
(1999) 10 GUJ CK 0016

In the Gujarat High Court

Case No : Special Civil Application No. 209 of 1999

Saurashtra Cement Ltd.

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 07-10-1999

Acts Referred:

Citation : (1999) 10 GUJ CK 0016

Hon'ble Judges : P.B. Majmudar, J;B.C. Patel, J

Bench : Division Bench

Advocate : P. Chidambaram and S.B. Vakil for B.H. Chhatrapati, for the Appellant; S.N. Shelath, Addl.A.G. for Respondent No. 1 and 2 and M.G. Doshit and Co., for the Respondent

Final Decision : Dismissed

Judgement

B.C. Patel.J

1. The Saurashtra Cement Limited, a company incorporated under the Indian companies Act has preferred this petition inter alia requesting for issuance of directions requiring the respondents no 1 to 3 to ensure that the petitioner is afforded a treatment similar to that is given to Digvijay Cement Company Limited ("Digvijay" for short) and to direct the respondent no. 1 to 3 to give similar benefits given to Digvijay by which better concession is given to it in the matter of payment of interest while entering into an agreement by the said company with the Government.

2. The facts leading to the present petition are as under:

The petitioner company and Digvijay were operating in the same area. Both the companies adopted new technology. The State Government published a scheme known as Incentive Scheme. It appears that with a view to avail of the benefit of the Incentive Scheme offered by the Government of Gujarat, Digvijay decided to expand its unit. This new unit has been located on a separate piece of land though adjacent to the old unit. An application was made to the State

Government for granting eligibility for incentive Scheme in respect of expansion and for granting recognition to the new process plant as a Pioneer Unit. The application for recognition of its new unit as a Pioneer Unit was not granted. It seems that repeated requests were made. However, the application was rejected on the ground that Digvijay's new unit was only an expansion and therefore, not eligible for registration as a Pioneer Unit. So far as the petitioner company is concerned, it had 3 plants for manufacturing cement prior to 1980. It seems that the petitioner decided to establish the new unit in view of the benefits declared by the Government by its Resolution dated 27.8.1980. On 5.11.1982, the petitioner company applied to the Government for sales tax benefit and grant of Pioneer Status. It transpires that the Government of Gujarat issued a certificate effective from the date of commissioning/date of diversification or expansion from 31.12.1982. It seems that under that certificate benefit of sales tax deferment was made available from 31.12.1982 to 31.12.1987. The company commenced its production in April 1985. In view of the new plant being operative, it discontinued manufacturing operation at the old plant. It seems that on 29.10.1987 the company submitted a detailed application for its new unit to the Industries Commissioner for grant of Pioneer Status. However, by letter dated 6.4.1988 said application was rejected on the ground that the petitioner company is an old unit in existence prior to 1.6.1980 and is located within 8 kms. from National High Way and that can be considered as a case of modernisation of the existing unit. It appears that since the petitioner company was not given the benefit of Pioneer Status, it had filed a writ petition in the High Court being SCA No. 398 of 1991. Similarly Digvijay also filed SCA before this High Court being SCA No. 4309 of 1990 on the same grounds as the said company was also denied Pioneer Status. Both the SCAs were heard together and by a common judgment dated 23.11.1992, the respondents were directed to reconsider the case of the petitioner as per the observations made in the judgment. However, it is interesting to note that after the matters were heard, the judgment was kept reserved and in the intervening period, the petitioner company entered into an agreement with the State Government by which the Government agreed to give certain benefit of installments in the payment of sales-tax and as per the agreement arrived at between the petitioner and the Government, the petitioner was, to withdraw the said SCA from the High Court. About entering into the said agreement there was mention in various correspondence between the petitioner and respondent-Government. However, said fact was not brought to the notice of the Court presumably because the hearing was already over and the matters were kept for judgment. We are of the opinion that it was the duty of the petitioner to point out the said fact to the Court (regarding aforesaid agreement arrived at between the petitioner and respondent State Government.)

3. The Division Bench thereafter disposed of both the SCAs and our attention was drawn by the learned counsel for the petitioner to the observations made by the Division Bench of this Court on page 18 of its judgment. On page 18 of the judgment, the Division Bench of this Court has observed as under:

" As stated above, the 1980 Scheme was introduced with a view to accelerate development of industries and strengthen the trend of the industries going to developing areas. The Cash Subsidy Scheme linked with Fixed Capital Investment was retained as it was, but the schemes of Sales Tax Exemption and interest free sales tax loan were found to be not sufficiently attractive and, therefore, they were replaced by the new Scheme of Sales Tax Exemption and Sales Tax Deferment. The exemption incentive was made available to all units-SSI, medium and large-except that this benefit was not to be available in respect of purchase of machinery and equipment. The exemption was also extended to sale of goods manufactured by such units to the extent specified in the scheme. It appears that as the benefit of exemption from sales tax was made available to all such types of new industrial units, the old incentive of interest free loan to a new, medium and large scale unit was discontinued. By way of an alternative to the Sales Tax Exemption, the 1980 Scheme permitted the new units to opt for the scheme of Sales Tax Deferment. In substance, such units were permitted to recover sales tax and retain the same with them for certain number of years. No interest was to be charged on amounts so deferred. All these benefits were made available to new industrial units going to backward areas. It is in this context that we shall have to interpret and construe paragraph 7 of the 1980 Scheme."

The Division Bench has further observed in pages 41 and 42 as under

"Digvijay Cement Co. was refused pioneer status on the grounds that :(i) its new unit could not be considered as a new industrial unit; ,(ii) the project was by way of expansion, and (iii) the unit was situated within 8 kms from its existing unit. Saurashtra Cement Co. was denied that status on the grounds that: (i) its unit was an old unit since it has been existing before 1.6.80; (ii) it had installed new machinery in its existing unit and, therefore, it was a case of modernisation, and (iii) its unit was situated within 8 kms. from the National High Way. Thus, both the petitioners were denied the pioneer status on the ground that what they did was either expansion or modernisation and not setting up a new large industrial unit. In view of the correct interpretation of paragraph 7, as held by us, it will have to be held that the respondents were not right in treating the new industrial units set up by the petitioners as expansion or modernisation of their old units. They were wrong in interpreting paragraph 7 of the 1980 Resolution and also applying the two impugned circulars to the petitioners. As the petitioners were thus denied pioneer status on such wrong interpretation of the 1980 Resolution and the two impugned circulars, proper course to adopt would be to direct the respondents to reconsider the case of the petitioners in light of the interpretation of paragraph 7 of the 1980 Resolution and the observations made in this judgment.

At pages 43 to 46 of the judgment, the Division Bench further observed as under:

"Before we direct the respondents as to which facts and circumstances they should bear in mind while reconsidering the case of Saurashtra Cement Co. one more ground, on which the pioneer status was denied to it, is required to be

dealt with. It was denied that status also on the ground that its unit is situated within 8 kms from the National High Way. It is an admitted position that no such conditions was laid down by the 1980 Resolution. While announcing further liberalisation of the incentives for pioneer units, the Government by its Resolution dated 13th March 1981, imposed a condition that the additional benefits declared by that Resolution would be available to the pioneer units which are located outside the corridor of 24-24 KM on both sides of the National Highway from the border of Maharashtra and Gujarat upto Ahmedabad and corridor of 8-8 KM on both sides of other National Highway passing through the State. What was done by the Government by this Resolution was to do away with the earlier limitation that special incentives were to be available to pioneer units going to backward districts and under-developed talukas. By this Resolution, liberalised incentives were made available to all pioneer units, even if they were set up in other areas also, except within the banned distance of six metropolitan cities. Another change that was made by this Resolution was that the ceiling of 10 percent or Rs. 10 lacs. whichever was less, was removed and the sales tax incentives were to be given on the amount upto 90 percent of the investment in gross fixed assets. But the pioneer units which were located within the corridor prescribed by it were to get the incentives as per the Resolution of 1980. It is now an admitted position that the unit set up by Saurashtra Cement Co. is within a distance of 8 kms from National Highway No.8-B, which originates at Porbandar and ends at Bamnbor, where it joins National Highway No.8-A. Though laying down on such a condition is challenged on the ground that it is discriminatory and arbitrary, it is not necessary to consider the said challenge as we are of the opinion that in the context of the sales tax incentive scheme and the object with which further liberalisation was made by the Resolution dated 13.3.81, the representation, which can be said to have been made to the entrepreneurs, was that the limitation of the corridor was to apply to the corridor attaching to the other portion of National Highway No.8 passing through the State. This Resolution was meant for the entrepreneurs setting up new industries within the State. It is a Resolution of the Government and not a piece of legislation. The object of the scheme and also the resolution dated 13.3.81 was to grant more incentives to pioneer units going to under-developed areas. In view of all these factors, the March 1981 Resolution will have to be interpreted reasonably and liberally. Even if we accept as true as contended by the learned Advocate General that the words "National Highway" would include not only National Highway No.8 but also National Highways nos 8-A and 8-B and that the expression "other National Highway" would mean other portion of the National Highway, what we have to consider is what an entrepreneur would have understood on reading the said Resolution. After the words "corridor of 24-24 KM on both sides of the National Highway from the border of Maharashtra and Gujarat upto Ahmedabad" the words which follow are, and corridor of 8-8 KM on both sides of other National Highway passing through the State" The Highway, which is referred to is the Highway, which comes from Maharashtra into Gujarat. Upto Ahmedabad, the corridor was to consist 24-24 KM on either side and thereafter it was to consist

8-8 KM on either side. Moreover the words, "passing through the State" also would create an impression that the National Highway, which was referred to was National Highway No.8. An entrepreneur would have understood the said Resolution only in this manner, particularly because it was well known then that industrial development was between the border of Gujarat and Ahmedabad. Beyond Ahmedabad, the industrial development was quite meagre. Even though the construction which is suggested by the learned Advocate General, appears to be the one which the Government could have had in mind and that becomes more clear from the fact that subsequently the Government removed this limitation also, what we have to consider is: How it was likely to be understood by the entrepreneurs ? It is no doubt true that Saurashtra Cement Company had started taking steps to establish their new industry at Ranavav which is within 8 kms from National Highway No.8-B, prior to the issuance of this Resolution i.e. before 13.3.81. But we cannot construe this Resolution in a different manner in respect of those entrepreneurs who had taken steps to establish new industries before 13.3.81 and those who had acted upon the representation made in the Government Resolutions dated 27.8.80 and 13.3.81. As stated in the petition, this condition of setting up a new industry beyond the corridor was waived in some case. That is the reason why imposition of this condition is also challenged by the company as discriminatory in addition to its challenge that it is also arbitrary. Therefore, while reconsidering the case of Saurashtra Cement Co., the respondents will have to bear those aspects also in mind. Further, the respondents will also have to consider that an entirely a new plant using different technology was set up on adjoining land; that the process of establishing new unit was initiated in the year 1980; that though it had initially planned to go for expansion or modernisation, it had decided to establish a new industrial unit, in view of the Resolution dated 27.8.80; that the new unit was not at all connected with the old unit; that the new unit was complete by itself and had its own independent identity; that it had spent a huge amount of Rs. 60 crores for setting up this new plant; that its new unit has been considered as a new unit for the purpose of exemption from electricity duty; it is treated as a separate factory and separate factory licence has been issued by the Government, and it was also given relaxation from the cement levy obligation on the basis that it was a new cement unit."

4. Learned counsel submitted that despite the clear observations, the application which was submitted for seeking the benefit in view of the order passed by the Division Bench came to be rejected.

5. Learned counsel appearing for the unit submitted that though Digvijay was on the same footing, the State has given more benefits in their favour subsequently after entering into the consent terms with the Digvijay. At a subsequent stage Digvijay had filed a petition in the High Court to which we will refer later on. Therefore, according to the petitioner, they also should be given additional benefits especially in the matter of fixation of rate of interest on par with the benefit given to Digvijay.

{[After about an hour, when we are in the process of dictating the judgment learned advocate Mr. Chhatrapati states that he is not seeking for adjournment but he is seeking for some indulgence as another counsel is also appearing in this matter and he is arguing a matter before some other court, and the moment he is free, he will come before this court for making his submissions. Thus court should abstain from further dictation till counsel comes.]}

It is required to be noted that this matter was adjourned at the request of the petitioner as learned counsel Mr. P. Chidambaram was to appear in this matter on behalf of the petitioner. Thus we accommodated and accordingly the matter was adjourned on the date which was convenient. We heard the matter on the adjourned date, though it was not possible for the Addl. Advocate General to appear in the matter. After the arguments of Mr. Chidambaram, learned counsel submitted before the Court that either Mr. S.B. Vakil or his Junior Mr. Chhatrapati will appear in the matter and will remain present before the court if anything in reply is to be submitted. We heard the learned Addl. Advocate General yesterday and when we were about to dictate the judgment, Mr. Chhatrapati submitted that the matter may be adjourned. At his request we postponed the dictation to give one more opportunity. However, today Mr. Chhatrapati never bothered to mention even at 11.00 a.m. or after the admission board was over. In view of this, there was no alternative but to proceed with the judgment. It was the duty of the learned advocate Mr. Chhatrapati to remain present if he wanted to submit in reply. At the fag end of his submission he submitted that he would make some submissions. We have permitted him to make submissions despite the fact that we were in the process of dictating the judgment.

After hearing him, we have proceeded further with the dictation of the judgment.]]}

6. Learned counsel appearing for the petitioner drew our attention to the Annexure-F, the consent terms entered into between the Digvijay and the State Government. He specifically invited our attention to clause 6 of the agreement and submitted that so far as Digvijay is concerned, the interest at the rate of 9 percent has been levied for the period commencing from 1.4.1998 and it is to be calculated on the outstanding amount of tax payable and installments are granted as per this consent terms. No other interest or penalty in respect of this amount of Rs. 49,40,38,106/- is levied or imposed by the Sales Tax Department. Our attention was drawn to clause 7 by which Digvijay was required to make down payment of Rs. 15 crores on or before 15.11.1998. He also drew our attention to the interest clause so far as the interest is concerned. Digvijay is permitted to make payment from 31.3.1999 to 30.9.2003. Thus the installments included the amount of tax and interest. According to the learned counsel for the petitioner, the State Government gave better and special treatment to Digvijay as compared to the petitioner by entering into the consent terms in the nature of an agreement between Digvijay and State Government. It is required to be noted

that the learned counsel has fairly conceded that the compromise entered into by the State Government with the Digvijay is not challenged. The learned counsel fairly conceded that he can only request to grant some benefit so far as the interest is concerned. Learned counsel drew our attention to the decision of the Apex Court in the case of D.S. Nakara and Others Vs. Union of India (UOI), Learned counsel invited our attention to para 15 of the judgment of the Apex Court which reads as under:

"Thus the fundamental principle is that Article 14 forbids class legislation but permits reasonable classification for the purpose of legislation which classification must satisfy the twin tests of classification being founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and that differentia must have a rational nexus to the object sought to be achieved by the statute in question."

Learned counsel drew out attention to the latter part of para 32 of the said judgment which reads as under:

"...Proceeding further, this Court observed that where all relevant considerations are the same, persons holding identical posts may not be treated differently in the matter of their pay merely because they belong to different departments. If that can't be done when they are in service, can that be done during their retirement ? Expanding this principle, one can confidently say that if pensioners form a class, their computation cannot be by different formula affording unequal treatment solely on the ground that some retired earlier and some retired later....."

7. Learned counsel further submitted that considering the earlier judgment of the Division Bench and the facts and circumstances of the case, both the companies were similarly situated and the companies could not have been treated differently merely because the settlement is arrived at on different dates (irrespective of length of time). Learned counsel further submitted that in view of the earlier judgment of the Division Bench of this Court, Digvijay's subsequent application was rejected and thereafter Digvijay preferred a petition being SCA No. 3046 of 1993 in which ultimately Government entered into the consent terms, the reference of which is already made earlier and the grievance of the petitioner is to the effect that whatever benefit is given to the Digvijay is not given to the petitioner company. He further submitted that against the earlier judgment of the Division Bench, State of Gujarat preferred SLP before the Apex Court challenging the decision. Learned counsel submitted that though the State was aggrieved by the decision of the earlier Division Bench, later on the State entered into an agreement with Digvijay, the terms of which were more beneficial to Digvijay and thus the State has treated two units though similarly situated in different manner. We have indicated hereinabove that according to the petitioner considering the installments and the rate of interest, in comparison to rate of interest charged from the petitioner and the installments and the down payment demanded from the Digvijay, the benefit granted to the Digvijay is

nothing but a more favourable treatment given to Digvijay as compared to the petitioner unit though similarly situated.

8. It is submitted by the learned counsel for the petitioner that simply because the petitioner company has entered into an agreement with the State Government earlier in point of time, still it cannot be said that the petitioner company has waived its fundamental right as there cannot be a waiver of breach of fundamental right. He relied upon the decision of the Apex Court in the case reported in *Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another*, Learned counsel submitted that merely because the company has entered into an agreement, the rights which are guaranteed under the Constitution cannot be said to have been waived by the petitioner company. According to the learned counsel the State has acted arbitrarily in so far as the petitioner unit is concerned more particularly when the both companies were similarly situated.

9. Mr. Shelat, learned Additional Advocate General appearing for the State submitted that in the instant case, the Court should not exercise the powers under Article 226 of the Constitution of India for issuing a writ so as to modify an agreement. Learned Addl. Advocate General further submitted that the petitioner company voluntarily entered into a contract by way of correspondence. That was done with a view to get a better relief at the relevant point of time. Merely because later point in time, if the State has entered into an agreement with Digvijay, according to the learned Addl. Advocate General for the State, the provisions contained under Article 226 of the Constitution cannot be invoked so as to alter or amend the contract executed by the petitioner. It is also required to be borne in mind as stated by the learned Addl. Advocate General for the State that so far as the petitioner company is concerned, the agreement was executed in the year 1992; while with the Digvijay the State entered into an agreement on 11.11.1998. It is an admitted position that the petitioner, after entering into an agreement has already availed of the benefits starting from 1992 onwards in the matter of getting benefit of payment by way of installments etc. At that point of time the petitioner company made a grievance that additional benefits in the matter of fixing rate of interest should be given to it. Learned Addl. Advocate General further submitted that as there was a stay operating against the State and in favour of Digvijay, the State was not in a position to recover the amount and considering the facts and circumstances, particularly delay, the State entered into an agreement with Digvijay later on.

10. So far as the petitioner company is concerned learned Addl. Advocate General for the State invited our attention to Annexure-A, a letter which was issued by the petitioner company on 15.9.1992 clearly indicating that the discussion took place in order to resolve the pending controversies and to avoid litigation pending in the High Court. The company was also aware that there may be further litigation and therefore, the petitioner company made a proposal to the Honourable Minister for Industries to pay the amount of sales-tax. It appears

that the Finance Department of Government of Gujarat on 30.9. 1992 addressed a letter at Annexure.B to the petitioner company. The company was requested to make down payment of Rs. 9 crores in two equal installments and according to the terms, the amount has been paid on 1.10.92 and 1.11.92. So far as the balance of arrears of the sales tax amount was concerned in para 4 of the letter it was pointed out that by 10 installments the amount has to be paid. In para 5, it is also indicated that the interest at the rate of 12 percent per annum shall have to be paid. It appears that the petitioner as well as the State both acted upon these terms and conditions. The petitioner company on 2.1.1993 vide Annexure-C again submitted an application for Pioneer Status. In the said letter itself the company indicated that they have started acting as per the terms and conditions of the letter dated 29.9.1992. However, in view of the decision of this court rendered earlier, said application was made. In the last para of the said application it is stated as under:

"We hope in case better benefits to Digvijay Cement Co. are given in the form of Sales-tax or they are granted Pioneer Status, our case will be re-examined sympathetically"

It is required to be noted that it was not a condition precedent for acceptance of the terms and conditions. On the same date viz. 2.1.1993 the company addressed a letter to the Chairman, State Level Committee for Pioneer Status inter alia stating as under:

" We have to inform you that the matter of grant of Sales-tax benefit to us is covered by the Government letter dated 29th September 1992. The terms and conditions of which are acceptable to us and we are implementing it in letter and spirit."

By a letter dated 9.3.1993 vide Annexure-E the State Government indicated that in view of MOU signed by the petitioner company the terms and conditions as mentioned in the letter dated 29.9.1992 were acceptable to the petitioner company and the company has assured to implement the conditions fully, earlier decision is not required to be reconsidered. The company has accepted the decision of not granting Pioneer Status or of not granting benefits for sales tax any further than already granted. The company has not challenged the decision of the State Government conveyed to the petitioner by letter dated 9.3.1993. Thus the company acquiesced in the matter and acted as per the terms and conditions as agreed. It seems that after a period of about 5 years during the pendency of the litigation the State Government entered into an agreement with Digvijay and therefore, the petitioner company, all of a sudden made a grievance that it should have been given same benefit though it did not challenge the decision rendered by the State Government much earlier.

11. Learned Addl. Advocate General further submitted that in the case, when the State has entered into a contract with a party then it is not open to compare the agreements executed between the Government and other parties. It is required

to be noted that though the matter was heard by the Division Bench, but before the decision was rendered, the petitioner company entered into an agreement without waiting for a final decision . The petitioner company as a matter of fact assured to withdraw the petition. It is on that assurance , the State has acted. So far as Digvijay is concerned, Digvijay approached the Government and its application was rejected for claiming Pioneer Status and therefore, a petition was filed in this court being Spl. C.A. No. 3046 of 1993. During the pendency of the petition and when the stay was operative against the State Government the Digvijay entered into an agreement. Learned Addl.Advocate General submitted that in view of this peculiar facts, both agreements cannot be compared. At the cost of repetition it is required to be stated that the agreement is not challenged and therefore, the act of the State in entering into an agreement with Digvijay is even accepted by the petitioner company. It is also submitted that by issuance of writ, this court now cannot alter the terms of the agreement which was voluntarily arrived by the petitioner with the respondent Government.

12. Learned Addl.Advocate General further submitted that where there are contractual obligations, writ petition is not the appropriate remedy . For impeaching validity of contractual obligations, the party cannot approach the High Court subsequently under Article 226 of the Constitution for a writ to avoid the enforcement of contract or its obligations under the terms of contract. When parties have entered into an agreement, binding agreement came into existence between the parties. In the instant case considering the correspondence, learned Addl.Advocate General submitted that it is not necessary that there must be an agreement signed by both the parties. He placed reliance on a decision of the Apex Court in the case of Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, . In this case, the Apex Court has approved the observations as stated in Cheshire & Fifoot's Law of Contract(8th Edn. 1972 p 24). In para 21 of the judgment the Apex Court has observed as under:

"...In order to determine whether, in any given case, it is reasonable to infer the existence of an agreement, it has long been usual to employ the language of offer and acceptance. In other words, the court examines all the circumstances to see if one party may be assumed to have made a firm "offer" and if the other may likewise be taken to have "accepted" that offer. These complementary ideas present a convenient method of analysing a situation, provided that they are not applied too literally and that facts are not sacrificed to phrases"

Learned Addl.Advocate General submitted that in the instant case there was exchange of correspondence, there was Memorandum of Understanding and parties have acted as per the terms set out therein. Thus in view of the concluded contract which came into existence between the parties, the petitioner has to act according to the terms of the contract. Learned Addl. Advocate General has contended that in the facts and circumstances of the case, the petitioner wants nothing but an avoidance of the obligations voluntarily incurred.

13. Learned Addl.Advocate General further submitted that when the liabilities are

arising out of mutually agreed conditions, there is no question of invoking writ jurisdiction. He drew our attention to a decision of the Apex Court in the case of State of Punjab v. Balbir Singh & ors. reported in AIR 1977 SC 1717 wherein the Apex Court has considered the case of Har Shanker (Supra) and the Apex Court held as under:

"....where this Court held , inter alia that considerations governing cancellation of licence under S. 36 of the Punjab Excise Act 1914 are not relevant in considering the question whether the demand was lawful under the terms which became binding on both sides as a result of mutual obligations carried out by following the conditions on which the liquor vends were auctioned is the enforcement of the liabilities arising out of mutually agreed conditions of auction which were sought to be enforced by the demand notice....."

The Apex Court, has in the case of Rajendra Singh v.. State of Madhya Pradesh & ors. reported in JT 1996(7) SC 216 reiterated the view expressed by the Constitution Bench in the case of Har Shanker (Supra) and held as under:

" ..writ jurisdiction of the High Court under Article 226 of the Constitution is not intended to facilitate avoidance of obligations voluntarily incurred"

The Apex Court , has dealt with the doctrine of fairness and reasonableness in the case of Assisitant Excise Commissioner & ors. v. Issac Peter & Ors. reported in JT 1994(2) SC 140 It was contended before the Apex Court that in short, the duty to act fairly is to be imported into the contract to modify and alter its terms and to create an obligation upon the State which is not there in the contract. In answer to this the Apex Court held as under:

"....We must confess, we are not aware of any such doctrine of fairness or reasonableness. Nor could the learned counsel bring to our notice any decision laying down such a proposition. Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the Rule of Law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties..."

The Apex Court in the case of Radhakrishna Agarwal and Others Vs. State of Bihar and Others, pointed out the Act of State incurring constitutional obligations and has distinguished when a State act is no longer governed by the constitutional provisions. In para 10 of the judgment the Apex Court held as under:

" It is thus clear that the Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another, involved discrimination at the very threshold or at the time of entry into the field of consideration of persons with whom the Government could contract at all. At this stage, no doubt the State Act purely in its executive

capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise of its constitutional powers. But after the State or its agents have entered into the field of ordinary contract the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Art. 14 or of any other constitutional provision when the State or its agents purporting to act within this field perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract."

14. In the instant case, considering the aforesaid decisions it is very clear that when there is a binding contract between the two parties, the parties are bound to act in accordance with the contract. It is not open for the court exercising extra ordinary powers under Article 226 of the Constitution to amend, or vary the contract or to call upon the State to give additional benefit outside the contract executed between the petitioner and the State. So far as the decision cited by the learned counsel for the petitioner in the case of D.S.Nakara (Supra) it is required to be noted that it was a case of prescribing an arbitrary date by the Government by which certain persons were given additional benefits. In the case of D.S. Nakara(Supra) there was a question of classification in the revised pension formula between pensioners on the basis of date of retirement specified in the memoranda. The court considered expanding horizons of socio economic justice, the Socialist Republic and Welfare State which the country endeavors to set up. The court pointed out that the fact that the old men who retired when emoluments were comparatively low are exposed to vagaries of continuously rising prices, the falling value of the rupee consequent upon inflationary inputs, by introducing an arbitrary eligibility criteria "being in service and retiring subsequent to the specified date" for being eligible for the liberalised pension scheme and thereby dividing a homogeneous class, the classification being not based on any discernible rational principle and being wholly unrelated to the objects sought to be achieved by grant of liberalised pension and the eligibility criteria devised being thoroughly arbitrary, the eligibility for liberalised pension scheme of "being in service on the specified date and retiring subsequent to that date" in the memoranda, violates Art. 14 and is unconstitutional and the court struck down the same. The Court was not called upon to consider any contractual obligations. In our opinion this decision is of no assistance to the petitioner.

15. It can never be said that in the instant case there was any question of prescribing arbitrarily date or dead line by the Government between two sets of citizens. As a matter of fact, in the instant case, the petitioner having voluntarily entered into an agreement with the Government and having accepted the benefit upto 1998, now it cannot make a grievance that some better concession has been offered to another company by Government at the later point of time and that too after a considerable period. We feel that the subject matter of this

petition therefore, purely governs the contractual field and the petitioner has voluntarily entered into a contract. Therefore, now it cannot ask the Government to give it some more additional benefits simply on the ground that after few years, in case of another company Government has entered into a contract giving some better concession in the said contract with Digvijay. In the facts and circumstances it cannot be said that there was any arbitrary action on the part of the State in giving more concession in case of another company viz. Digvijay. Thus, in short the matter rest in contractual field between the parties and principles of violation of fundamental rights cannot be pressed into service.

16. Mr. Chhatrapati learned advocate appearing for the petitioner at the fag end submitted that there is no question of contract in the present case. He submitted that the Sales-tax Act does not provide for any contract. According to him, it is merely a question of considering remission provided in section 55 of Gujarat Sales Tax Act. He further submitted that while considering section 55 of the Gujarat Sales-tax Act the State has given different treatment to both Digvijay and the petitioner and according to him, therefore, the benefit subsequently extended to Digvijay ought to have been extended to the petitioner. He submitted that in the case of Choksi Tube Company Ltd. v. Union of India & ors. reported in (1997) II SCC 179 the Apex Court quashed the Notification. It is required to be noted that subsequently a special Notification was issued in favour of the importer exempting from duty. Government despite Supreme Court's direction, failed to file a counter affidavit to show the existence of any public interest or exceptional circumstances that prompted the Government to issue the subsequent Notification. The court expressed its views that under such circumstances, it must be assumed that neither public interest nor exceptional circumstances existed. The Notification was cancelled under these circumstances. It is required to be noted that the Notification in the earlier case was in close proximate of time while in the instant case despite the order, rejecting the prayer made to the State Government, the petitioner did not thought it fit to challenge the same for more than five years and it took the benefit of the agreement. Thus even on the ground of delay and laches, this petition is required to be rejected. In the result, the petition stands rejected. Rule is discharged with costs which it quantified at Rs. 5000/-.