
(2002) 04 PAT CK 0102
In the Patna High Court
Case No : C.W.J.C. No. 6838 of 2000

Kalyanpur Cements Ltd.

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 24-04-2002

Acts Referred:

Citation : (2002) 04 PAT CK 0102

Judgement

1. The petitioner, M/s. Kalyanpur Cement Limited, a Public Sector Company is engaged in business of cement manufacturing and marketing operations since 1946 and has expanded its capacity from time to time and at present, as alleged, the Company is operating one million tone cement plant. The said plant was commissioned in March, 1992 and according to the petitioner the plant is of the most modern and advanced technology. According to the petitioner for the factors beyond their control and reach, the Company on account of general recession in the cement industry suffered heavy losses for past few years which resulted in erosion of net worth/capital of the Company.

2. The Company faced with such a grim situation approached the Financial Institutions in May, 1997 for financial assistance and restructuring because in absence of the same the survival of the Company was almost impossible. The Company's proposals for financial assistance and restructuring were duly approved by (1) IFCI, (2) IDBI, (3) ICICI and (4) IIBI, but the said Financial Institutions imposed a condition for grant of assistance or restructuring that the petitioner would obtain a sales tax exemption for a period of five years from the State Government in terms of the Industrial policy, 1995. While approving the proposals made by the petitioner, the Financial Institutions proposed certain concessions in favour of the present petitioner namely reschedulement of the loan, interest free funding of interest and conversion of loan into share capital.

3. In terms of the said rehabilitation package submitted to the Financial Institutions and later approved by them, a proposal was submitted to the Industrial Development Commissioner, Government of Bihar vide letter No.

11152, dated 21.11.1997 for considering grant of sales tax exemption in terms of the said 1995 Industrial Policy. The petitioner says that the sales tax exemption was not granted to the petitioner even after expiry of submission of the application for almost a period of two and half years, therefore, the petitioner, who was already suffering a great hardship, is suffering further. The petitioner says that as the Financial Institutions have put an embargo of sales tax exemption before release of the financial assistance, in absence of the sales tax exemption in accordance with the 1995 Policy the petitioner, a sufferer is forced to come to this Court. According to the petitioner and as is evident from Annexure-3, the committee on rehabilitation under Industrial Development Commissioner met on 7.1.1998 and decided to provide sales tax exemption to the petitioner-company for a period of five years with effect from 1.1.1998 to 31.12.2002.

4. According to the petitioner its case was thereafter duly examined on 23.1.1998 by a committee headed by the Development Commissioner which decided that for the purposes of giving sales tax exemption if amendments are required to be made in Bihar Finance Act, the same be done after taking legal opinion. In support of this contention reliance has been placed on the minutes of the meeting annexed as Annexure-4.

5. The proposal as contained in Annexure-4 was considered on 12.3.1998 by the State Level Empowered Committee constituted under the Chairmanship of the Chief Secretary, Government of Bihar pursuant to Industrial Policy, 1995, after consideration of the said proposal vide Annexure-5 the State Level Committee decided to seek the legal opinion of the Advocate General, Bihar that whether under the provisions of Bihar Finance Act the benefit of sales tax exemption could be considered for "a potentially viable sick industrial unit" or not and if the said benefit cannot be extended under the existing provisions what amendments should be made in the Bihar Finance Act.

6. According to the petitioner opinions were obtained from the Advocate General, who opined that no amendments were needed in the Bihar Finance Act, 1981 but a Notification only was required to be issued to give effect to the provisions of the Industrial Policy of 1995. Thereafter on 21.1.1999 a joint meeting of All India Financial Institutions/Banks and the high officers of the Government of Bihar was held under the Chairmanship of the Industrial Development Commissioner, Government of Bihar. The officials of the Government of Bihar informed the Financial Institutions and the Banks that the exemption of sales tax was under consideration of the Government and the decision was likely to be taken very soon. For these allegations the petitioner places strong reliance upon Annexure-6, the minutes of the meeting held on 21.1.1999. The petitioner alleges that on 12.7.1999 and 29.10.1999 two joint meetings were held at IICI, New Delhi and Senior Officers viz. Industrial Development Commissioner and Institutional Finance Commissioner, Government of Bihar attended the same. In the said meeting the State Government through their senior representatives

reiterated their demands and stated that the Government was committed to the revival of the industry in the State in general and that of Kalyanpur Cement Ltd. in particular as it was located in one of the backward Districts of Bihar and provide direct employment to over 2000 persons. The minutes of both those meetings have been annexed with the petition at Annexure-7 (series). The Financial Institutions observed in the said meeting that they would consider the case of the petitioner only after sales tax exemption is granted in his favour.

7. The petitioner says that on number of occasions the State Government reiterated its commitment to provide sales tax exemption to the Company. Annexure-8 has been pressed into service in support of this plea. In a meeting held on 17.12.1999 under the Chairmanship of the Minister of Industries, Government of Bihar which was also attended by the senior officers of All India Financial Institutions, viability of the company was discussed and it was declared by the Financial Institutions that the company was viable and if restructuring scheme is made operative the company can meet its expenses and honour its obligations and liabilities. The petitioner says that the Hon"ble Minister assured that necessary notification for sales tax exemption would be issued by the State Government by second week of January, 2002. The petitioner says that the Finance Commissioner in a meeting with Director of Industries and Joint Commissioner of Commercial Tax approved the draft of the notification and the same was later approved by the Economic Sub-Committee of the Cabinet of Bihar. In support of this plea Annexure-10 has been pressed into service.

8. From Annexure-11, a copy of the letter dated 31.3.2000, it would appear that the Commissioner, Commercial Taxes in response to the letter dated 22.3.2000 of the IFCI informed that issuance of the Notification was delayed due to Assembly Elections in Bihar and that the issue would be resolved soon and necessary Notification would be issued.

9. Placing reliance upon Annexure-12, minutes of the meeting dated 29.5.2000 it is contended that in the said meeting under the Chairmanship of the Minister of Industries and four other Ministers including the Minister of Commercial Taxes and Departmental Secretaries deliberations were had and the Minister of Commercial Taxes gave a categorical assurance that the sales tax exemption notification would be issued by his Department at the earliest.

10. The petitioner says that despite all above assurances, commitments, letters, meetings etc the State Government did not issue any notification which is causing great hardship to the petitioner. According to him, the Notification in accordance with Clause 24 of the Industrial Policy, 1995 ought to have been issued within one month of the release/publication of the policy in September, 1995. Placing reliance upon Clause 24 of the Industrial Policy it is contended that all concerned Departments and Organizations were obliged to issue follow-up notifications to give effect to the provisions of the policy within a month and this was to be monitored by the Government.

11. According to the petitioner issuance of a notification is not only in the interest of the petitioner-company but is also in the interest of the State Government as well as the public at large because the petitioner apart from paying sales tax of Rs. 12 crores is paying excise duties to the tune of Rs. 25 crores, mining royalty Rs. 1.25 crores, railway freight Rs. 12 crores and is paying the electricity charges to the State Electricity Board to the tune of Rs. 18 crores. The petitioner says that total amount of Rs. 68.25 crores is being paid by the petitioner to the State and national exchequer and out of the same if an exemption of Rs. 12 crores per annum is given to the petitioner, the same is not going to cause any loss to the State because even after the said exemption the petitioner would be paying Rs. 56.25 crores per annum to the different exchequers and would continue to provide employment to more than 2000 persons apart from giving business and employment to auxiliaries, ancillaries and subsidiaries. The petitioner says that the non-issuance of the notification in accordance with the Industrial Policy, 1995 may lead to closure of the factory which may lead to serious law and order problem as has also been observed by the Minister of Commercial Taxes in the meeting held on 29.5.2000. Placing reliance on the minutes of the meeting dated 29.5.2000, annexed as Annexure-12, it is contended that due to closure of the company thousands of the workers would become jobless which may lead to a serious problem of law and order. It is further contended that in absence of financial restructuring and grant of sales tax exemption the petitioner would be obliged to close the factory and a most modern and latest advanced technology would become junk. It is also contended that the closure of the factory may lead to a loss of Rs. 250 crores to the Financial Institutions because they would not be able to recover the said amount from a dying industry. The petitioner submits that despite several approaches, requests, reminders, and letters the respondent-State is not ready to come out of the hibernation, therefore, this Court should interfere in the matter and require the State authorities to issue necessary notification in accordance with Clause 24 of the Industrial Policy, 1995.

12. It would be noteworthy that this writ application was filed on 31.7.2000. This date would assume importance for the purposes of consideration of this petition. On 1.8.2000 the matter was heard but at the request of the Government Counsel it was adjourned. On 14.11.2000 the matter was again adjourned with a direction to the State Counsel to apprise the Court regarding the stand of the Government in the matter.

13. On 16.10.2000 a counter affidavit was filed by one Sri Vishnudeo Bhagat, Commercial Taxes Officer, Special Circle, Patna. In paragraph 6 of the said counter affidavit it was clearly mentioned that the petitioner-company was already taking advantage of the deferment scheme, therefore, the said company would not be entitled to the benefit under the exemption scheme. In paragraph 10 of the said counter affidavit it was contended that the issue of eligibility for benefits relating to sales tax to sick potentially viable non-BIFR sick industrial unit can be decided only after issuance of necessary notification. From this

statement it would appear that the State Government was of the view that unless a notification under Clause 24 of the scheme is issued the viability of the petitioner-company would not be considered. In paragraph 13 it was clearly stated that the issuance of appropriate notification in terms of the Industrial Policy, 1995 was being actively considered by the Government.

14. When the matter came before the Court for hearing on 12.12.2000 this Court observed that relevant records have not been placed along with the counter affidavit. The Court directed that the matter should be discussed with the Advocate General. The matter was thereafter listed for consideration on 13.12.2000, 2.1.2001, 17.1.2001 and 15.2.2001. It would be noteworthy that a rejoinder was filed by the petitioner on 14.11.2000.

15. On 5.12.2000 a supplementary counter affidavit was filed by the Respondent No. 4. The affidavit was sworn by Sri Mukesh Nandan Prasad, Respondent No. 4 in this petition. In paragraph 5 it was clearly stated that the Hon"ble Minister, Department of Commercial Taxes has approved the proposals along with draft notification regarding extension of sales tax relating incentives to sick industrial units. In paragraph 8 of this counter affidavit it was contended that it shall be possible to issue necessary notification after approval of the proposal of the relevant notification by the Hon"ble Chief (Finance) Minister and the Cabinet. It was also contended in the affidavit that the said deponent requested the Secretary-cum-Commissioner, Department of Finance vide letter dated 28.11.2000 to take necessary approval earliest so that it could be informed to the High Court. On 13.12.2000 said Mukesh Nandan Prasad submitted his apology for the language used in his official communication. Yet another supplementary counter affidavit dated 9.1.2001 was filed by Sri Krishna Nand Roy, Assistant Commissioner, Commercial Taxes, Bihar. In the said affidavit it was contended that the State Government in a meeting taken by the Chief Minister on 6.1.2001 considered the issue of extension of sales tax related incentives to industrial units and after due deliberation the Government had decided to reject the claim of the writ petitioner on certain ground : (i). The Industrial Policy, 1995 has lapsed on 31.8.2000, (ii) Government have so far not issued any sales tax related notification with reference to para 22 of the policy, as such, no right has accrued to any person/enterprise belonging to this category to claim sales tax exemption or other related benefits, (iii) No revival package, as envisaged in para 22(2)(i) of the Industrial Policy, 1995 has been approved by the State Level Empowered Committee headed by Chief Secretary, pertaining to this writ petitioner. No such approval could even be granted in the absence of a suitable notification, (iv) Tax reforms, at an All India Level, are being considered at the level of Chief Ministers of all States. In two conference of Chief Ministers, it has been decided that all sales tax related incentives to industries should be abolished, except for special category States, and failure to do so will result in withholding of 25% of Central Plan Assistance.

16. On 5.2.2001 the petitioner filed an application for amendment challenging

the decision dated 6-1-2001, inter alia, pleading that the ground for rejection of the petitioner's case and non-issuance of the notification were not in accordance with law nor in accordance with the policy. It was contended by the petitioner that the petitioner had already made the application much before expiry of the policy, therefore, the lapse of the policy would not come in his way. The other reasons for non-issuance of the notification were also challenged. On 16.2.2001 Mukesh Nandan Prasad, Respondent No. 4 again filed his counter affidavit. It would be noteworthy that on 16.2.2001 this Court noticed certain glaring defects in the counter affidavits and the lapses on the part of the Officers of the Government, therefore, made certain critical observations. The matter was taken up for consideration on 2.8.2001. Thereafter on 10-8-2001 yet another supplementary counter affidavit was filed by Virendra Kumar Singh, Joint Commissioner, Commercial Taxes, Headquarters, Patna. In the said affidavit it is contended that in compliance of the order dated 2.8.2001 passed by the High Court the respondent was submitting certain facts for consideration by the High Court. It is contended that the State Government decided on 5.3.2001 not to extend any sales tax related incentive to any industrial unit referred to in para 22 of the Industrial Policy. According to the affidavit, the Commissioner, Commercial Taxes, communicated the said decision of the State Government vide his letter No. 669 dated 5.3.2001 to the Industrial Development Commissioner, Bihar, Patna; a copy of the said letter is annexed to this counter affidavit as Annexure-A. The affidavit further says that in view of the said decision the Secretary, Industries Department rejected the petitioner's application and communicated his decision to the petitioner-company on 14.5.2001 vide letter No. 1816.

17. On 1.8.2000 the petitioner along with a supplementary affidavit had filed the complete text of the Industrial Policy, 1995.

18. SriTara Kantjha, learned Senior Counsel for the petitioner placing strong reliance upon Clause 22, 23 and 24 of the Industrial Policy, 1995 submitted that the State Government, in accordance with Clause 24 of the said policy is duty bound to issue notification to give effect to the provisions of the policy and by keeping the matter pending for long many years the Government cannot be allowed to say that as the policy had lapsed the petitioner's application cannot be considered and a notification would not be issued. It is further contended that the authorities which have to consider have to evolve suitable measures for potentially viable non-BIFR sick industrial units and the committee after-considering the case has to recommend concessions and facilities, therefore, the case of the petitioner has to be considered and only thereafter the Government has to pass the final orders, According to him, the manner in which the matter has been thrown from one department to another and during the pendency of this petition the Chief Minister and the Cabinet have passed the resolution would show that they have scant rather no regards to the authority of this Court. It is also submitted by him that the Government while rejecting the petitioner's case has relied upon certain meeting of the Chief Ministers of States but has not submitted any document to show that such an understanding was developed in

the meeting of the Chief Ministers. His further contention is that the Government is relying upon the order dated 6.1.2001 but the same is not on the record, therefore, every body is at a loss to understand as to what persuaded the Chief Minister to refuse issuance of the notification. He lastly contended that during the pendency of this writ petition in the cabinet meeting held on 5.3.2001 a decision has been taken that notification should not be issued but the said order is bad because the Cabinet without applying its mind to the facts of the case has simply placed its reliance upon the Chief Minister's order dated 6.1.2001. It is prayed by the petitioner that the Government be directed to issue the notification and consider the case of the petitioner for grant of sales tax exemption so that the petitioner-unit survives the odd days.

19. In the reply it is contended by the learned Counsel for the State Government that in a meeting taken by the Chief Minister on 6.1.2001 the issue of extension of sales tax related incentives was considered and after due deliberation the Government decided to reject the claim because the Industrial Policy lapsed on 31.8.2000. the Government did not issue the sales tax related notification with reference to para 22 of the policy, therefore, no right accrued in favour of the petitioner to claim sales tax exemption on other related benefits, no revival package as envisaged in para 22(2)(i) of the Industrial Policy, 1995 had been approved by the State Level Empowered Committee, and as such an approval could not even be granted in the absence of a suitable notification and as in the conference of the Chief Ministers, it had been decided that all sales tax related incentives to the industries should be abolished, therefore, the respondent-State was justified in rejecting the claim. It was further contended that in the meeting of the Cabinet held on 5.3.2001 the Cabinet after giving its thoughtful consideration to the totality of the circumstances has taken the policy decision that a notification relating to sales tax incentive be not issued, therefore, also the petitioner is not entitled to any relief. Learned Counsel for the State has prayed for dismissal of the petition.

20. For proper and due appreciation of the matter in dispute it is necessary to refer to the relevant provisions of the Industrial Policy, 1995, Clause 22, 23, and 24 which are material for the purposes of this petition read as under:

REVIVAL OF SICK UNITS

The continuing problems of Industrial sickness is a matter of great concern for the Government. Closure of units leads to unemployment and locking up of capital deployed in such ventures. The State Government is determined to take effective measures and to render all possible assistance for the amelioration of this malaise.

22.1. INDUSTRIAL SICKNESS IN SSI SECTION

The State Government proposes to take the following measures for the revival of SSI Units:

(i) There are scores of medium and small scale units which are sick but have the potential of becoming viable. For such SSI Units which are outside the purview of the Bureau of Industrial and Financial Reconstruction (BIFR), the State Government proposes to form an apex body on the lines of BIFR with Director of Industries as its Head to consider their revival.

(ii) The State level apex body for rehabilitation of sick industry would be vested with adequate powers so that it can effectively implement management and financial restructuring.

(iii) The sick SSI units would be identified as per guidelines given by RBI/IDBI, Appropriate packages of reliefs and concessions for such units would be approved for their rehabilitation.

(iv) Sick units undergoing rehabilitation will not have to take sickness certificate every year. The approved revival package for each sick unit would indicate the period of revival.

(v) The apex body shall monitor the progress of the revival package.

(vi) A sick unit being revived would be entitled to Sales Tax exemption/deferment exemption from Minimum Guarantee etc. as determined in the revival package.

(vii) The State level apex body would besides representatives of Government Department/Organizations/Financial Institutions will also have as its members one representative each of Confederation of Indian Industries, Bihar Industries Association and Bihar Chamber of Commerce.

The rehabilitation package would be implemented within a fixed time frame so that the process of revival is not delayed.

22.2. SICKNESS IN LARGE AND MEDIUM SECTOR

(i) A committee with Industrial Development Commissioner as its head will be constituted to evolve suitable measures for potentially viable non BIFR sick Industrial units including PSUs in the large and medium sector.

The committee will recommend concessions and facilities including those in this policy statement if considered necessary for revival of the unit. These recommendations would be placed before the Government through State Level Empowered Committee (SLEC) already constituted under the chairmanship of Chief Secretary for final decision.

(ii) Concessions and facilities identified under the scheme of rehabilitation prepared by the Board for Industrial and Financial Reconstruction (BIRF) or by Inter-Institutional Committee of IRBI, BICICO/BSFC and Bank would be placed before the Committee headed by the Industrial Development Commissioner for consideration and recommendation to Government through SLEC for approval.

(iii) Rehabilitation measures for sick but potentially viable industrial units may,

inter-alia, include reliefs and concessions or sacrifice from various government departments/organisations and or additional facilities including allocation of power from BSEB/DVC and any other agency/statutory body/local authority.

22.3. Such closed and sick industrial units which have once availed of the facility of sales tax exemption/deferment under a rehabilitation package prepared by BIFR shall not get the same facility again if they turn sick or are closed again. This will also apply to other facilities given to such sick and closed industrial units which have once availed of such facilities in the past. However, the State Government may consider extending such facilities on case to case basis as required.

23. Definition(s) given in the Annexure form (s) part of the policy

24. MONITORING AND REVIEW

All concerned departments and organisations will issue follow up notifications to give effect to the provisions of the Policy within a month. This will be appropriately monitored by the Government.

The State Government may carry out Mid Term Review of this Policy.

22. From a conjoint reading of Clauses 22, 23 and 24 it would clearly appear that the State Government declared its determination to take effective measures and to render all possible assistance for amelioration of the said malaise. The Government had also declared that continuing problems of industrial sickness was a matter of great concern for the Government. Clause 24 of the Policy clearly reads that all concerned departments and organisations will issue follow-up notifications to give effect to the provisions of the policy within a month and this would be appropriately monitored by the Government. The Policy came into being in the year 1995. In accordance with the declaration made and the assurance given by the State Government a notification was required to be issued by the concerned department/organisation within one month of the policy to give effect to the provisions of the policy. Clause 24 clearly provided that issuance of the notification to give effect to the provisions of the policy would be appropriately monitored by the Government. The policy reserved a right unto to the Government to carry out mid term review of the policy. From a fair reading of Clause 24 it would clearly appear that immediately after enforcement of the Industrial Policy, 1995 all concerned departments and organisations were required to issue notification to give effect to the provisions of the policy. The Government had undertaken to monitor this. Non-issuance of the notification by the concerned departments and organisations in fact was a bad act on the part of the said departments and organisations. The Government in fact failed in appropriately monitoring the action of the concerned departments and organisations. In our considered opinion the Government cannot take the stand that as a notification in accordance with Clause 24 was not issued, the petitioner would not be entitled to any relief. When the Government has undertaken to monitor issuance of the notification then it cannot shirk the liability by saying

that as no notification has been issued the petitioner's case cannot be considered.

23. From Clause 22.2 which relates to sickness in large and medium sector, it would clearly appear that a committee with Industrial Development Commissioner as its head is to be constituted to evolve suitable measures for potentially viable non BIFR sick industrial units including PSUs in the large and medium sector. Clause 22.2 of the policy would come into force after a notification under Clause 24 is issued. In the present matter it appears that the cart has been put before the horse. Without issuing the notification the case of the petitioner was considered and all of a sudden the State Government took a somersault and started asserting that as no notification under Clause 24 was issued and as no approval was given by the committee under Clause 22.2(i) of the policy, the petitioner is not entitled to any relief. A further perusal of Clause 22.2 would show that a committee headed by Industrial Development Commissioner has to evolve suitable measures and thereafter to recommend concessions and facilities including those in the policy statement, it considered necessary for revival of the unit. The said recommendations were to be placed before the Government through State Level Empowered Committee already constituted under the Chairmanship of the Chief Secretary for final decision. Sub-clause (3) of Clause 22.2 provides that rehabilitation measures for sick but potentially viable industrial units may, inter alia, include reliefs and concessions or sacrifice from various Government departments/organisations and/or additional facilities including allocation of power from BSEB/DVC and any other agency/statutory body/ local authority. Clause 22.3 though not relevant for the present purposes simply provides that closed and sick industrial units which have once availed of the facility of sales tax exemption/deferment under a rehabilitation package prepared by BIFR shall not get the same facility again if they turn sick or are closed again. It is not in dispute before us that the petitioner is not an industrial unit/industrial concern nor it is said by the respondent that the petitioner was otherwise not entitled to the concessions/incentives as provided under the scheme.

24. From the explanation appended to sub-paragraph (d) of the paragraphs of the Annexure, annexed to the Industrial Policy, it would clearly appear that for the purposes of concessions/benefits relating to sales tax, only such units shall be deemed to be industrial units which carry on the business of manufacturing goods for sale. The word "manufacture", with all its grammatical variations and cognate expression, shall have the same meaning as defined in the Bihar Finance Act, 1981. From a conjoint reading of Clauses 22, 23 and 24 and the definition clauses annexed to the policy it would clearly appear that the Government was obliged to monitor issuance of the notification and the concerned departments and organisations were also bound to issue follow up notifications to give effect to the provisions of the policy within one month. At this junction of time the State Government cannot be allowed to say that because the notification was not issued, the petitioner would not be entitled to any relief. This was a serious lapse

on the part of the State Government in not monitoring the issuance of the notification and it was also a lapse on the part of the concerned departments and organisations in not issuing the follow up notifications within one month. It is trite that one cannot be allowed to take advantage of his own wrong. When the policy clearly provided that a notification would be issued within one month by the concerned department/organisation then the Government was obliged to issue further direction as a monitoring agency to the department/organisation to issue the notifications. It appears that on one side the Government failed in monitoring the matter and on the other hand is trying to take advantage of its own wrong.

25. The stand of the State Government that the policy has lapsed on 31.8.2000, therefore, the petitioner is not entitled to any relief, is not a palatable defence. Once an assurance is given by the State Government in form of Industrial Policy then the Government had to fulfil its commitments. Non-fulfilment of the assurances is bad on the part of the State Government and they cannot be allowed to take advantage of their own lapses by raising a plea that the policy had lapsed less realising that the petitioner made the application much before the policy had lapsed. No body from the side of the State Government is ready and willing to say as to why final orders were not passed in relation to issuance of the notification and relating to the petitioner's entitlement during the currency/subsistence of the policy. Even otherwise it is trite law that if a right has accrued in favour of somebody then lapse of such policy subsequent to making of the application would not adversely affect the right of such person because the person in authority cannot be allowed to say that because of his own inaction, he has made the application of the other party infructuous. The policy does not contain any provision to show that if an application is not decided during the subsistence or survival of the policy then the application would stand rejected. The policy also nowhere says that in case a notification under Clause 24 of the policy is not issued then too the entitlement of a claimant would come to an end. In our considered opinion, if the petitioner was entitled to certain concessions during the subsistence of the policy then the lapse of the policy or subsequent change in the policy would not disentitle him from claiming the benefits.

26. We can successfully place our reliance on a judgment of the Supreme Court in the matter of Mangalore Chemicals and Fertilisers Ltd. Vs. Deputy Commissioner of Commercial Taxes and others, . In the said matter it was not disputed that the said appellant was entitled to the benefit of the notification dated 30th June, 1969 but was not eligible for the said benefit under the notification dated 11th August, 1975. After quoting the two policies of sales tax concessions etc., the Supreme Court in paragraph 4 of this judgment observed as under:

(4) There is, as set out earlier, no dispute that the appellant was entitled to the benefit of the notification dated 30th June, 1969. There is also no dispute that the refunds were eligible to be adjusted against sales tax payable for respective

years. The only controversy is whether the appellant, not having actually secured the "prior permission" would be entitled to adjustment having regard to the words of the notification of 11th August, 1975, that "until permission of renewal is granted by the Deputy Commissioner of Commercial Taxes, the new industry should not be allowed to adjust the refunds". The contention virtually means this. "No doubt you were eligible and entitled to make the adjustments. There was also no impediment in law to grant you such permission. But see language of Clause. (5). since we did not give you the permission you cannot be permitted to adjust." Is this the effect of the law?

27. The sales tax already paid by the appellant on the raw materials procured by it is the subject-matter of the refunds, the sales tax against which the refund is sought to be adjusted is the sales tax payable by appellant on the sales of goods manufactured by it. If the contention of the Revenue is correct, the position is that while the appellant is entitled to the refund it cannot, however, adjust the same against current dues of the particular year but should pay the tax working out its refunds separately. The situation may well have been such but the snag comes here. If the adjustments made by the appellant in its monthly statements are disallowed, the sale tax payable would be deemed to be in default and would attract a penalty ranging from 1 1/2% to 2 1/2% per month from the date it fell due. That penalty, in the facts of the case, would be very much more than the amounts of refund.

28. The Supreme Court in relation to grant of permission for adjustment could at all be made or not after the period to which such adjustment related had itself expired, observed that the stand of the Revenue suffers from certain basic fallacies, besides being wholly technical. The Apex Court observed that the appellant did not have any prior permission because it was withheld by the revenue without any justification. The Supreme Court also observed that a permission of this nature was a technical requirement and could be issued making it operative from the time it was applied for. From the said judgment of the Supreme Court it would clearly appear that if eligibility is once earned then the same cannot be held to be not available by lapse of the policy or by non-issuance of a notification or non-grant of the permission.

29. From the counter affidavit dated 9.1.2001 it simply appears that the Government in its meeting dated 6.1.2001 had rejected the claim of the writ petitioner on an untenable ground that the Industrial Policy, 1995 had lapsed on 31.8.2000. We are also not inclined to accept the stand of the State Government that as no notification was issued by the State Government under Clause 24 of the Policy, the petitioner would not be entitled to any relief. In fact, it was a hyper technical objection raised by the State Government. From the documents annexed with the petition and the counter affidavits filed by the respondent-State, it would clearly appear that the State Government had taken a firm and positive stand for issuance of appropriate notifications in terms of the Industrial Policy, 1995 and it was being actively considered by the Government (please

refer to para 13 of the affidavit dated 16.10.2000). So far as the defence of the State Government that the petitioner had already taken the benefit of deferment policy, he would not be entitled to sales tax exemption is concerned, it can straightaway be rejected in view of para 22.3 of the Industrial Policy 1995. From Clause 22.3 it would clearly appear that facility of sales tax exemption/deferment would not be available to a closed and sick industrial unit which had once obtained the same. In the present case it clearly appears that the petitioner was taking the benefit of deferment under a different policy and was claiming sales tax exemption under the 1995 Policy. In a case of deferment of the tax, the Industrial Unit is obliged to pay and deposit the tax after the period of deferment is over, but in a case of sales tax exemption, such an Industrial Unit is not at all required to pay the tax.

30. In para 10 of the affidavit dated 16.10.2000 the State had made a statement that the issue of eligibility for benefits relating to sales tax to sick potentially viable non BIFR sick industrial unit can be decided only after issuance of necessary notifications. In para 13 they made a statement on oath that issuance of appropriate notification was being actively considered by the Government. When these statements were made on 16.10.2000 what especially persuaded the State Government to reject the case of the petitioner on 6.1.2001 has not been brought on the record. We are at a loss to understand as to what persuaded the State Government to take a somersault and reject the petitioner's case on the ground that the policy had lapsed and no notification under Clause 24 had been issued, therefore, the petitioner is not entitled to any benefits. In a case like present when the State was taking an altogether different stand from the earlier one it was obliged to inform this Court that what transpired within a period of two months and twenty days for taking a different stand.

31. From the affidavit dated 5.12.2000 sworn by Mukesh Nandan Prasad, Respondent No. 4 it would clearly appear (paragraph 5 of the affidavit) that the Hon'ble Minister, Department of Commercial Taxes had approved the proposals along with draft notification regarding extension of sales tax related incentives to sick industrial unit. On one side even on 5.12.2000, after the lapse of the policy on 31.8.2000, the State Government through the deponent was informing this Court that the Hon'ble Minister, Department of Commercial Taxes had approved the proposals along with draft notification and in the subsequent decision dated 6.1.2001 took the stand that because the policy had lapsed on 31.8.2000, the petitioner's case was to be rejected. We are unable to reconcile between the two stands taken by the State Government. From para 8 of the counter affidavit dated 5.12.2000, it would again appear that the State Government through the deponent made the statement in this Court that it should be possible to issue necessary notification after approval of the proposal along with relevant notification by the Hon'ble Chief (Finance) Minister and the Cabinet. What happened after 5.12.2000 upto 6.1.2001 is in absolute dark. Nobody is ready to unfold the mysteries. Nobody is ready to crease out the wrinkles. In a case like present contrary to the assurances given in the High Court when a decision is

taken by the State Government, the State is obliged to inform this Court that what persuaded it to reject the case on the ground that the policy had lapsed and as no notification under Clause 24 was issued, the petitioner was not entitled to any relief.

32. So far as the defence of the State Government that the Government had so far not issued any sales tax related notification with reference to para 22 of the policy, therefore, no right accrued in favour of anybody is concerned, we are of the opinion that this stand is not available to the State Government because it was a lapse on the part of the State.

33. The third stand taken in the affidavit dated 9.1.2001 that no revival package as envisaged in para 22.2(i) had been approved by the State Level Empowered Committee is concerned, we are of the opinion that this defence is an afterthought and even otherwise not tenable in the law. We have extensively quoted Clause 22.2 of the Industrial Policy, 1995. In a case of large and medium sector industry a committee headed by Industrial Development Commissioner was to be constituted to evolve suitable measure and the said committee was to recommend concessions and facilities including those in policy statement, if considered necessary for revival of the unit. The recommendations made by the said committee were to be placed before the Government through the State Level Empowered Committee already constituted under the Chairmanship of the Chief Secretary for final decision. In the present case assuming for a minute that even in absence of a notification under Clause 24 of the policy, the committee headed by the Industrial Development Commissioner could make its recommendations and the said recommendations were to be considered by the State Level Empowered Committee and the same was not done then again the lapses are on the part of the committee headed by the Industrial Development Commissioner and the State Level Empowered Committee. For non-action on the part of these two committees, the petitioner's entitlement cannot be curtailed or massacred. The petitioner was only required to submit its case before the committee along with the proposals given by the Financial Institutions and once it was so done by him, the Committee headed by the Industrial Development Commissioner was required to look into the proposals and evolve suitable measures for potentially viable non BIFR sick industrial units. The Committee was obliged to submit its recommendations relating concessions and facilities before the State Level Empowered Committee and the said State Level Empowered Committee was obliged to place the said recommendations before the Government. If the lapses are on the part of the two Committees and during this period the policy lapsed, can it be said under the law that because of the non-action or inaction on the part of the said Committees and the Government, the petitioner's entitlement came to an end? The Government's defence that no revival package was approved by the State Level Empowered Committee, therefore, the petitioner is not entitled is bad defence. The further defence of the State Government that such an approval could even be not granted in absence of a suitable notification would again speak bad on the part of the State

Government. We fail to understand the propriety of this defence. On one side the State Government says that no notification was issued, therefore, the revival package could not be approved and at the same time the State Government in a decision dated 6.1.2001 observes that as there was no approval of the revival package, the petitioner was not entitled to any reliefs.

34. In the affidavit dated 9.1.2002 it has also been contended that at All India Level tax reforms were being considered at the level of the Chief Ministers of the States and in two conferences of the Chief Ministers it had been decided that all sales tax related incentives to industries should be abolished. In support of this observation, nothing has been produced in this Court. Nobody knows that on what dates the conferences were held, what was the agenda and in relation to what matters the said Chief Ministers observed that all sales tax related incentives should be abolished. Assuming for a minute that in the conference of the Chief Ministers it had been so decided then a resolution passed by the Chief Ministers in their conference would not make their resolution legal and enforceable. The Chief Ministers in their conference may or may not discuss the pros and cons of the policy or may decide the future course of action but they even otherwise would not be entitled to show that the policy decision taken by the Government should be recalled, annulled, modified or nullified. When the State Government gives an assurance and undertaking, in form of a policy then in fact it allures person/industries to enter into the industrial ventures, invest money on the assurances contained in their policy. Would it be justified on the part of the State Government to say later on that on a second thought they were withdrawing the policy and the benefits flowing from the policy? We are unable to conceive to this argument.

35. It would be necessary to note that affidavit dated 9.1.2001 has been further affirmed by Sri Mukesh Nandan Prasad, Respondent No. 4 to this petition under his affidavit dated 16.2.2001. From the affidavit dated 10.8.2001 it would appear that on 5.3.2001 the Cabinet has taken the decision not to issue the notification. Neither the decision dated 6.1.2001 nor the Cabinet decision dated 5.3.2001 have been placed before this Court, therefore, this Court is at a loss to understand as to what in fact the decisions were. We have already considered the points raised in the affidavit dated 2.1.2001 and we shall proceed to consider the contents of the affidavit dated 10.8.2001 and the letter dated 5.3.2001.

36. In the affidavit dated 10.8.2001. Sri Virendra Kumar Singh, Joint Commissioner, Commercial Taxes, Patna has stated that the State Government decided on 5.3.2001 not to extend any sales tax related incentive to any industrial unit referred to in paragraph 22 of the Industrial Policy, 1995 and the Commissioner, Commercial Taxes, communicated the said decision vide his letter No. 669 dated 5.3.2001 to the Industrial Development Commissioner, Bihar.

37. A perusal of the letter dated 5.3.2001, annexed to the affidavit would show that the Government took the policy decision not to issue a notification in relation to sales tax related incentive. The Cabinet in fact was not considering the

case of the petitioner but in fact took a decision not to issue the notification for extending benefits under Clause 22 of the Industrial Policy, 1995. At this stage even for the sake of repetition we will again refer to Clause 24 of the Industrial Policy, 1995. The Policy unequivocally and with unambiguous terms clearly mentioned that all concerned departments and organizations would issue follow up notifications to give effect to the provisions of the policy within a month and this will be appropriately monitored by the Government. The policy did not leave any discretion or authority unto the State Government not to issue a notification or restrain any department or organisation from issuing a notification. In fact the policy obliged the State Government to appropriately monitor issuance of the follow up notifications within one month by concerned departments and organisation to give effect to the provisions of the policy. When the Government had undertaken the authority to monitor something then it was obliged to see that such notifications/follow up notifications were issued within one month. The State Government/Cabinet could not re-write Clause 24 of the Industrial Policy, 1995 by saying that it would not allow issuance of a notification in accordance with the policy.

38. The letter dated 5.3.2001 simply says that the Cabinet had taken the decision that in accordance with Clause 22 of the Industrial Policy, 1995, the sick industrial units would not be entitled to any sales tax benefits/concessions and no notification to that effect would be issued. It appear: that without appreciating the true effect and import of the Industrial Policy, 1995, the Cabinet took the decision of not issuing the notification.

39. We have already observed that the Government was to monitor issuance of the notifications within one month by the concerned departments and organisations and it could not take a decision that such a notification should not be issued. Issuance of a notification in fact was mandatory upon the concerned departments and organisations. The State Government was simply given a right to carry out mid term review of this policy. The authority to review the policy could be exercised by the State Government during the currency of the policy and not after the policy had lapsed. Unfortunately the State Government and the Cabinet assumed jurisdiction which was not vested in it by law and specially by the policy. We could understand a case that after issuance of the notification the State Government after considering the recommendations was deciding that concessions and facilities should not be extended in favour of the petitioner but in the present case the State Government/ Cabinet took the pleas which cannot be reconciled and in fact the State Government tried to blow hot and cold at the same time, or we can say, was trying the approbate and reprobate at the same time. On one side the State said that because the notification was not issued, the State Level Empowered Committee would not approve the proposals and at the same time was saying that because no approval was made by the State Level Empowered Committee in favour of the petitioner, he was not entitled to any benefits. In our opinion, the State Government ought to have directed the concerned departments and organisations to issue follow up notifications to give

effect of the provisions of the policy and should have monitored the same in accordance with Clause 24 of the Policy.

40. Though the decisions dated 6.1.2001 and 5.3.2001 have not been placed before us but as the substance of the same have been submitted before us we are of the considered opinion that both the decisions deserve to be quashed. The decisions are accordingly quashed.

41. The concerned departments and organisations are hereby directed to issue follow up notifications to give effect to the provisions of the policy within one month from today. After the notification is issued a Committee headed by the Industrial Development Commissioner would be constituted to evolve suitable measures for potentially viable non BIFR sick industrial unit (the present petitioner) and the said Committee would submit its recommendations before the State Level Empowered Committee which in its turn shall place the said recommendations before the Government. After receiving the said recommendations from the State Level Empowered Committee, the Government shall take final decision in the matter. The petition is thus allowed.