(2004) 04 AHC CK 0203

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 1155 of 2003

Propene Products Limited APPELLANT

Vs

State of U.P. and Others RESPONDENT

Date of Decision : 09-04-2004

Acts Referred:

Constitution of India, 1950 — Article 226, 309
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16
Uttar Pradesh Trade Tax Act, 1948 — Section 38, 4A

Citation : (2004) 04 AHC CK 0203

Hon'ble Judges : V.C. Mishra, J;M. Katju, J

Bench : Division Bench

Advocate : W.H. Khan and J.H. Khan, for the Appellant; Shashi Kant and Vivek Saran and S.C., for the Respondent

Judgement

M. Katju, J.—This writ petition has been filed praying for a writ of mandamus directing the respondent nos. 1 to 4 to immediately publish an amendment in the notification dated 21.2.97 to extend the benefit of Trade Tax exemption of 15 years to Agro Based Units in pursuance of the policy on Agro Based and Food Processing Industry published by the Govt. of UP. and under G.O. dated 30.5.94 amended by G.O. dated 19.10.95 and the order of the Chief Minister and the Chief Secretary. The petitioner has also prayed for a mandamus directing the respondents to continue the deferment of Trade Tax granted to the petitioner''s sick unit till the package is finalised and approved by the State Govt.

2. Heard learned counsel for the parties.

3. The petitioner is a company registered under the Indian Companies Act. It is alleged in para 4 of the writ petition that in January 1995 the petitioner was allured by the Commissioner, Director of Industries and Executive Director Udyog Bandhu to invest in Agro Based Sector which has been accorded top most priority under the Industrial Policy 1994.A true copy of the Industrial Policy 1994 is Annexure 1 to the petition. The Executive Director, Udyog Bandhu also provided

a copy of the G.O. dated 30 5.94 for formation of an Empowered Committee under the Chairmanship of the Chief Secretary , U.P. to provide impetrs to industrialisation. This Committee consisted of the Principal Secretaries or Secretaries of all concerned departments as members and was empowered to take decisions concerning special incentives /concessions like Trade tax holiday for 15 years. The recommendation of the Committee was required to be forwarded to the Chief Minister. True copy of G.O. dated 30.5.94 is Annexure 2. It is alleged in para 8 of the petition that the government came out with another G.O. No. 4274 dated 19.10.95 declaring it to be integral part of G.O. dated 30.5.94 with a promise to grant total trade tax exemption for 15 years to Agro Based Units investing over Rs. 10 crore to bring them at pary with units investing over Rs. 50 crore in other sectors. True copy of G.O. dated 19.10.95 is Annexure 4. True copy of the Industrial Policy 1996 is Annexure 5. On 26.7.95 the petitioner moved an application for registration before the Ministry of Agriculture and obtained a registration certificate on 1.1.96. The said application was duly recommended by the Executive Director, Udyog Bandhu vide Annexure 8. Thereafter the petitioner acquired land for the project as stated in para 16 of the petition and it was granted financial assistance of Rs. 950 lac vide Annexure 11. The petitioner established. Milk Dairy during 1996-97 with an investment of more than 14 crores. It is alleged. In para 18 of the petition that the petitioner was promised that it would be granted total trade tax holiday for a period of 15 years. In para 20 of the petition it is stated that the G.O. 21.2.97 was published granting trade tax exemption of 15 years to units investing over Rs. 50 crores but the said G.O. did not cover Agro Based Units investing over Rs. 10 crores. It is alleged that this omission was duly admitted by all the concerned government authorities and several representations were made for rectifying this policy. It is alleged in para 24 of the petition that a meeting under the Chairmanship of the Chief Minister Was held at Yojna Bhawan on 5.6.98 in which the petitioner was also invited. In this meeting a resolution was passed to extend the relief to Agro based units which invested over Rs.10 crores. It is alleged in para 25 that thereafter on 16.10.98 a review meeting was held under the Chairmanship of the Chief Secretary in which the Principal Secretary ,Tax and Registration was asked to submit status of compliance report in pursuance to the decision of the High Powered Committee meeting held on 5.6.98. It is alleged in para 27 of the petition that despite this meeting the Tax Department did not amend the notification dated 21.2.97. It is alleged in para 28 of the petition that the Executive Director, Udyog Bandhu through many letters has requested the Principal Secretary, Tax and Registration, U.P. to perform the ministerial act and amend the notification 21.2.97 for the promised extension of special incentive of Agro Based Policy to units investing over Rs. 10 crores vide Annexure 16. Several representations have been made in this connection but all in vain It is alleged in para 36 of the petition that Chief Minister again passed a categorical order for amending the notification dated 21.2.97 but in vain. In pan 38 of the petition it is alleged that another meeting of the Empowered Committee was held on 16.1.2002 under the Chief Secretary in which again a decision was taken for amending the notification 21.2.97.

4. A counter affidavit has been filed by the State Govt. and we have perused the same. In para 3-B it is stated that the exemption notification dated 21.2.97 was issued by the Governor exercising his power u/s 4A of the U.P.Trade Tax Act granting exemption to new industrial units having investment of Rs. 50 crores or more subject to the conditions relating to the grant of exemption. The petitioner has not made an investment of Rs. 50 crores but only about Rs.14 crores. Hence he is not entitled to the exemption. It is alleged that the matter has not been placed for decision before the Cabinet for grant of exemption. In fact there is no decision of the U.P. Cabinet for grant of exemption to Agro Based units having investment of Rs. 10 crores or more. Copy of the notification dated 21.2.97 is Annexure CA-1. It is alleged that this Court cannot issue an order directing exemption to be granted.

5. As regards the allegations regarding Section 38 of the U.P. Trade Tax Act it has been mentioned in para 3-E of the counter affidavit when an industrial unit may be allowed deferment of payment of tax. Section 38 applies where such industrial unit is declared a sick unit in accordance with the guide lines specified in this behalf by a body constituted by the Central Govt. or the State Govt. in connection with a rehabilitation scheme of the sick industrial unit and is approved for rehabilitation by an approved agency appointed by the Govt. It is alleged that although the petitioner filed an application u/s 16 of the Sick Industries (Special Provision) Act, 1985 before the BIFR but no rehabilitation scheme has been approved by the BIFR so far nor does. The petitioners came within the guidelines. Thus the petitioner cannot get the benefit of Section 38 In para 3-H of the counter affidavit it is stated that consideration by the Empowered Committee for exemption to a unit like that of petitioner does not amount to a decision of the State Govt. to grant exemption u/s 4-A. It is stated that no notification u/s 4-A has been issued by the State Govt. granting exemption to new industrial units having investment of Rs. 10 crores or more. There is no decision by the Cabinet granting such exemption. In para 18 of the counter affidavit the allegations in paragraphs 22 and 23 of the writ petition have been replied. It is stated that the agenda of the meeting dated 25.10.97 pertains to a meeting under the Chairmanship of the Principal Secretary Institutional Finance, U.P. The decision to grant trade tax exemption has to be taken by the Cabinet, but no decision was taken to grant exemption to Agro based units having investment of Rs. 10 crores or more. No notification u/s 4A has been issued in this connection. In para 20 and 23 of the counter affidavit it is stated that there was no promise to the petitioner that the govt. will be grant exemption to new units having investment of Rs. 10 crores or more in the same manner as exemption granted to new units having investment of Rs. 50 crores. In para 31 of the counter affidavit it is stated that Annexure 5 to the petition clearly shows that there was no promise for grant of exemption to units having investment of Rs. 10 crores or more. In para 33 it is stated that no promise was made for granting exemption to unithaving investment of Rs. 10 crores or more but it was

merely communicated that this matter shall be considered. However, the Cabinet has not taken any decision in this connection.

6. In para 40 it is stated that grant of exemption is a legislative function to be decided by the State Govt. u/s 4-A.

We have also perused the counter affidavit filed by the Bank of Baroda.

7. On the facts and circumstances we find no merit in this petition. This Court cannot issue a mandamus directing grant of exemption of Trade tax to any one. Grant of exemption is in the discretion of for the State Govt. to decide u/s 4-A of the U.R. Trade Tax Act or some other provisions of the said Act.

8. The Court has no competence to issue a direction contrary to law. vide Union of India and Another Vs. Kirloskar Pneumatic Company Limited, , State of U. P. and others Vs. Harish Chandra and others, , and Vice-Chancellor, University of Allahabad and Others Vs. Dr Anand Prakash Mishra and Others,

9. In State of Punjab and others Vs. Renuka Singla and others, the Supreme Court observed :

"We fail to appreciate as to how the High Court or this Court can be generous or liberal in issuing such directions which in substance amount to directing the authorities concerned to violate their own statutory Rules and Regulations."

10. Similarly , in Karnataka State Road Transport Corporation v. Ashrafulla Khan and Ors. J.T. 2002 (2) S.C.C. 560 (vide para 27) the Apex Court has held :

"The High Court under Article 226 of the Constitution is required to enforce Rule of law and not pass order or direction which is contrary to what has been injuncted by law"

11. It is also a settled legal proposition that the Court can neither legislate nor can it issue a direction to the State Government to enact a law or issue a direction in a particular manner. At the most, if the Court comes to the conclusion that a particular provision is ultra-vires or unconstitutional, it can simply strike down the same, or in a particular case, write down a particular law to meet a particular situation, but this case do not fall in that category.

12. In Union of India v. Deoki Nandan Aggarwal AIR 1992 S.C. 96 Supreme Court observed :

"It is not the duty of the Court either to enlarge the scope of legislation or the intention of the legislature when the nature of the provision is plain and unambiguous. The Court cannot re-write, re-cast or re-frame the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the Courts." In our opinion the same principle applies to executive functions also."

13. Thus the Court does not have the power to issue a direction to the legislature to enact a law in a particular manner, or to issue a direction to the government

to make some subordinate legislation or issue a circular.

14. In Mallikarjuna Rao and Others Vs. State of Andhra Pradesh and Others, the Supreme Court has held that a Writ Court, in exercise of its power under Article 226, has no power even indirectly to require the Executive to exercise its law-making power. The Court observed that it is neither legal nor proper for the High Court to issue a direction or advisory sermons to the Executive in respect of the sphere which is exclusively within the domain of the Executive under the Constitution. The power under Article 309 of the Constitution to frame Rules is a legislative power. This power under the Constitution has to be exercised by the President or the Governor of a State, as the case may be. The Courts cannot usurp the functions assigned to the Executive under the Constitution and cannot even indirectly require the Executive to exercise its law-making power in any manner. The Courts cannot assume to itself a supervisory role over the rule making power of the Executive under Article 309 of the Constitution.

15. While deciding the said case, the Supreme Court placed reliance on a large number of judgements, particularly Narinder Chand Hem Raj and Others Vs. Lt. Governor, Administrator, Union Territory, Himachal Pradesh and Others, , State of Himachal Pradesh Vs. A Parent of a Student of Medical College, Simla and Others, .

16. In Asif Hameed and others Vs. State of Jammu and Kashmir and Others, the Supreme Court observed (vide para. 17)

"Although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the State. The legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another"

17. In para 19 of the same judgement the Supreme Court also observed:

"The Constitution does not permit the Court to direct or advise to executive in matters of policy or to sermonize qua any matter, which under the Constitution lies within the sphere of the legislature or executive."

18. In State of Karnataka v. State of A.P. (2000) 9 SCC 5712 (vide para 160) the Supreme Court observed.

"It is settled law that such a direction cannot possibly be granted so as to compel an authority to exercise a power which has a substantial element of discretion. In any event the mandamus to exercise a power which is legislative in character cannot be issued."

19. In Pushpak Jyoti v. State of U.P., Writ Petition No. 52499 of 2002 decided on 11.12.2003 a division bench of this Court after considering a catena of decisions, has observed that the Court must maintain judicial restraint, and not encroach into the legislative or executive fields, or interfere with policy decisions.

20. In our opinion it is the discretion of the Government to grant exemption to certain classes, and the Court cannot extend the exemption to other classes. The Court cannot examine the wisdom, merit or efficacy of the policy of the legislature or executive. (vide Maharashtra State Board of Secondary and Higher Secondary Education and Another Vs. Paritosh Bhupeshkumar Sheth and Others, .

21. In V.K. Sood v. Secretary, Civil Aviation 1993 (67) F.L.R. 214 the Supreme Court observed :

"Thus it would be clear that, in exercise of the rule-making power, the President or authorised person is entitled to prescribe the method of recruitment, qualifications, both educational as well as technical, for appointment or conditions of service to an office or a post under the State. The Rules, thus, having been made in exercise of the powers under proviso (2) to Article 309 of the Constitution, being statutory, cannot be impeached on the ground that authorities have prescribed tailor-made qualifications to suit the stated individual....Suffice to state that it is settled law that no motives can be attributed to the legislature in making law. The Rules prescribe qualifications for eligibility and the suitability of the appellant would be tested by the Union Public Service Commission....Moreover, it is for the rule-making authority or for the legislature to regulate the method of recruitment, prescribe qualifications etc. It is not the province of the Court to trench into and prescribe qualifications in particular when matters are of technical nature."

22. In District Mining Officer and Others Vs. Tata Iron and Steel Co. and Another, the Supreme Court held that the function of the Court is only to expound the law and not to legislate.

23. Similarly in Supreme Court Employees'' Welfare Association and Others Vs. Union of India (UOI) and Another, the Supreme Court held that the Court cannot direct the legislature to enact a particular law for the reason that under the constitutional scheme the Parliament exercises sovereign power to enact law and no outside power or authority can issue a particular piece of legislation.

24. A similar view has been reiterated in State of Jammu and Kashmir v. A.R. Zakai and Ors. 1992 (64) F.L.R. 724 S.C. and A.K. Roy and Others Vs. Union of India (UOI) and Others, .

25. In Union of India (UOI) Vs. Prakash P. Hinduja and Another, , the Supreme Court held that if the Court issues a direction which amounts to legislation and is not complied with by the State, it cannot be held that the State has committed Contempt of Court for the reason that the order passed by the Court was without jurisdiction and it has no competence to issue a direction amounting to legislation.

26. Thus, in view of the above, the Court has a very limited role and in exercise of that, it is not open to it to extend the exemption granted by the State Govt.

Neither can the Court legislate nor has it any competence to issue directions to the legislature or the Govt. to enact a law or issue a notification in a particular manner. In view of the above, no such direction as prayed for by the petitioner can be issued.

27. Learned counsel for the petitioner has relied on the decision of the Supreme Court in State of Bihar v. Suprabhat Steel Ltd. 1999 UPTC 170. In that decision, the Supreme Court upheld the High Court judgment which struck down a notification issued u/s 7 of the Bihar Finance Act which was contrary to the industrial incentive policy.

28. In our opinion the aforesaid decision is distinguishable. A bare perusal of Section 4-A of the U.P. Trade Tax Act shows that exemption from trade tax can only be granted by the State Govt. by issuing a notification.

29. Section 4-A states:

"Notwithstanding anything contained in this Act, where the State Government is of the opinion that it is necessary so to do for increasing the production of any goods or for promoting the development of any industry in the State generally or any district or part of district in particular, it may on application or otherwise, In any particular case or generally by notification, declare that the turnover of sales in respect of such goods by the manufacturer thereof shall, during such period not exceeding fifteen years from such date on or after the date 6f starting production as may be specified by the State government in such notification, which may be the date of the notification or a date prior or subsequent to the date of such notification, and where no date is so specified from the date of first sale by such manufacturer if such sale takes place within six months from the date of starting production and in any other case from the date following the expiration of six months from the date of starting production, and subject to such conditions as may be specified be exempt from trade tax on sale of goods whether wholly or partly or be liable to tax at such reduced rates it may fix"

30. Thus the manner of granting exemption has been specified in Section 4-A of the Act and hence the exemption can only be granted in that manner and no other manner vide Prabha Shankar Dubey Vs. State of Madhya Pradesh, That manner is by issuing a notification u/s 4A

31. Secondly in the present case it has been clearly stated in the counter affidavit that no decision of the U.P. Cabinet has been taken granting exemption to those who had invested less than Rs. 50 crores.

32. It may be mentioned that the Industrial Policy 1996, copy of which is Annexure-5 to the petition, states:

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ksxksa esa iwath dh vko'';drk vU; m|ksxksa dh vis{kk de gksrh gS mi;qZDr fpfUgr {ks= ds m|ksxksa dh mu fof'k"V bdkb;ksa ftuesa #i;s 10 djksM+ ls vf/kd dk iwath fofu;kstu gS] dks fo'ks"k lqfo/kk,a vuqeU; fd;s tkus ij bEikoMZ desVh } kjk fopkj fd;k tk;sxkA

33. A bare perusal of the above statement in the Industrial Policy 1996 shows that no final decision has been taken to grant exemption from trade tax to those who had invested above Rs 10 crores All that has been stated is that the matter will be considered. In our opinion unless there is a notification issued u/s 4-A of the UP Trade Tax Act there is no grant of exemption.

34. In tax matters the Government has greater latitude to tax one category and not to tax other categories vide The Anant Mills Co. Ltd. Vs. State of Gujarat and Others, ; Malwa Bus Service (Private) Limited and Others Vs. State of Punjab and Others, ; Income Tax Officer v. N. T. R. Rymbai; AIR 1976 SC 670; Amalgamated Tea Estate v. State of Kerala 1975 U.P T.C. 89 etc. A taxing statute is not open to attack on ground that it taxes some persons or objects and not others, East India Tobacco Co. Vs. State of Andhra Pradesh, . The Stale has a wide discretion in selecting the objects or persons that it will tax, and in order to tax something it is not bound to tax everything, Orient Weaving Mills (P) Ltd. Vs. The Union of India (UOI), State of M.P. v. Bhopal Sugar Industries AIR 1974 SC 1179. It can pick and choose objects, areas, persons, rates of tax, etc V. Venugopala Ravi Varma Rajah Vs. Union of India and Another, Gopal Narain v. State of U.P. A.I.R 1964 SC 730 Khyerbari Tea Co. Ltd. and Another Vs. The State of Assam, ; T.G. Venkataraman, etc. Vs. State of Madras and Another,

35. It must be remembered that all legislation or policy decisions (such as the kind we are examining), particularly in fiscal matters, is essentially ad hoc and experimental. Since fiscal matters now a days are extremely complicated the Court should ordinarily defer to the opinion of the experts and give the state wide latitude in devising ways and means in imposing and collecting taxes.

36. As Justice. Frankfurter of the U.S. Supreme Court observed in American Federation of Labour v. American Sash and Door Co. (1949) 335 US 538 :

Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a Court debilitates popular democratic government. Most laws dealing with social and economic problems are matters of trial and error. That which before trial appears to be demonslrably bad may belie prophecy in actual operation. But even if a law is found wanting on trial, it is better that us defects should be demonstrated and removed the legislature than that the law should be aborted by judicial fiat. Such an assertion of judicial power defeats responsibility from those on whom in a democratic society it ultimately rests. Hence rather than exercise judicial review Courts should ordinarily allow legislatures to correct their own mistakes wherever possible."

37. Similarly in his dissenting judgment in New State Ice Co. v. Liebmann. 285 US 262 (1932) Mr. Justice Brandeis, the renowned Judge of the U.S. Supreme

Court, observed that the government must be left free to engage in social experiments. Progress in the social sciences, even as in the physical sciences, depends on "a process of trial and error" and Courts must not interfere with necessary experiments.

38. Justice Brandeis also observed:

"To slay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation." (see also ''The Legacy of Holmes and Brandeis'' by Samuel Konefsky).

39. In P.T.R. Exports (Madras) Pvt. Ltd. and others Vs. Union of India and others, the Supreme Court observed:

"The power to lay policy by executive decisions or by legislation includes power to withdraw the same unless it is malafide exercise of powers or decision or the action taken is in abuse of powers.---------The Court leaves the authority to decide its full range of choice within the executive or legislative power. In matters of economic policy it is a settled law that the court gives a large leeway to the executive and the legislature-------------Government would lake diverse factors far formulating the policy----------in the overall larger interest of the economy of the country....When the Government is satisfied that change in the policy was necessary in the public interest, it would be entitled to revise the policy and lay down new policy.

40. In Secretary of Agriculture v. Central Roig Refining Co. (1949) 338 US 604 : 94 L Ed. 381 392, Mr. Justice Frankfurter of the U.S. Supreme Court observed:

"Congress was confronted with the formulation of policy peculiarly within its wide swath of discretion. It would be a singular intrusion of the judiciary into the legislative process to extrapolate restrictions upon the formulation of such an economic policy from those deeply rooted notions of justice which the Due Process Clause expresses...."

In view of the above, there is no force in this petition. The writ petition is dismissed.

41. Before parting with this case we would like to mention that the Courts should exercise great self-restrant in interfering in economic policy matters as these are matters ordinarily to be dealt with by experts in government departments and in the statutory bodies.

42. In R.K. Garg and Others Vs. Union of India (UOI) and Others, a Constitution Bench of the Supreme Court observed:

"Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J. that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The Court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed that in Morey v. Doud where Frankfurter, J. said in his inimitable style:

''In the utilities, lax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events all these show that self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability."

43. In Prag Ice and Oil Mills and Another Vs. Union of India (UOI), the Supreme Court observed:

''We do not think that it is the function of the Court to sit in judgment over such matters of economic policy as must necessarily be left to the government of the day to decide. Many of them are matters of prediction of ultimate results on which even experts can seriously err and doubtlessly differ. Courts can certainly not be expected to decide them without even the aid of experts."

44. In M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others, the Supreme Court observed:

"Judicial review is not concerned with matters of economic policy. The Court does not substitute its judgment for that of the legislature or its agents as to matters within the province of either. The Court does not supplant the feel of experts by its own views"

It must be remembered that certain matters are by their nature such as best be left to experts in the field. This Court does not have the technical and administrative expertise in this respect.

45. In the words of Chief Justice Neely :

"I have very few illusions about my own limitations as a Judge. I am not an accountant, electrical engineer, financer, banker, stockbroker or system management analyst. It is the height of folly to expect Judges intelligently to review a 5000 page record addressing the intricacies of a public utility operation. It is not the function of a Judge to act as a super board, or with the zeal of a pedantic school master substituting its judgment for that of the administrator."

46. In our opinion there should be judicial restraint in fiscal and economic regulatory measures. The State should not be hampered by the Court in such measures unless they are clearly illegal or unconstitutional. All administrative decisions in the economic and social spheres are essentially ad hoc and experimental. Since economic matters are extremely. complicated, this inevitably entails special treatment for distinct social phenomena. The State must therefore be left with wide latitude in. devising ways and means of imposing fiscal regulatory measures, and the Court should not, unless compelled by the statute or by the Constitution, encroach into this field.

