
(2019) 07 BOM CK 0196
In the Bombay High Court
Case No : Writ Petition No. 2209 Of 2018

K.M. Refineries And Infraspac Pvt. Ltd. APPELLANT
Vs
State Of Maharashtra Through Principal Secretary And Others RESPONDENT

Date of Decision : 16-07-2019

Acts Referred:

Constitution Of India, 1950 — Article 14, 19, 31, 37, 39(b), 39(c), 299

Citation : (2019) 07 BOM CK 0196

Hon'ble Judges : Sunil B. Shukre, J;S.M. Modak, J

Bench : Division Bench

Advocate : Firdos Mirza, Gaurav V. Kathed, K.L. Dharmadhikari

Final Decision : Allowed

Judgement

Sunil B. Shukre, J

1. Heard. Rule. Rule made returnable forthwith. Heard finally by consent.
2. The facts of this Petition appear on quite a narrow canvass. Suffice it to say, for the purposes of this Petition that the Petitioner - a registered Company dealing in manufacture of Vegetable Oil and Allied Oil products, fired by the enthusiasm created by the Government scheme intending to have industries at disperse places all over Maharashtra under 'New Package Scheme of Incentives, 1993' (for short, 'Incentive Scheme'), set up a factory unit at village Dabha, Tahil Nandgaon Khandeshwar, District Amravati with the hope that the incentives offered under the Incentive Scheme would offset the increased cost of production and the Petitioner would be able to compete with other similar industries in marketing its products at affordable rates, without causing any loss to the Petitioner - Company.
3. Under the Incentive Scheme, monetary and other incentives in the nature of tax subsidy or tax exemption at the rates prescribed in the scheme and other benefits were given. The document of Incentive Scheme required that the Eligibility Certificate be issued by the Implementing Agency and invariably the

Implementing Agency would be the concerned District Industries Centre headed by an officer of the rank of General Manager.

4. The Petitioner made an application for issuance of the Eligibility Certificate by the District Industries Center, Amravati. The Petitioner was found eligible for getting the certificate, and therefore, by the final order issued on 20th March 2017, the General Manager, District Industries Centre, Amravati issued the Eligibility Certificate which was valid for nine years. Under the Incentive Scheme, the date from which the Eligibility Certificate shall take effect for availing of the sales tax incentives was to be specified by the Commissioner of Sales Tax.

5. In the instant case, the Eligibility Certificate reached the table of the Commissioner of Sales Tax for specifying the date from which the incentives to be given to the Petitioner were to take effect. The Commissioner of Sales Tax prescribed the effective date, but, while doing so, curtailed the validity period by about three years by his order passed on 10th August 2017. The Petitioner has taken an exception to such curtailment of the validity period by filing this Petition. The Petitioner has also raised another grievance in this Petition. He submits that incentives given in the Incentive Scheme have been substantially reduced by new policy prescribing new tax structure of the State and according to him, this violates principle of promissory estoppel.

6. It is the submission of the learned Counsel for the Petitioner that the curtailment of validity period is not permissible under the Incentive Scheme. It is also his submission that, even if new tax structure has come into being it would have no adverse impact on the monetary incentives given under the Incentive Scheme by virtue of the Application of the doctrine of 'Promissory estoppel'. The law consistently laid down by the Hon'ble Apex Court right from the case of Motiram Padampat Sugar Mills Company Limited v. State of Uttar Pradesh, (1979) 2 SCC 409, reiterated in the case of Gujarat State Financial Corporation v. Lotus Hotels Pvt. Ltd. (1983) 3 SCC 379, would demonstrate it, submits learned Counsel.

7. Mr. Dharmadhikari, the learned AGP for Respondent Nos. 1 & 4 submits that even if there is any change in the tax structure, the Petitioner would not be entitled to receive the original tax benefits as provided under the Incentive Scheme of 1993 and whatever benefits that might be conferred upon the Petitioner would be made available only in terms of Government Resolution recently issued on 12th June 2018 and also the other instructions that have been issued so far or would be issued from time to time. He points out that under the new tax structure which has a centralized system of Sales Tax under the name General Sales Tax (for short, 'GST' for the sake of convenience), there is no provision for grant of any exemption from GST, and therefore, the assessee or the tax payer is liable to first pay the GST and at the most eligible units would get refunds based on Eligibility Certificates as provided under the Government Resolution dated 12th June 2018.

8. We have gone through the document of the Incentive Scheme of 1993, placed on record. It elaboratively speaks of the incentives to be given to the Industries. The object of the Incentive Scheme is to achieve dispersal of the industries outside Mumbai-Thane-Pune industrial belt and to attract industries to underdeveloped and developing areas of the State. The Incentive Scheme was originally introduced in 1964 and was amended from time to time. One of the significant amendments, was in the year 1993. It extended the period of Incentive Scheme to 30th September 1998. Another significant amendment was made in the year 2007 vide Government Resolution dated 30th March, 2007. It appears that the Incentive Scheme has been further extended by few more Government Resolutions and there is no dispute about the fact that the Incentive Scheme came to be extended for further periods from time to time and it was in operation when the impugned order was passed by the Commissioner of Sales Tax. In fact, there is no document placed on record which shows that the Incentive Scheme has been superseded by any other scheme or policy. Be that as it may, the fact remains that the scheme had the object of making an effort for ensuring even distribution of industrial units across the State of Maharashtra so that the employment is provided to larger sections of the society and there occurs equal distribution of wealth and means of production, to the common benefit of inhabitants of State.

9. The Incentive Scheme as modified from time to time envisages giving of promotional and financial incentives. The financial incentives include the tax exemptions, cash subsidies for payment of tax interest, subsidies, various matters and other exemptions. The promotional incentives include Industrial Promotion subsidy, refund of Octroi/Entry Tax (in lieu of Octroi) and the like. The promotional and financial incentives could be availed of only upon the industry qualifying itself in terms of the eligibility conditions prescribed in the scheme. The industry is required to obtain an Eligibility Certificate from the Implementing Agency, which is defined to be the concerned District Industries Centre. The decision of the Implementing Agency as per clause-3.1(1), though subject to such directions as the Government may issue from time to time in this regard, is final and binding on the Eligible Unit. Clause 3.1 (3) prescribes that the Commissioner of Sales Tax shall endorse the Eligibility Certificate issued by the Implementing Agency and it shall be his duty to specify the date of effect of eligibility for the incentives under the Incentive Scheme.

10. The provisions contained in clause - 3.1 would clearly show that it is for the Implementing Agency to decide about the issuance of Eligibility Certificate which decision is final and it is for the Commissioner of Sales Tax to specify the date from which the Eligibility Certificate shall take effect. These provisions further indicate in clear terms that there is no authority given to the Commissioner of Sales Tax to modify, enlarge or curtail the validity period decided by the Implementing Agency and the only power which has been given to him is as regards specification of a particular date from which the Eligibility Certificate shall take effect. But by the impugned order dated 10th August, 2017, the curtailment

has been done, which is beyond the powers of the Commissioner of Sales Tax. This order, therefore, would have to be quashed and set aside.

11. Apart from the curtailment of the period of Eligibility Certificate, the Petitioner has yet another grievance. The grievance is about reduction of the incentives offered under the Incentive Scheme which is in detriment to the interest of the Petitioner and also the larger societal interest. The Petitioner submits that no reduction of the incentives already offered under the Incentive Scheme in operation on the date on which the Eligibility Certificate was issued could have been made and if it has been made now, it would be in violation of the principle of promissory estoppel.

12. The learned Counsel for Petitioner submits that it is well settled law that the promise solemnly given by the State cannot be withdrawn to the detriment and the disadvantage of the person, who has acted upon it and suffered liabilities. According to the learned AGP, even if there is reduction in the incentives, it would not ultimately affect the Petitioner in adverse manner, and therefore, there is no breach of the principle of promissory estoppel. In order to resolve the issue so raised, it would be necessary for us to first understand the doctrine of Promissory estoppel.

13. An insightful exposition of the doctrine of promissory estoppel could be found in the case of *Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh* reported in (1979) 2 SCC 409. The observations of the Hon'ble Apex Court appearing in Paragraph No. 24 are relevant and they are reproduced thus:

"24. This Court finally, after referring to the decision in the *Ganges Manufacturing Co. v. Sourujmull* (1880) ILR 5 Cal 669, *Municipal Corporation of the City of Bombay v. Secretary of State for India* (1905) ILR 29 Bom 580 and *Collector of Bombay v. Municipal Corporation of the City of Bombay* 1952 SCR 43, summed up the position as follows:

Under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an ex parte appraisal of the circumstances in which the obligation has arisen. The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution. It is elementary that in a republic governed by the rule of law, no one, howsoever high or low, is above the law. Everyone is subject to the law as fully and completely as any other and the

Government is no exception. It is indeed the pride of constitutional democracy and rule of law that the Government stands on the same footing as a private individual so far as the obligation of the law is concerned: the former is equally bound as the latter. It is indeed difficult to see on what principle can a Government, committed to the rule of law, claim immunity from the doctrine of promissory estoppel. Can the Government say that it is under no obligation to act in a manner that is fair and just or that it is not bound by considerations of "honesty and good faith"? Why should the Government not be held to a high "standard of rectangular rectitude while dealing with its citizens"? There was a time when the doctrine of executive necessity was regarded as sufficient justification for the Government to repudiate even its contractual obligations; but, let it be said to the eternal glory of this Court, this doctrine was emphatically negated in the *Union of India v. Indo-Afghan Agencies* case (1968) 2 SCR 366 and the supremacy of the rule of law was established. It was laid down by this Court that the Government cannot claim to be immune from the applicability of the rule of promissory estoppel and repudiate a promise made by it on the ground that such promise may fetter its future executive action. If the Government does not want its freedom of executive action to be hampered or restricted, the Government need not make a promise knowing or intending that it would be acted on by the promisee and the promisee would alter his position relying upon it. But if the Government makes such a promise and the promisee acts in reliance upon it and alters his position, there is no reason why the Government should not be compelled to make good such promise like any other private individual. The law cannot acquire legitimacy and gain social acceptance unless it accords with the moral values of the society and the constant endeavour of the Courts and the legislature must, therefore, be to close the gap between law and morality and bring about as near an approximation between the two as possible. The doctrine of promissory estoppel is a significant judicial contribution in that direction. But it is necessary to point out that since the doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires. If it can be shown by the Government that having regard to the facts as they have transpired, it would be inequitable to hold the Government to the promise made by it, the Court would not raise an equity in favour of the promisee and enforce the promise against the Government. The doctrine of promissory estoppel would be displaced in such a case because, on the facts, equity would not require that the Government should be held bound by the promise made by it. When the Government is able to show that in view of the facts as have transpired since the making of the promise, public interest would be prejudiced if the Government were required to carry out the promise, the Court would have to balance the public interest in the Government carrying out a promise made to a citizen which has induced the citizen to act upon it and alter his position and the public interest likely to suffer if the promise were required to be carried out by the government and determine which way the equity lies. It would not be enough for the Government just to say that public interest requires that the Government should not be compelled to carry out the promise or that

the public interest would suffer if the Government were required to honour it. The Government cannot, as Shah, J., pointed out in the Indo-Afghan Agencies case, claim to be exempt from the liability to carry out the promise "on some indefinite and undisclosed ground of necessity or expediency", nor can the Government claim to be the sole judge of its liability and repudiate it "on an ex parte appraisal of the circumstances". If the Government wants to resist the liability, it will have to disclose to the Court what are the facts and circumstances on account of which the Government claims to be exempt from the liability and it would be for the Court to decide whether those facts and circumstances are such as to render it inequitable to enforce the liability against the Government. Mere claim of change of policy would not be sufficient to exonerate the Government from the liability: the Government would have to show what precisely is the changed policy and also its reason and justification so that the Court can judge for itself which way the public interest lies and what the equity of the case demands. It is only if the Court is satisfied, on proper and adequate material placed by the Government, that overriding public interest requires that the Government should not be held bound by the promise but should be free to act unfettered by it, that the Court would refuse to enforce the promise against the Government. The Court would not act on the mere ipse dixit of the Government, for it is the Court which has to decide and not the Government whether the Government should be held exempt from liability. This is the essence of the rule of law. The burden would be upon the Government to show that the public interest in the Government acting otherwise than in accordance with the promise is so overwhelming that it would be inequitable to hold the Government bound by the promise and the Court would insist on a highly rigorous standard of proof in the discharge of this burden. But even where there is no such overriding public interest, it may still be competent to the Government to resile from the promise "on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position" provided of course it is possible for the promisee to restore status quo ante. If, however, the promisee cannot resume his position, the promise would become final and irrevocable. Vide Emmanuel Avodeji Ajaye v. Briscoe."

14. Two propositions of law emerge from the above observations. Firstly, once the promise is solemnly given by the State with an intention that when acted upon, it would create a legal relation and acting on it the promisee has changed his/her position and incurred liability, the State must be held as bound by the promise, except when owing to change of circumstances or subsequent developments larger public interests demand that the promise be not enforced against the State lest newly established balance of equities would tilt against the Government or larger public interest. Secondly, the doctrine is equitable in nature, and therefore, it must yield when the equity so requires. But, that does not mean that the Government can claim to be exempt from the liability to carry out the promise on some indefinite and undisclosed ground of necessity or unacceptability and that the Government will have to disclose the facts and

circumstances on account of which the Government seeks its exemption from the liability. Thus, the exemption to the Government can be granted only on the basis of facts and circumstances of each case and the burden to establish a case for exemption would be upon the Government.

15. The principle of promissory estoppel has now been firmly entrenched in India with its consistent reiteration and following in the later cases. One of such cases is that of *Gujarat State Financial Corporation v. Lotus Hotels Pvt. Ltd.* Reported in (1983) 3 SCC 379.

16. Now, if we look at the Incentive Scheme, one feature of the Scheme that would prominently strike us is that of a promise given by the State to the industries. The promise is that, if the industries come out of their secure shells in Mumbai-Thane-Pune industrial belt and set up their industrial units in diffused virgin pastures of the State, spread out in rural and remote areas, the industrial units would be eligible for various incentives offered in the Incentive Scheme. These incentives are meant for offsetting the additional investment and increase in cost of production of the industrial units so that the goods and services could be produced at competitive rates and without incurring any losses.

17. Relying upon such a promise and assurance given by the State, the Petitioner has opened its industrial unit at village Dabha by making substantial investment. The Petitioner has acted upon the promise and the promise had been given by the State with an intention to create legal relation. The Petitioner having changed its position and having made investments, has forged a legal relation with the State, and therefore, now the State would be bound by the promise that it gave to the Petitioner through the Incentive Scheme and which it confirmed it by issuing the Eligibility Certificate.

18. It would be clear from the facts stated and the discussion made by us thus far that the doctrine of promissory estoppel clearly apply here and would forbid the Government from taking any decision of not completely implementing the Incentive Scheme or reducing the incentives to the detriment of the Petitioner and to that extent the decision would have to be held as illegal. Once a promise has been solemnly given with an intention that it would be acted upon and which has been indeed acted upon and liabilities suffered by the promisee, the State cannot be permitted to backtrack on the promise and change its position so as to cause loss to the promisee. There can be an exception to the application of the principle of promissory estoppel, but, the facts and circumstances necessary for exempting the Government from its liability do not exist on record and the reply of the State also does not convincingly point out any such exceptional facts and circumstances warranting toning down or withdrawing of its promise, much to the disadvantage of the Petitioner. If the State has to reverse its promise, it must demonstrate specifically the facts and circumstances showing that enforcing of the promise against it would be highly iniquitous. The Government cannot change its stand merely upon its ipse dixit. There must be in existence justifiable facts and circumstances to change the decision or otherwise the State must give

full effect to the decision, which in the present case is to be found in the Incentive Scheme. This is the essence of the rule of law.

19. In the earlier paragraph, we have found that the Incentive Scheme has been framed by the State with a view to ensure equal distribution of wealth and means of production to the common benefit of citizenry of the State. The ostensible purpose was to encourage setting up of industrial units across the State of Maharashtra so that the employment is made available to greater sections of the society and the economy of the State as a whole stands to gain. The object and purpose of the Incentive Scheme is in consonance with the ideals held aloft by the directive principles of State policy contained in Part - IV of the Constitution of India, in particular, Article 39(c). Article 39(c) lays down thus:

"39. Certain principles of policy to be followed by the State-

The State shall, in particular, direct its policy towards securing-

- (a)
- (b)
- (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
- (d)
- (e)
- (f)"

20. Though the earlier decisions of the Hon'ble Supreme Court indicated that the courts were hardly concerned with the directive principles, they being not justiciable or enforceable in the courts of law like the fundamental rights, the duty of the courts in relation to the directive principles of the State policy came to be stressed much in later decisions, especially after 13-member Bench in *Keshavananda v. State of Kerala*, (1973) 4 SCC 225. This case laid down certain broad propositions as regards fundamental rights, such as-

- (i) There is no disharmony between the directives and the fundamental rights, because they supplement each other in achieving the common goal and establishing a welfare of State;
- (ii) Fundamental rights cannot be enjoyed fully unless conducive atmosphere for their enjoyment is created, which is possible only when the directive principles are implemented;
- (iii) Parliament is competent to abrogate any of the fundamental rights by amending the Constitution in order to enable the State to implement the directive principles;
- (iv) Though the mandate of Article 37 is directed at the State, the courts are also

bound by the mandate, within the parameters of the Constitution or any other statute under their consideration; and

(v) The courts have a duty while interpreting the Constitution and statutes to harmonise the social objective underlying the directive principles with the individual rights.

21. In the case of *Centre of Legal Research v. State of Kerala* reported in (1986) 2 SCC 706 : AIR 1986 SC 1322, the Hon'ble Apex Court held that the Court may issue suitable directions so that the Government may perform its duty to implement the directive principles of State Policy.

22. In the case of *Sheela v. Union of India*, reported in (1986) 3 SCC 596 : 1986 SC 1773, the Hon'ble Apex Court had taken a similar view in order to enforce the legislation passed to protect children. The Hon'ble Apex Court has also struck down an executive order or law for violating the directive principles (See - Cf. *Ashwathanarayana v. State of Karnataka*, 1989 Supp (1) SCC 696; *A.I. Bank Officers v. Union of India*, (1989) 4 SCC 90).

23. The law so crystallized in relation to the status of the directive principles of State Policy would tell us that if there is any action of the State or any executive order made by the State which dilutes or abridges the mandate of the directives, the Court in exercise of power of judicial review can annul the action or the executive order. The only condition necessary for doing so would be that the executive order or the law underlying the impugned action or order should have a reasonable nexus with the directive principles or should be made for implementing the directive principles and this has to be ascertained by examining nature and character of the basic executive order or the law. Sometimes, even the basic law or order could be in derogation of the directives. In that event also, the court would have the power to strike down the same. A useful reference in this regard may be made to the observations of the Hon'ble Apex Court in paragraph Nos. 3, 4 and 5 of *Tinsukhia Electric Supply Co. Ltd. v. State of Assam*, reported in (1989) 3 SCC 709. For the sake of convenience, we reproduce here a portion from the relevant observations made in paragraph No. 5, which reads as follows:-

"5. Whenever a question is raised that the Parliament or the State legislature have abused their powers and inserted a declaration in a law for not giving effect to securing the Directive Principles specified in Article 39(b) and (c), the court can and must necessarily go into that question and decide. See the observations of Justice Mathew in *Kesavananda Bharati Case* at page 855 of the report (SCC p.896). If the court comes to the conclusion that the declaration was merely a pretence and that the real purpose of the law is the accomplishment of some object other than to give effect to the policy of the State towards securing the Directive Principles as enjoined by Articles 39(b) and (c), the declaration would not debar the court from striking down any provision therein which violates Article 14, 19 or 31....."

24. The interpretation given by the Hon'ble Apex Court as regards the status of the directive principles of State Policy, in our considered opinion, applies to the facts and circumstances of the present case. The Incentive Scheme, as stated earlier, has been framed ostensibly to achieve one of the directives contained in Article 39(c) for ensuring equal distribution of wealth and means of production. Specific incentives to the industries have been offered and many of the industries have also availed of those incentives by setting up their industrial units situated in various parts across the State of Maharashtra. These units have been established by making substantial investment and even at the risk of increase in the expenditure on account of transportation, marketing and the like. Thus, these units have suffered liabilities with the hope that the increased cost of production would be evened out appropriately by the incentives given to them.

25. Now, midway through the operation of the Incentive Scheme, many of the incentives are being taken away or reduced and if this is permitted, it would certainly adversely affect not only the industrial units, but also the whole process of achieving the directive of Article 39(c) that operation of economic system does not result in the concentration of wealth and means of production to the common detriment. Such reduction under the Incentive Scheme in the name of new policy of GST is clearly not permissible and the Incentive Scheme that was in operation on the date of issuance of Eligibility Certificate would have to be enforced against the State. The only liberty that could be granted to the State would be of modifying the Incentive Scheme in such a way that it is consistent with the new tax structure under the General Sales Tax Scheme and at the same time it also does not result in reducing or restricting the benefits which have been conferred upon an industrial unit like that of the Petitioner under the Incentive Scheme.

26. In the result, we find that this Petition deserves to be allowed and it is allowed accordingly.

27. The impugned order dated 10th August 2017 is hereby quashed and set-aside and the Commissioner of Sales Tax or any authorized Officer is directed to specify the effective date of the Eligibility Certificate without curtailing the validity period in terms of clause - 3.1(3) of the Incentive Scheme within a period of four weeks from the date of receipt of this Judgment.

28. The Respondents are directed to implement the Incentive Scheme as amended up-to-date with a discretion to modify the scheme so as to bring it in line with the new tax structure under the General Sales Tax scheme, but without reducing or restricting the benefits as conferred upon the Petitioner under the Incentive Scheme within a period of eight weeks from the date of receipt of this Judgment.

29. Rule is made absolute in these terms. No order as to costs.