(2008) 04 GUJ CK 0081

In the Gujarat High Court

Case No : Special Civil Application No. 24233 of 2007

Essar Oil Ltd. and 1 APPELLANT

Vs

State of Gujarat and Others RESPONDENT

Date of Decision : 22-04-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144
Constitution of India, 1950 — Article 226
Wild Life (Protection) Act, 1972 — Section 29, 35, 35(6)

Citation : (2008) 04 GUJ CK 0081

Hon'ble Judges : R.R. Tripathi, J;M.S. Shah, J

Bench : Division Bench

Advocate : K.S. Nanavati, with Mr. Keyur Gandhi for Nanavati Associates for Petitioners - 2, for the Appellant; Kamal Trivedi, Advocate General with Ms. Sangeeta Vishen, AGP for Respondents :1 and 4, for the Respondent

Final Decision : Allowed

Judgement

Honourable Mr. Justice M.S. Shah

1. This petition under Article 226 of the Constitution is directed against denial of sales-tax incentive benefit to the first petitioner Company - Essar Oil Ltd. (hereinafter referred to as the "Spetitioner" or the "Spetitioner Company") under the Government of Gujarat Capital Investment Incentive Premier Prestigious Scheme, 1995:2000 (hereinafter referred to as "the said Scheme").

2. The facts leading to filing of this petition may be set out in three parts " the first part relating to initial setting up of the project and the scheme floated by the State Government for granting incentives to the industries coming up in the backward areas; the second part narrating the events which prevented the petitioner Company from completing the project within the time limit and the consequent impact by denial of the benefits of the sales-tax incentives and the third part indicating how the petitioner Company could complete the project after the Hon''ble Supreme Court removed the cloud.

3.0 The Project and the Sales Tax Incentive Scheme

3.1 The petitioner Company came forward to set up a major venture in Vadinar in Jamnagar District, Gujarat State as a 100% export oriented unit for refining of petroleum products with a capacity of 9 million tones per annum at an estimated project cost of Rs.1900 crores. The State Government, therefore, requested the Central Government in the year 1990 to clear the petitioner Company''s proposal for setting up the oil refinery. The clearance for setting up the oil refinery was granted by the Government of India.

3.2 On 10.11.1994, the petitioner filed an application for right of way for laying Submarine Crude Oil Pipeline, Cooling Water/Return Water Pipeline and Product Jetty for establishment of its Refinery Project at Vadinar, District Jamnagar, to the Conservator of Forests, Marine National Park, Jamnagar. On 13.02.1995, the State Government requested the Chief Conservator of Forests, Regional Office, Western Region, Bhopal, to move the Government of India to issue suitable orders to allow the first petitioner to make geophysical survey in Marine National Park/Sanctuary area. The proposal was forwarded by the Chief Conservator of Forests, Bhopal to the Government of India on 15.05.1995. On 08.09.1995, the State Government in its Forests and Environment Department informed the Government of India in the Ministry of Environment and Forests, inter alia, that the approval in principle was granted to the petitioner Company to install Single Buoy Mooring/Crude Oil Terminal/Jetty and connecting pipeline in the National Marine Park and Sanctuary area in Vadinar, District Jamnagar on the terms and conditions to be decided in due course by the State Government.

3.3 The State Government in the Industries and Mines Department vide Resolution dated 11.09.1995 introduced a scheme called "S Capital Investment Incentive to Premier/Prestigious Unit Scheme, 1995-2000". The operative period of the Scheme was stated to be with effect from 16.08.1995 upto 15.08.2000. It is not necessary to refer to all the clauses of the Scheme. Suffice it to state that the petitioner fell in the category of premier unit i.e. new industrial unit having a project cost of more than Rs.1,000/-crores and employing 100 workers on a regular basis and following the employment policy of the State Government. Clause (v) of the Scheme defined premier unit in the following terms :-

S(v) PREMIER UNIT

A new industrial unit or industrial complex fulfilling the following criteria will be considered for granting status of "SPremier Unit".

(a) The industrial unit shall have a project cost of Rs.500 crores or more. Such units having project cost of Rs.1,000 crores and above shall be entitled for extended period to avail incentive as provided under para 6 B.

(b) Only one unit per taluka will be eligible for the Premier Unit status. In banned area no unit is permitted.

(c) The unit shall employ at least 100 workers on a regular basis and shall follow the employment policy of the State Government.?

Part''II of the said Scheme provided that the rate of incentive would depend on the location, investment and status of the project. The incentives offered were sales-tax exemption or sales-tax deferment or composite scheme. There is no dispute about the fact that the petitioner opted for sales-tax deferment scheme. As per clause 6(i)(B), the rate of incentive applicable to the petitioner company was the rate available for the most backward area. The extent of exemption was 125% of eligible fixed capital investment.

3.4 Since the petitioner company''s investment was going to be more than Rs.1,000 crores, the duration of incentive of sales-tax deferment was to be for a period of 17 years from the date of commercial production. Clause 6(v) of the said Scheme provided for effective steps for extending date of commercial production in the following terms :

S(v) Effective steps for extending date of commercial production :

The unit which cannot go into commercial production before expiry of the scheme will be allowed to go into commercial production beyond the last date of the scheme provided it has taken the following effective steps :

(1) The industrial unit should have obtained provisional registration as a Prestigious/Premier unit before 15th August 2000.

(2) 25% of project cost should have been incurred before 15th August 2000. The unit which has taken above effective steps will be allowed to go into commercial production as shown below :

(a) The unit with project cost above Rs.100 crores but below Rs.300 crores should go into commercial production on or before 15th August 2002.

(b) The unit with project cost more than Rs.300 crores should go into commercial production on or before 15th February 2003.

Such units shall have to apply to industries Commissioner for extending date of commercial production by 31st August 2000.?

(Emphasis supplied)

3.5 It is the petitioner''s case that the petitioner had obtained provisional registration as a Premier Unit by Industries Commissioner letter dated 25.06.1999 (Annexure'' I) that more than 25% of the project cost was incurred before 15.08.2000 and that as per the above clause of the Scheme, the petitioner unit with project cost of more than Rs.300/-crores was required to go into commercial production on or before 15.02.2003. The time limit was subsequently extended upto 15.08.2003 vide Government Resolution dated 12.04.2001 (Page-313 '' Annexure-P). This extension was also granted subject to the condition that the unit ought to have incurred at least 25% of the original project cost upto 15.08.2000.

4.0 Injunction granted by High Court Against Petitioner Company and Adverse Consequences.

However, before the petitioner Company could go into commercial production, the following events took place preventing the petitioner Company from implementing the project :

4.1 While the petitioner was already granted by the State Government in the Forests and Environment Department permission on 16.10.1997 for using 8.79 hectares of forest land falling under Marine National Park/Marine Sanctuary for various purposes subject to certain terms and conditions including obtaining permission of the Central Government under the Forest Conservation Act, 1980 and also getting clearance under the CRZ Regulations and the petitioner Company was granted the Central Government permission under the Forests Conservation Act on 08.12.1999 and the CRZ clearance was granted on 03.11.2000, before the petitioner Company could act on the basis of the aforesaid permission and clearance, by judgment dated 13, 18, 20, 27th July 2000 and 03rd August 2000 in Public Interest Litigation being Special Civil Application Nos.1778, 5476 and 5928 of 2000, a Division Bench of this Court (to which one of us was a party Ravi R. Tripathi, J.) restrained the State Government from granting any more authorization and permission for laying down any pipeline in any part of the sanctuary of the National Park and in case any applications are pending, the same shall be decided keeping in view the interpretation placed by the Division Bench on Section 29 of the Wild Life (Protection) Act, 1972 in light of the observations made in the judgment.

4.2 The aforesaid Public Interest Litigation was commenced for making grievance against consideration of the application of Bharat Oman Refineries Ltd. for laying a pipeline in the Marine Park/Sanctuary area. The present petitioner Company was not a party to any of the above petitions. During the course of hearing, the Court had put a query to the learned counsel for the State Government as to whether any more applications of this nature (applications for laying pipeline through the National Marine Park/Sanctuary area) were pending before the State Government and whether the State Government was inclined to grant any more authorizations and permissions for laying such pipelines. In response to the query, the learned Government counsel had placed a copy of the letter dated 25.07.2000 sent to him by the Under Secretary to the Government along with a copy of the letter dated 08.09.1995, which was sent to the Secretary of Ministry of Environment and Forests, Government of India, by the Under Secretary, Forests and Environment Department, Government of Gujarat. The Court noted that there were two more proposals pending with the State Government one from Essar Oil Ltd. i.e. the present petitioner Company and the other from Gujarat Poshitra Port Ltd. The Court noted the fact that four pipelines were already in existence and the fifth one was the pipeline to be laid down by Bharat Oman Refineries Ltd. for which the authorization was granted in February 2000 and which was the subject matter of challenge in those three petitions. The Court thereupon observed that "Senough is enough", and then restrained the State Government from giving any more authorization and permission for laying down any pipeline in any part of the Sanctuary or the National Marine Park.

4.3 Aggrieved by the above directions which were given by the Court without giving the petitioner company an opportunity of being heard, the petitioner Company filed review applications which came to be disposed of by order dated 23.02.2001 on the ground that the grievance was beyond the scope of review.

4.4 The petitioner Company, therefore, moved the Hon''ble Supreme Court by filing SLP (Civil) No.3654 of 2001. On 11.05.2001, the Apex Court granted stay of the High Court judgment in so far as the petitioner was concerned. It appears that in view of the above stay order granted by the Hon''ble Supreme Court, the petitioner Company moved the State Government for permitting the petitioner Company to proceed with the construction of jetty and laying the pipeline. By letter dated 29.10.2001, the State Government in the Forests and Environment Department specifically called upon the petitioner Company to ensure that no construction activities were commenced before obtaining all necessary clearances from different Government departments, agencies and the conditions stipulated by the Ministry of Environment and Forests, Government of India as well as the Forests and Environment Department of the State Government were strictly complied with. In view of absence of any permission from the Chief Wild Life Warden, Gujarat State u/s 29 of the Wild Life (Protection) Act, 1972, the petitioner could not commence the construction of jetty or laying down the pipeline in the National Marine Park/Sanctuary area and, therefore, could not commence commercial production.

4.5 The petitioner had already applied for registration before 15.08.2000 and had incurred more than 25% cost before 15.08.2000. On 18.07.2001, the petitioner was accordingly granted the "Spipeline registration" valid upto 15.08.2003 within which the petitioner Company was required to start commercial production. The petitioner again made a representation to the Industries Commissioner on 07.05.2002 requesting him to grant the extension for a further period of three years i.e. upto August 2006 to commence commercial production for the purpose of availing the incentive benefit under the Scheme and pointed out that the delay in completing the project and consequent delay in starting commercial production was due to the factors beyond the control of the petitioner. By letter dated 28.05.2002, the Industries Commissioner rejected the request. The petitioner, therefore, submitted a representation dated 19.06.2002 to the Chief Minister pointing out the circumstances which had delayed the completion of the project. Similar representations were thereafter made on 14.03.2003, 02.12.2003 and 26.12.2003. It appears that the said representations were not responded to.

5.0 Apex Court Judgment, Grant of Permission and Commencement of Production

5.1 Ultimately on 19.01.2004, the Hon''ble Supreme Court quashed and set aside the judgment dated 03.08.2000 of this Court and directed the State Government to issue the authorization in the requisite format under Sections 29 and 35 of the Wild Life (Protection) Act within a fortnight after disapproving the interpretation placed by the High Court on the provisions of the Wild Life (Protection) Act, 1972. The Hon''ble Supreme Court has taken the view in the judgment dated 19.01.2004 that the permission granted by the State Government on 19.10.2007 was the permission contemplated by Section 29 of the Wild Life (Protection) Act. The Apex Court concluded the judgment reported in Essar Oil Ltd. Vs. Halar Utkarsh Samiti and Others, in terms of the following directions :-

S64. As far as the appellant (Essar Oil Ltd.) is concerned, however, the way is now clear to proceed with the project in accordance with the permissions granted to it under the WPA, FCA and EPA. The State Government will issue the authorization in the requisite format under Sections 29 and 35 within a fortnight. We, therefore, allow the appeals to the extent stated with no order as to costs.

5.2 In compliance with the above judgment, by letter dated 12.02.2004, the State Government authorized the Chief Wild Life Warden, Gujarat State under Sections 29 and 35 (6) of the Wild Life (Protection) Act to permit the petitioner Company for laying oil pipeline in the National Marine Park/Sanctuary area. The Chief Wild Life Warden issued the requisite permission on 27.02.2004.

5.3 In view of the above permission granted by the Chief Wild Life Warden under Sections 29 and 35 of the Wild Life (Protection) Act, the petitioner Company again sent representations dated 06.04.2004, 12.07.2004 and 27.07.2004 to the Government requesting for extending the time limit for commencement of commercial production for the purpose of sales tax deferment incentive scheme. It appears that in view of the above representations, the State Government in the Industries and Mines Department vide Resolution dated 10.05.2006 (Annexure-Y) constituted a Committee comprising of the Advisor to the Chief Minister, the then Additional Chief Secretary, Finance Department and the then Principal Secretary, Industries and Mines department. The Committee was constituted to consider various such representations of the petitioner Company and other Companies. It appears that no progress was made and the petitioner''s representations remained undecided.

5.4 On 26.11.2006, the petitioner Company commenced production and started paying sales-tax on the products being sold by it. Ultimately, the present petition came to be filed on 18.09.2007 contending that for no fault of it, the petitioner Company was prevented from completing the project and that it was on account of the petitioner being so prevented for almost five years that the petitioner could not commence the commercial production within the time limit of 15.08.2003 which was the extended time limit stipulated by the Government generally, for the units which had applied before 15.08.2000 and which had incurred 25% of the project cost before 15.08.2000.

6.0 Submissions on behalf of the Petitioner Company

At the hearing of this petition, Mr KS Nanavati, learned counsel for the petitioner Company has referred to the aforesaid events and has taken us through the judgment of the Division Bench of this Court rendered on 13th July/3rd August, 2000 and the decision of the Apex Court dated 19.01.2004 and has made the submissions :

6.1 Only on account of the injunction granted by this Court on 13th July/3rd August, 2000 which was ultimately set aside by the Hon''ble Supreme Court on 19.01.2004, the State Government had not granted any permission or authorization for proceeding with construction of the jetty and laying the pipeline. Even after interim stay of the High Court judgment was granted by the Hon''ble Supreme Court on 11.05.2001, the State Government did not direct the Chief Wild Life Warden to grant the permission. The permission by the Chief Wild Life Warden was granted only on 27.02.2004 and therefore, the entire period from 13.07.2000 upto 27.02.2004 ought to be excluded while considering the question whether the petitioner Company had commenced commercial production within the time limit stipulated by the concerned Government Resolutions. It is submitted that if the above period is excluded or in other words, if three years and 230 days are added, it would extend the time limit for commencing commercial production upto 2nd April, 2007. Since the petitioner had already commenced the production on 26.11.2006, the petitioner had complied with the terms and conditions of the incentive scheme and therefore, the petitioner cannot be denied the benefits of the incentive scheme on the ground of delay in commencing the commercial production which delay was only on account of the injunction which was granted by this Court in Public Interest Litigation to which the petitioner Company was not even joined as a party.

6.2 While in the memo of the petition some allegations/submissions have been made attributing the delay to the Forests and Conservation Department of State Government, but the petitioner Company is not interested in pursuing those allegations and in fact would like to withdraw those allegations and the petitioner would like to invoke the following maxims of equity :-

(i) SAn act of the Court shall prejudice no man, and

(ii) The law does not compel a man to do that which he cannot possibly perform.

6.3 In view of the permission granted by the State Government on 16.10.1997, the petitioner had commenced the construction work of laying of water intake jetty and product jetty in the Marine National Park and in the Marine Sanctuary area. The petitioners were not only prevented from doing so, but the Forest Department launched prosecution against the petitioners under various provisions of the Wild Life (Protection) Act and Environment Protection Act against the contractor doing the work on behalf of the Company and therefore, the petitioners had no other alternative but to stop the work and could not commence the work even after the Central Government granted its formal approval under the provisions of the Forests Conservation Act on 08.12.1999 and the CRZ permission was granted on 03.11.2000 and even thereafter, when the judgment dated 13th July/3rd August, 2000 of this Court was stayed by the Hon''ble Supreme Court on 11.05.2001, no permission was granted by the Chief Wild Life Warden and in fact by letter dated 29.10.2001, the State Government informed the petitioner Company not to do any work without obtaining the requisite permissions and clearances under various statutes. The petitioner had done all that was required to be done by the petitioner for obtaining such permissions and clearances, but if the authorities did not grant such permissions for no fault of the petitioner, the petitioner could not be blamed nor could the petitioner be held to be ineligible for availing of the incentive under the Scheme for which project, the petitioners had already incurred expenditure of Rs. 5388 crores as recorded in the judgment of the Apex Court. In fact the petitioners have already incurred capital expenditure of approximately Rs. 6000 crores by the end of 2006 and have commenced production in November 2006. Apart from the fact that the petitioner had obtained the provisional premier registration under the 1995-2000 Scheme by Industries Commissionerate letter dated 25.06.1999 (Annexure-I), the petitioner Company had also incurred capital expenditure of more than 25% of the project cost before 15.08.2000 and therefore, the petitioners'' case was registered as a pipeline case so as to get the benefit of extended period to go into commercial production period initially stipulated in the Scheme as 15.02.2003 [clause v(2)(b)] was extended upto 15.08.2003. While the petitioners were physically prevented from carrying on any activity between 19.03.1999 and 27.02.2004, even without referring to the said five year period, even confining the period to the two termini between 13.07.2000 (when this Court restrained the State Government from granting any authorization to the present petitioner from laying any pipeline in the Marine Park/Sanctuary area) and 27.02.2004 (when pursuant to the Hon''ble Supreme Court decision the Chief Warden granted the permission), the petitioners are entitled to get the benefit of exclusion of the said period of three years and 230 days.

6.4 The Courts have held that no act of the Court shall prejudice any party nor does the law compel any party to do that which cannot possibly be performed. Strong reliance is placed on the decision of the Apex Court in South Eastern Coalfields Ltd. Vs. State of M.P. and Others, and more particularly on the observations made in Para 28 thereof.

6.5 Reliance is also placed on the decision of the Hon''ble Supreme Court in Raj Kumar Dey and Others Vs. Tarapada Dey and Others, particularly the observations made in Para 6 thereof. Reliance is also placed on the decision in Bareilly Development Authority Vs. Methodist Church of India, (1988) Supp. SCC 174 for the purpose of contending that in such matters, the period during which the work of construction has been stopped, has to be excluded while determining whether there was any breach of condition stipulated in the contract.

7. Submissions on behalf of the State Government

On the other hand, Mr Kamal Trivedi, learned Advocate General assisted by Ms Sangeeta Vishen, learned AGP has opposed the petition and made the following submissions :-

7.1 The petition suffers from delay, laches and acquiescence. The petitioners were already informed by the Industries Commissioner as far back as on 28.05.2002 that it was not possible to accord any extension of the time limit for commencing commercial production as per the prevailing policy. Since no petition was filed at the relevant time, the present petition filed in September 2007 was delayed by more than five years.

7.2 The petitioner has not made reference to the earlier round of litigation, wherein another Division Bench of this Court had passed order dated 20.04.1999 directing the petitioner herein not to carry on any construction activity in Marine National Park/Marine Sanctuary area against the statutory provisions including the provisions contained in the Wild Life (Protection) Act, 1972. The petitioner had not challenged the said order before the higher forum.

7.3 Vide Government Resolution dated 10.05.2006, the State Government has formed a Committee to examine various issues pertaining to the petitioner''s group and to recommend to the Government how the issues can be sorted out. The issues raised by the petitioner in the present petition have also been included in the subject matters to be examined by the Committee and therefore also, the present petition may not be entertained.

7.4 The petitioner has already started paying tax after starting commercial production by the end of 2006. The petitioner having acquiesced in the matter, the petitioner cannot now be permitted to move this Court on the ground that the delay caused in starting commercial production was at the behest of the Forests Department.

7.5 When the incentive scheme was framed by the State Government in the year 1995, the quantum of incentives to be granted under the Scheme were contemplated on the basis of the fact situation then prevailing. When the incentive Scheme was floated, the Government was not in a position to provide the necessary infrastructure in the backward areas and, therefore, the industries were given incentives to set up units in the backward areas. However, now the entire situation has undergone a considerable change. Substantial infrastructure facilities like roads, water and electricity are being provided by the State Government to the industries even in the backward areas. If the petitioner has made capital investment of about Rs.6000 crores plus as alleged, the incentive of sales tax deferment may be astronomical figure of Rs.7500 crores. The State Government cannot afford to have collection of such large amount of sale tax/ value added tax deferred for a period of 17 years. Hence, even if the petitioner''s case is required to be considered as falling within the Incentive Scheme, the State Government should not be compelled to permit the petitioner to defer payment of sale-tax/value added tax to the tune of entire 125% of the eligible capital investment for a long period of 17 years as originally contemplated in the Scheme.

DISCUSSION

8. Having heard the learned counsel for the parties, we have given anxious and thoughtful consideration to the issues involved in this petition.

9. As far as the preliminary contention raised by the learned Advocate General is concerned, though the petition filed in September 2007 may appear to be prima facie delayed, the delay is sufficiently explained. After the Industries Commissioner rejected the application for extension on 28.5.2002, the petitioner Company made a representation to the Chief Minister on 19.6.2002 pointing out the circumstances which were delaying completion of the project. That was also the time when the litigation was pending before the Hon''ble Supreme Court and the very fact that after the Supreme Court rendered the decision on 19.1.2004 and the Chief Wild Life Warden granted the permission on 27.2.2004, pursuant to the petitioner Company''s representations in 2004, the State Government itself constituted a Committee on 10.05.2006 to look into, inter alia, the petitioner''s grievance indicates that the issue was alive and the State Government was ready to consider the petitioner''s request for suitable reliefs. But since the Committee constituted as far back as in May 2006 made no progress, the petitioner could not be expected to wait indefinitely because the very purpose of availing of the sales tax deferment incentive would be frustrated, if the petitioner has to go on paying sales-tax during the gestation period. The Scheme had granted a long period of 17 years during which the eligible premier unit was to be permitted to defer payment of sales-tax.

10. The contention that the petitioner has suppressed material facts regarding the previous litigation has no substance. Special Civil Application No. 2840 of 1999 was filed by Halar Utkarsh Samiti alleging violations of several pieces of Environment Legislations. That petition came to be disposed of on 20.08.1999 with a direction to the Essar Oil Ltd. (petitioner herein) to furnish an undertaking to the effect that until sanction by the appropriate authority as required by law is granted, no construction will be carried out. The State Government had granted the permission on 16.10.1997, the Central Government had granted the permission on 08.12.1999 and the CRZ permission was granted on 03.11.2000. What prevented the petitioner Company from carrying on the construction was the restraint order passed by this Court on 13th July/3rd August, 2000 in a PIL to which the petitioner Company was not even joined as a party, that too on the basis of the interpretation of the provisions of Section 29 of the Wild Life (Protection) Act, 1972 which did not commend to the Hon''ble Supreme Court and therefore, it was only on 19.01.2004 that the Hon''ble Supreme Court after placing correct interpretation on the provisions of the Wild Life (Protection) Act directed the State Government to continue to act on the basis of the permission granted by the State Government as far back as on 16.10.1997 and further directed the State Government to authorize the Chief Wild Life Warden, Gujarat

State under Sections 29 and 35 of the Act for permitting the petitioner to lay the oil pipeline. We, therefore, see no ground to dismiss the petition on the ground of suppression of facts.

11. As regards the contention that the State Government itself has appointed a Committee to look into the matter, we would have ordinarily accepted the said submission and required the petitioner to wait for some time, but the very fact that in spite of constitution of the Committee as far back as in May 2006, no progress has been made and in the meantime, the petitioner has already commenced commercial production and is required to pay tax, we have taken up this petition for final hearing to decide the question raised in the petition.

12. As regards the contention that the petitioner has already started paying tax and has acquiesced into the matter and therefore, the petition may not be entertained, the very fact that upon commencement of commercial production the petitioner has started paying tax is not a factor which could go against the petitioner. On the contrary, the petitioner''s not paying the tax even after commencement of commercial production would have been an act contrary to the provisions of the statute because so far the petitioner has not been granted the benefit of sales-tax deferment and therefore, the petitioner''s abiding by law cannot be a ground for denying it the benefit of sales-tax incentive as per the Scheme under which the petitioner is stated to have been found eligible because the petitioner was granted such provisional premier unit registration as far back as on 25.06.1999 (Annexure -I). Of course, the question whether the petitioner Company had incurred expenditure to the tune of 25% or more of the estimated project cost, which will be gone into by the State Government before taking any final decision in the matter because that was important condition for considering the pipeline cases as the Government was conscious about the fact that there were units which had obtained provisional registration before 15.08.2000 which was the last date of the Scheme, but which units were not in a position to commence commercial production and therefore, they were granted extended time limit to qualify as pipeline cases.

13. Now we come to the core question whether the petitioners are entitled to a writ of this Court directing the State Government to extend the period for commencing commercial production. We have carefully noticed the facts found by the Apex Court and law applicable on the question of restitution.

14. In South Eastern Coalfields Ltd. Vs. State of M.P. and Others, , the Apex Court made the following observation in Paras 27 and 28 :

S 27. Section 144 CPC is not the fountain source of restitution, it is rather a statutory recognition of a pre-existing rule of justice, equity and fair play. That is why it is often held that even away from Section 144 the court has inherent jurisdiction to order restitution so as to do complete justice between the parties. In AIR 1922 269 (Privy Council) . Their Lordships of the Privy Council said : (AIR p. 271)

SIt is the duty of the court u/s 144 of the CPC to ''place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed''. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the court to act rightly and fairly according to the circumstances towards all parties involved.

Cairns, L.C. said in Rodger Vs. Comptoir D''Escompte de Paris [(1871) 3 PC 465] : (ER p.125)

S[O]ne of the first and highest duties of all courts is to take care that the act of the court does no injury to any of the suitors, and when the expression, ''the act of the court'' is used, it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole, from the lowest court which entertains jurisdiction over the matter up to the highest court which finally disposes of the case.

This is also on the principle that a wrong order should not be perpetuated by keeping it alive and respecting it A. Arunagiri Vs. S.P. Rathinasami, . In the exercise of such inherent power the courts have applied the principles of restitution to myriad situations not strictly falling within the terms of Section 144.

28. That no one shall suffer by an act of the Court is not a rule confined to an erroneous act of the court; the ''act of the court'' embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the Court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the Court being wrongful or a mistake or error committed by the court; the test is whether on account of an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the act of such party. The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the Court not intervened by its interim order when at the end of the proceedings the Court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate, the Court would act in conjunction with what is the real and substantial justice. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences.?

[Emphasis supplied]

15. Now we may turn to the Apex Court judgment in Essar Oil Ltd. Vs. Halar Utkarsh Samiti and Others, highlighting the facts showing how the High Court judgment dated 13th July/3rd August, 2000 had affected the present petitioner, which was not a party to any of the petitions (PIL) in which the said judgment was rendered by this Court.

15.1 The Apex Court observed in Para 39 of the judgment dated 19.1.2004 that it was the appellant''s case and the records showed that it was encouraged by the State Government to set up a major venture at Vadinar in Jamnagar District of Gujarat as a 100% exported oriented unit for refining of petroleum products with a capacity of 9 million tons per annum at an estimated project cost of Rs.1900/-crores. The then Chief Minister of the State of Gujarat had written a letter dated 11.04.1990 to the Ministry of Planning, Government of India stating that the project was expected to generate foreign exchange earnings of above Rs.3000/-crores within a period of five years. It was anticipated by the State Government that the project would completely change the face of the Vadinar area, which was traditionally a backward area of Gujarat and therefore, the project would offer direct and indirect employment and would encourage growth of various other ancillary industries in that region. The letter further stated that the project had the full support of the Government of Gujarat and it was being accorded the highest priority and that the appellant''s proposal for setting up the oil refinery should be cleared by the Government of India urgently. The clearance for setting up the oil refinery was accordingly granted by the Government of India.

15.2 The Apex Court then recorded the subsequent history leading upto the State Government permission on 16.10.1997 u/s 29 of the Wild Life (Protection) Act, 1972 and also the approval of the Central Government granted on 27.11.19997 and 08.12.1999. The Apex Court also observed in Para 52 of the judgment as under :

S One would have thought that the clearance under the WPA (Wild Life Protection Act) was completed by this. In fact, according to the appellant, they had invested Rs.5388.41 crores in setting up the project on 4500 acres of land in Jamnagar district. The labour colonies had been built up for 10,000 labourers and other constructions were well under way. It has also claimed that for the purposes of the project the appellant has obtained finances inter alia from IDBI, ICICI, nationalised banks, IFCI, LIC and GIC.

15.3 The Apex Court further noted that on 04.11.2000, the appellant wrote to the State Government that since all clearances had been received, it should be permitted to set up its project. However, the Conservator of Forests wrote two letters dated 20.11.2000 and 30.11.2000 to the appellant stating that the appellant had not been granted approval under the Wild Life (Protection) Act as had been found by the High Court in the impugned decision. The Apex Court also observed -S The High Court erred in rejecting the application for review. It was an opportunity for the High Court to rectify the error made earlier in deciding against the appellant without hearing it. We are also handicapped by the absence of any discussion by the High Court on the factual controversy in the appellant''s case. This has resulted in an unnecessarily arduous exercise and an entirely avoidable delay.

The Apex Court also observed that it was clear from the evidence on record that the State Government and the appellant (petitioner Company herein) had taken precautions after consulting experts to see that the pipeline route causes minimal and reversible damage to the wildlife and that the permissions given by the Central Government under the FCA and EPA were on the basis of the laying of the pipeline as proposed. There was no challenge to these permissions and a change in the layout would set these permission at naught. The Apex Court also observed that the High Court erred in rejecting the reports of the experts who had opined in favour of Bharat Oman Refineries Ltd. and the appellant (the present petitioner).

16. When this Court was hearing and finally disposing of the Public Interest Litigation challenging the permission granted by the State Government under the Wild Life (Protection) Act to Bharat Oman Refineries Ltd. for laying down the pipeline in Marine National Park/Sanctuary area, this Court granted permanent injunction adversely affecting the present petitioner Company which was not a party to the petition. The State Government gave an impression that the case of Essar Oil Ltd. (i.e. the present petitioner Company) was still pending and it was for this reason that this Court said "SEnough is Enough". Had the attention of this Court been invited to the State Government permission dated 16.10.1997 in favour of Essar Oil Ltd. and also the approval granted by the Central Government on 27.11.1997 and 08.12.1999, this Court would not have treated the petitioner Company''s case as a case of pending application just as this Court did not restrain Bharat Oman Refineries Ltd. from laying down the pipeline. In case this Court had been informed by the State Government that the permission had already been granted to the present petitioner Company, this Court would have not issued any direction to the State Government not to grant permission in any other case i.e. Essar Oil Ltd. and another Company which were the only two cases shown to the Court as pending cases. When the present petitioner Company moved review application, this Court rejected that application as beyond the scope of review, and the Apex Court observed that the High Court rejected the opportunity of rectifying the error. We are, therefore, of the view that the test laid down by the Apex Court for attracting applicability of the principle of restitution is reasonably satisfied in the facts of the present case. It was on account of the above relevant facts not having been brought to the notice of the Division Bench of this Court that resulted into the petitioner Company being restrained by this Court from laying down any pipeline in the Marine National Park/Sanctuary area notwithstanding the permission which was already granted by the State Government under the Wild Life (Protection) Act as far back

as on 16.10.1997 and the permissions granted by the Central Government on 27.11.1997 and 08.12.1999. We are, therefore, of the view that the petitioner has made out a case for invoking the doctrine of restitution for the purpose of availing of the benefit of the incentives under the State Government Capital Investment Incentive Premier Prestigious Unit Scheme, 1995: 2000, more particularly, for the purpose of considering the question whether the petitioner had commenced commercial production within the stipulated time limit.

17. Similarly, in Bareilly Development Authority Vs. Methodist Church of India, (1988) Supp. SCC 174, the respondent "Methodist Church of India was granted permission on 11.11.1983 to complete the construction of a Medical College and Mission Hospital within a period of three years, subject to various conditions" one of them was to complete the work of construction within a period of three years with effect from 11.11.1983. On 24.01.1984, the Development Authority passed a contrary order rejecting the building plan on certain grounds. As there were two conflicting orders, the respondent took up the matter with the State Government which remitted the matter to the Development Authority for consideration afresh and the Development Authority thereafter took a fresh decision on 30.05.1985 to the effect that approval and permission granted on 11.11.1983 would stand restored and accordingly, the subsequent order dated 24.01.1984 rescinding permission be treated as ineffective. Thereafter, the Development Authority proceeded to pass the impugned order dated 19.07.1987 directing the demolition of the structure on the ground that the construction had not been completed within the prescribed period. The High Court, therefore, held that in computation of the period of three years for completion of the proposed building, the period during which the work of construction had been stopped (24.01.1984 to 30.05.1985) had to be excluded. The appeal filed by the Development Authority came to be dismissed by the Apex Court. The other issues raised in that matter are not relevant for the purposes of the present petition. The fact remains that the Apex Court confirmed the decision of the High Court taking the view that the period during which the work of construction had been stopped, had to be excluded. In the facts of the present case also, the State Government had granted the permission on 16.10.1997 and the Central Government had granted the permission on 08.12.1999. The very fact that the Chief Wild Life Warden issued the permission on 27.02.2004 after the decision of the Apex Court on 19.01.2004 is itself sufficient to show that the request made by the petitioner for excluding the intervening period between 13th July/3rd August, 2000 and 27.02.2004 is reasonable.

18. At this stage, we may refer to one objection raised by the learned Advocate General. It was vehemently submitted that if the period from 13.07.2000 to 27.02.2004 is excluded as requested for by the petitioner, it would not only have the effect of extending the period within which the commercial production was required to be commenced, but it would also pro-tanto extend the 17 year period for availing of the tax deferment advantage. In other words, it was contended that if the commercial production had commenced by 15.08.2003, the 17 year

period for sales-tax deferment benefit would have expired on 14.08.2020, but by acceding to the petitioner''s request, that 17 year period would now expire in November 2023.

19. Apropos the above submission, Mr Nanavati for the petitioner fairly states that the petitioner Company will not claim any sales-tax/VAT deferment benefit for any period beyond 14.08.2020. It is submitted that in fact as soon as the petitioner''s turnover would reach the permissible percentage of the eligible investment as per the Scheme, the petitioner will cease to get the advantage of deferment and therefore, the petitioner may not get the benefit of deferment even upto 14.08.2020, but whatever may be the actual position, under no circumstances, the petitioner will claim any deferment benefit beyond 14.08.2020.

20. Apropos the submission of the learned Advocate General that the State Government is now providing infrastructure facilities in the backward areas also, Mr Nanavati has submitted that when the petitioner made heavy investments for the project in Vadinar, it was a backward area and the petitioner had to provide all the infrastructure facilities like roads, water and electricity on its own and, therefore, merely because the infrastructure facilities are now being provided by the State Government to set up industries in the erstwhile backward areas, that cannot be held out as a ground against the petitioner to reduce the quantum of incentives payable to the petitioner under the Incentive Scheme.

Without prejudice to the above submission, Mr Nanavati states that although the petitioner is entitled to get the full benefits under the Incentive Scheme i.e. 125% of the eligible capital investment, the petitioner is ready to make the following concessions if the State Government does not challenge the decision of this Court and within one month from today the State Government grants the petitioner the benefit of sales-tax/VAT deferment as per the above Scheme by extending the period of commercial production :-

(i) The petitioner shall not claim any refund of the sales-tax/VAT amount paid or payable for the period upto 15th April, 2008. It is stated that by now the petitioner has already paid sales-tax/VAT to the tune of approx. Rs. 300 crores from the date of commercial production till 15th April, 2008.

(ii) The petitioner agrees to reduction of the amount of sales-tax/VAT to be deferred by a sum of Rs.500 crores from the amount otherwise computable at 125% of the eligible capital investment made by the petitioner in the unit under consideration.

For making the above concessions, Mr Nanavati has relied on the affidavit dated 15.4.2008 of the Sr. Vice President "Corporate" Legal of the petitioner Company.

21. In response to the above suggestions, Mr Kamal Trivedi, learned Advocate General has submitted that while the petitioner should not be refunded the sales-tax/VAT already paid by the petitioner or payable for the period upto today,

assuming that the petitioner is found to be eligible under the Scheme, the amount otherwise computable on the basis of the eligible capital investment made by the petitioner in the unit under consideration should be reduced by Rs.700 Crores i.e over and above non-refund of the amount of Rs.300 Crores and odd amount paid by the petitioner towards sales-tax/VAT till today, the amount of sales-tax/VAT payment of which could be deferred by the petitioner under the Scheme should be reduced by Rs.700 Crores.

22. In view of the above discussion, we direct the respondents to consider, within one month from the date of receipt of this judgment, the petitioner''s application for granting the benefits of deferment of sales-tax/valued added tax under the Capital Investment Incentive Premier Prestigious Unit Scheme, 1995:2000 after proceeding on the basis that for the purpose of considering whether commercial production had commenced within the stipulated date, the period from 13.07.2000 upto 27.02.2004 shall be excluded; in other words, the time limit for commencement of commercial production shall stand extended from 15.08.2003 to 02.04.2007. We further direct that while considering the petitioner''s application for the incentives as aforesaid, the State Government shall stipulate the following conditions, provided the final eligibility certificate is issued within one month from the date of receipt of the judgment :

(i) The petitioner shall not be given the benefit of deferment of Sales-tax/Value Added Tax beyond 14th August, 2020.

(ii) The amount of Sales-tax/VAT already paid/payable by the petitioner for the period upto today shall not be refunded to the petitioner.

(The above amount is stated by the petitioner Company to be above Rs.300 crores)

(iii) Without adjusting the Sales-tax/VAT paid for the period upto today as aforesaid, the amount otherwise computable under the Incentive Scheme on the basis of the eligible capital investment made by the petitioner in the unit under consideration shall be reduced by Rs.700 crores.

While the above direction for consideration shall be complied with within one month from the date of receipt of this judgment, the State Government shall also consider issuance of ad-hoc eligibility certificate in terms of clause 7(d) of the Incentive Scheme, if permissible under the Incentive Scheme.

23. It is clarified that the above directions are given in the peculiar facts and circumstances of the case where this Court had restrained the State Government from granting any permission under the Wild Life (Protection) Act, 1972 and the Apex Court reversed the decision of this Court and directed the State Government to issue the permission under the Act after considering the events commencing from 1990 onwards, including the observation made by the Apex Court in the judgment dated 19.01.2004 that while rejecting the present petitioner -company''s review application in 2000, this Court did not avail of the

opportunity for rectifying the error made by this Court earlier in deciding against petitioner - Essar Oil Ltd. without hearing it.

24. The petition is allowed in the aforesaid terms. Rule is made absolute to the aforesaid extent with no order as to costs.

