(2000) 02 PAT CK 0133

In the Patna High Court

Case No : C.W.J.C. No. 3828 of 1999 z (R)

Sharda Cement Company APPELLANT

Vs

The State of Bihar and Others RESPONDENT

Date of Decision : 25-02-2000

Acts Referred:

Bihar Finance Act, 1981 — Section 13, 14, 3, 4, 7
Central Sales Tax Act, 1956 — Section 15
Employees State Insurance (Central) Rules, 1950 — Rule 17
Employees State Insurance Act, 1948 — Section 68, 75(2), 96(1)

Citation : (2000) 2 PLJR 447

Hon'ble Judges : S.N. Jha, J;P.K. Sinha, J

Bench : Division Bench

Advocate : Biren Poddar and Anubha Rawat, for the Appellant; Ritu Kumar, for the Respondent

Final Decision : Dismissed

Judgement

S.N. Jha, J.—The dispute in this writ petition relates to exemption from payment of sales tax on purchase of raw materials and sale of finished goods in terms of the 1995 Industrial Policy of the Government of Bihar. The relevant provisions relating to sales tax incentives are contained in Clause 16 of the Policy. Clause 16.1 lays down that new industrial units will be allowed the facility of either "Set-off" or "exemption" at their choice on purchase of raw materials for a period of ten years for category ''A'' and eight years for category ''B'' districts from the date of commencement of production of the unit. Likewise, Clause 16.2 lays down that new units, in addition to the benefits of the exemption/set-off of sales tax on purchase will also have the option to choose deferment or exemption of sales tax (both Bihar Sales Tax and Central Sales Tax) on sale of finished goods for a period of ten years and eight years depending on the category of the district, from the date of commencement of the production. It may be mentioned here that the 1995 Policy is to remain in force for five years from 1.9.95. It is not necessary to notice other parts of the Policy for the purpose of this case.

2. In order to give effect to the aforesaid exemption scheme, as required u/s 7(3) of the Bihar Finance Act, 1981, on 22.9.95 the Government of Bihar issued notifications vide SO 478 and SO 479. While the former deals with the exemption from sales tax on purchase of raw materials, the latter relates to exemption on sale of finished goods.

3. The Petitioner claims to have set up a Portland Slag Cement Manufacturing unit at village Rauta in Hazaribagh district in terms of the provisions of 1995 Industrial Policy. On 31.1.97 it applied for grant of registration u/s 14 of the Bihar Finance Act and Central Sales Tax Act, 1956 before the competent authority of the Commercial Taxes Department. On 3.2.97, the registration certificates were granted under both the Acts vide Certificate Nos. HZ 4254 and HZ 3700(C) effective from 16.1.97 and 5.2.97 respectively. The Petitioner was also granted certificate u/s 13 of the Bihar Finance Act allowing purchase of materials mentioned in the certificate at concessional rates of tax. The said certificate bears No. HZ 200/13(1)(b) and (c)/98-99. The Petitioner was also registered as an S.S.I, unit by the Industries Department on 15.3.97 vide registration No. 03060597 showing the date of production as 16.1.97.

4. On 20.2.98 the Petitioner applied for exemption certificate in terms of Clause 16.1 and 16.2 of the Industrial Policy read with SOs 478 and 479 dated 22.12.95. By letter Nos. 630 and 631 dated 28.6.99 it was asked to show cause why its application be not rejected on the ground of delay under Clauses 16 and 17 of SOs 478 and 479. On 24.7.99 the Petitioner submitted reply. On 26.8.99 by memo Nos. 1557 and 1558 dated 26.8.99 the Petitioner was informed that the applications for grant of exemption had been rejected on 24.7.99. The said orders dated 24.7.99 passed by the Deputy Commissioner of Commercial Taxes, Hazaribagh, were later approved by the Joint Commissioner of Commercial Taxes (Administration) Hazaribagh, on 27.9.99.

5. The Petitioner, in the circumstances, has approached this Court for quashing of the said orders dated 24.7.99 and 27.9.99 marked Annexures 8 and 8/1 to the writ petition, as well as for direction upon the Respondents to immediately grant exemption certificate in terms of SOs 478 and 479 dated 22.12.95 with effect from the date of commencement of production i.e. 16.1.97. The Petitioner further seeks a declaration that Clause 16 of the notification SO 478 and Clause 17 of the other notification SO 479 dated 22.12.95 are ultra virus the Industrial Policy. According to the Petitioner, the clauses impose additional restriction/ condition over and above the restrictions and conditions mentioned in the Industrial Policy in terms of which the Petitioners are otherwise entitled to grant of exemption from payment of sales tax on purchase of raw materials and sale of finished goods.

6. At this stage it would be apt to notice the relevant provisions of the two notifications, SO 478 and SO 479. SO 478 provides for exemption from sales tax payable on purchase of raw materials required in the production of goods, to new industrial units which have commenced production between 1.9.95 and

31.8.2000, and obtained the registration certficate from the competent officer under the Bihar Finance Act and tax exemption certificate in Form II after making application in Form I, subject to certain terms and conditions as mentioned in the notification. It is not necessary to refer to other conditions except Clause 16. Clause 16 lays down that the application for tax exemption must be filed within a period of 60 days from the date of publication of the notification in the official gazette or the date of commencement of production, whichever is later, in the prescribed form along with the required documents and evidence before the designated officer. On sufficient cause being shown, delay upto 60 days can be condoned. The other notification, SO 479 dated 22.12.95, likewise provides for exemption from tax payable on sale of finished goods to new industrial units which have commenced production between 1.9.95 and 31.8.2000 and obtained registration certificate from the competent officer under the Act i.e. Bihar Finance Act and the tax exemption certificate in Form II after making applications for such exemption in Form I, subject to certain terms and conditions. Clause 17 contains similar provisions regarding making application for grant of tax exemption certificate within period of 60 days from the date of application of the notification in the official gazette or commencement of production, whichever is later, extendable upto 60 days.

7. Shri Biren Poddar, learned Counsel for the Petitioner, submitted that the State Government has no jurisdiction to lay down terms and conditions in derogation of the provisions of the Industrial Policy. Fixing period of 60 days, extendable upto further period of 60 days i.e. 120 days in all, according to the Counsel, is not only arbitrary but also confiscatory as it permanently takes away the right of the new industrial units to claim exemption from payment of sales tax. He pointed out that the application for grant of exemption certificate is required to be accompanied by documents which are beyond the control of the applicant to obtain. In fact, the document, such as, registration certificate under the Bihar Finance Act is granted by the same officer, i.e., the Deputy Commissioner of Commercial Taxes who grants the exemption certificate under the impugned notifications, and if he does not grant the registration certificate within the period of 60/120 days, he may by making the exemption application in fructuous deprive the applicant of his valuable right to get exemption which would really frustrate the object of the scheme itself. Counsel submitted that once the Government decides as a policy to grant exemption from sales tax on purchase of raw materials and/or sale of finished goods and pursuant to such decision a person sets up an Industrial unit, any further condition at a tangent with the policy and the promises contained therein, is liable to be struck down.

8. I have already mentioned above that the application for grant of exemption certificate is to be filed in Form I, and only such units are eligible to apply and claim exemption which have commenced production between 1.9.95 and 31.8.2000 (called ''new industrial unit'') and have obtained the registration certificate from the competent officer under the Bihar Finance Act. It may be stated here that the said eligibility clause making only such new industrial unit

which has obtained registration certificate under the Bihar Finance Act is not being challenged in this case. As a matter of fact, u/s 14 of the Bihar Finance Act no dealer who is liable to pay tax u/s 3 or Section 4 can sell or purchase goods unless he has been granted and is in possession of a valid registration certificate. It is not the case of the Petitioner that it is not liable to pay tax under Sections 3 and 4 on sale or purchase of goods, all that it claims is exemption on purchase of raw materials required in the production of the goods and sale of finished goods. As a matter of fact, the Petitioner had already been granted the registration certificate u/s 14 of the Act on 3.2.97 itself.

9. It is pertinent to mention here that while making application in Form I the applicant is required to mention in columns 1(ga) and (gha), (i) the number of registration certificate under the Bihar Finance Act, 1981/Central Sales Tax Act, 1956(if the unit is registered under that Act i.e. the CST Act), and (ii) Registration No./licence No./entrepreneur''s Ashay-Patra granted by the competent officer of Industries Department, Government of Bihar or the Government of India. In column 3, the applicant is required to furnish the details of the premises where goods are produced and the finished goods are kept. If the premises do not belong to the applicant he is required to enclose attested copy of the registered lease deed. Though there are several other columns in the form they relate to particulars regarding the name of the applicant, trade, items of production, details of the persons having interest in the business, the details of their immovable properties, the bank account and registration, licence, permits etc. granted under any other law for the time being in force; details of loan taken from the Industries Department, Industrial Development Corporation, Financial Development Corporation etc.

10. It would, thus, appear that strictly speaking the only document which the applicant is required to enclose with the application is attested copy of the registered sale deed in case the premises in question do not belong to him. If he is the owner of the premises, he is merely required to give the particulars of the holding, location etc. As regards the registration certificates under the Bihar Finance Act/Central Sales Tax Act or the registration/licence granted by the Industries Department/Government of India, the applicant is merely required to mention the registration number, licence number, as the case may be. He is not even required to enclose copies of the registration certificate or the licence. As regards the CST Act, he is required to mention the registration number only if he is registered under that Act. As regards registration under the Bihar Finance Act, in view of the provisions of Section 14, it is difficult to imagine that a unit will start commercial production without being registered. That perhaps is the reason why in the present case, the registration under the Bihar Finance Act was made effective from 16.1.97 which is the date the Petitioner unit admittedly started production. Similarly, it is difficult to visualise an industrial unit being set up without getting the industrial licence from the State Government or the Government of India. In the circumstances, I fail to understand how the requirement of mentioning the particulars of the registration/licence numbers can

be said to be onerous.

11. As a matter of fact, in the present case, this question does not arise at all. As seen above, on 3.2.97 it was granted registration certificate under the Bihar Finance Act (effective from 16.1.97) and Central Sales Tax Act. The District Industries Centre, the competent authority of the Government of Bihar registered the unit as an SSI unit on 15.3.97. All that was required to do was to mention the particulars of the said registration in the application for grant of exemption certificate. However, the application was made as late as on 20.2.98. Admittedly, the Petitioner had commenced commercial production on 16.1.97. Reckoned from that date, the period of 60 days expired on 16.3.97 and the period of 120 days expired on 15.5.97. Since it was already in possession of the required certificates by 15.3.97 nothing prevented it from making application within 60 days from the date of commencement of production or, in any case, within the extendable period. The application, however, was made 401 days thereafter. Laches are writ large on the case of the Petitioner.

12. I shall now consider the question of permissibility of fixing a time limit for making application because the fact of the matter is that the application has been rejected on the ground of delay alone. I may mention here that in course of hearing we made a pointed query from the Counsel for the Petitioner as to whether application for tax exemption can be permitted to be made at any time, the Counsel did not take a definite stand. At one stage he seemed to agree that some period may have to be fixed, later he again reverted to his plea that the provision is unreasonable and arbitrary. The question, according to me, has two aspects-whether a period can at all be prescribed and/or whether the period of 60/120 days already prescribed is too short for making such application. The answer is not far to seek. The first part of the question has to be answered in the affirmative. In terms of the provisions of the Bihar Finance Act and the Central Sales Tax Act the person incurs liability to pay tax on purchase of materials and sale of finished goods no sooner the transaction takes place. Such liability cannot be kept in abeyance ad infinitum or for a period as long as 8 or 10 years, which is the total period of exemption provided in the Industrial Policy. That would not be in the interest of either the person concerned or the revenue. If the question is answered in the negative and it is held that no period can be fixed, taking the proposition to its logical end, it would follow that application for exemption can be made even after expiry of the stipulated period of 10/8 years which cannot be conceived. Therefore, an outer limit has to be fixed for making the application. The only thing is what should be the period. In other words, whether the period of 60/120 days is unreasonably short. The answer to this question, in my opinion, has to be given in the negative. I have already mentioned above the salient features of the application in Form I and its requirements. All that is required for making application is that the applicant should mention the number of registration certificate under the Bihar Finance Act/Central Sales Tax Act (if applicable), the number of registration certificate/licence granted by either the Industries Department of the State Government or the Government of India. For

making application for exemption certificate, getting the unit registered with the Commercial Taxes Department or the Industries Department of the Government of Bihar or Government of India can hardly be said to be the requirement because unless the unit is granted registration/licence there is no question of its being set up as an industrial unit and commencing production, since the period is to be reckoned from the date of commencement of production, period of 60 days cannot be said to be unreasonable or too short within which application cannot be made. There is also provision for extension of time upto 60 days, so that in an appropriate case, the delay upto 60 days may be condoned. In my opinion, the clause contains sufficient safeguard to protect the interest of bonafide applicants, who for justifiable reasons could not make application within time. Such a provision is not unusual. In various statutes condonable limit has been fixed. Counsel agreed but submitted that in those statutes there is no requirement of getting the unit registered with the Commercial Taxes/Industries Departments. I have already dealt with this aspect.

13. Shri Poddar, however, submitted that prescribing period of 60/120 days amounts to imposing further condition, and since no such condition has been laid down, in the Industrial Policy Resolution, it cannot be done so by notification. He relied on State of Bihar and Others Vs. M/s. Suprabhat Steel Limited and Others, ; G.B. Kumar and Sons v. State of Bihar (1998) 70 STC 240; and AIR 1972 1935 (SC) , in support of his contentions that the period of limitation cannot be fixed by rules, muchless in conflict with the substantive provisions of the statute so as to permit or curtail of the rights created by such statute.

14. In G.B. Kumar and Sons v. State of Bihar the point for consideration was whether the claim for refund of sales tax paid under the Bihar Finance Act to which the Petitioner was entitled u/s 15(b) of the Central Sales Tax Act could be subject to period of limitation, and the claim could be rejected on the ground that it had not been made within that period. This Court answered the question in the negative following the decision of the Supreme Court in State of Mysore v. Mallick Hashim and Co. (1973) 31 STC 358, in which the Supreme Court had laid down that any rule prescribing period of limitation for making application for refund was unreasonable. The case is clearly distinguishable. The question of refund stands on an entirely different footing. If a person pays sales tax in respect of declared goods, with respect to which he is entitled to refund u/s 15(b) of Central Sales Tax Act, it is obvious that fixing a period of limitation and rejecting the claim for refund on the ground that the application was made beyond the period of limitation would result in unjust enrichment to the revenue and the same can never be sustained. The money clearly belongs to that person and cannot be denied to him on the ground that he did not make application for refund within the prescribed period of limitation.

15. The case of M/s. Bharat Barrel and Drum Mfg. Company arose out of a proceeding under the Employees State Insurance Act, 1948, and the point for consideration was whether the period of limitation for enforcement of claim by

the Corporation (ESI Corporation) could be prescribed by rule. The Supreme Court upon consideration of different provisions of the Act held that the legislature did not intend to fetter the claim of the Corporation u/s 68 made u/s 75(2)(b) of the Act. The Court noted that rule making power conferred on the Government by Section 96(1)(b) related to regulation of the procedure after the application/claim is filed before the ESI court. But Rule 17 (by which the period of limitation was prescribed) had the effect of extinguishing the claim by creating a bar of 12 months'' limitation. It is to be kept in mind that in that case the Supreme Court was considering a piece of subordinate legislation. Rights were created by an enactment of the legislature, viz., the Employees'' State Insurance Act, which was sought to be restricted to the point of extinguishment by rules framed under the enactment by the Government. This led the Court to observe:

It appears to us that where the legislature clearly intends to provide specifically the period of limitation in respect of claims arising there under, it cannot be considered to have left such matters in respect of claims under some similar provisions to be provided for by the rules to be made by the Government under its delegated powers to prescribe the procedure to be followed in proceedings before such Court. What is sought to be conferred is the power to make rules for regulating the procedure before the Insurance Court after an application has been filed and when it is seized of the matter. That apart the nature of the rule bars the claim itself and extinguishes the right which is not within the pale of procedure.

The decision and the observations made therein have no relevance in the present case. The case in hand is not one of any conflict between a subordinate legislation and an enactment. The so called conflict is said to be between two Government orders one, a resolution called industrial policy, and the other, statutory order made under the Bihar Finance Act. It may be pointed out here that while the Industrial Policy contains an incentive scheme to encourage industrialisation in the State, so far as incentives relating to sales tax are concerned, the policy cannot be implemented without corresponding notification under the relevant statute, that is, the Bihar Finance Act. It is for this reason that the impugned notifications, SOs 478 and 479 dated 22.12.95, were issued.

16. The contention of the Counsel for the Petitioner is that the notification u/s 7(3) of the Bihar Finance Act must be consistent and not at a tangent with the provisions of the Industrial Policy, and in this regard reliance has been placed on the case of Suprabhat Steel Ltd. (supra). The facts of that case, however, were entirely different. In terms of the relevant clause of the Industrial Policy of 1993, not only new industrial units going into production between 1.4.93 and 31.3.98 were entitled to exemption on the purchase of raw materials provided their investment in plant and machinery did not exceed Rs. 15 crores; the old industrial unit also were entitled to similar exemption from 1.4.93 provided the investment in plant and machinery as on 1.4.93 did not exceed Rs. 15 crores. In other words, both the old industrial units as well as new industrial units

commencing production after 1.4.93 were entitled to exemption. But in the notification which was issued u/s 7(3)(b) of the Bihar Finance Act a condition was laid down to the effect that only such unit which has not availed of any facility or benefit under any industrial policy would be entitled to the benefit of exemption. Upholding the decision of the High Court invalidating the said condition, the Supreme Court observed.

It is true that issuance of such notifications entitles the industrial units to avail of the incentives and benefits declared by the State Government in its own industrial incentive policy. But in exercise of such power, it would not be permissible for the State Government to deny any benefit which is otherwise available to an industrial unit under the incentive policy itself. The industrial incentive policy is issued by the State Government after such policy is approved by the Cabinet itself. The issuance of the notification u/s 7 of the Bihar Finance Act is by the State Government in the Finance Department which notification is issued to carry out the objectives and the policy itself. In this view of the matter, any notification issued by Government order in exercise of power u/s 7 of the Bihar Finance Act, if is found to be repugnant to the industrial policy declared in a government resolution, then the said notification must be held to be bad to that extent.

17. The ratio of the above decision, is that since a notification is required to be issued under the Statute to give effect to the industrial policy, the provisions of such notification must be consistent with the policy and any provision repugnant thereto would be bad to that extent. The question is whether the Clauses 16 and 17 of SOs 478 and 479 fixing period of 60/120 days for making application for exemption certificate are ''repugnant'' to the relevant provision of the Industrial Policy. I have no hesitation in answering this question in the negative. As the Supreme Court has observed the notification u/s 7 of the Bihar Finance Act is issued to give effect to the Industrial Policy. In Suprabhat Steel''s case part of the notification sought to restrict the benefit to such industrial unit which had availed of the facility under the previous Industrial Policy. Since Clause 10 of the Industrial Policy of 1993 on the point of sales tax incentive did not make any such distinction, the Supreme Court held that making such a provision was repugnant to the policy. Such is not the position in the present case. I have already indicated above the desirability, may, the necessity of fixing a period for making application. In my opinion, if no period is fixed, implementation of the scheme would result in anomalies and complications both for industrial unit as well as the Revenue. Prescription of the period by itself does not extinguish the right of an industrial unit (which really is in the nature of concession), the right gets extinguished when the application is not made within that period. In Suprabhat Steel''s case, on the other hand, old units were not eligible to apply, if they had availed of similar facility under the earlier Industrial Policy, though there was no such provision in the present Industrial Policy. In the above view of the matter, the decision in Suprabhat Steel is of no help to the Petitioners.

18. Before I conclude I must say that, though no such submission was made, I have considered the desirability of issuing direction to the Respondents to consider the case of the Petitioner on merit after condoning the delay, for the impugned provisions of the notifications are binding on the departmental authority but not on this Court in writ jurisdiction. In the facts of the case on account of the grave and unexplained laches, I do not think, any such direction is called for.

19. In the above premises, for the reasons stated above, I do not find any merit in this writ petition, which is accordingly dismissed, but I will make no order as to costs.

P.K. Sinha, J.

20. I agree.