
(1998) 07 PAT CK 0064
In the Patna High Court
Case No : C.W.J.C. No. 6616 of 1992

Shree Durga Roller Flour Mills (P) Ltd. APPELLANT
Vs
The State of Bihar and Others RESPONDENT

Date of Decision : 13-07-1998

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Customs Act, 1962 — Section 25

Citation : (1998) 3 PLJR 821

Hon'ble Judges : B.M. Lal, C.J.; S.K. Singh, J

Bench : Division Bench

Advocate : B.P. Rajgarhiya, Pawan Kumar, R.K. Prasad and T.B. Singh, for the Appellant; O.P. Agrawal and N.K. Sharma for State and Ajoy Bihari Sinha, for the Respondent

Final Decision : Dismissed

Judgement

B.M. Lal, C.J.—The Petitioner M/s Shree Durga Roller Flour Mills (P) Ltd. is a company incorporated under the Indian Companies Act, has approached this Court under Articles 226 and 227 of the Constitution of India through its Director, Sri Ajay Prakash Saraogi, a resident of Gaya. in the State of Bihar seeing relief against the Respondents for issuance of order or orders, direction or directions, writ or writs in the nature of mandamus and certiorari commanding the Respondents to grant interest free sales tax loan to the Petitioner on the basis of industrial resolution No. 2829 dated 8-3-1980 (Annexure-2) as also Industrial Resolution No. 1153 dated 20.1.1981 (Annexure-3) to the extent of 50% of the fixed capital investment of Petitioner's industrial unit which is established in the district of Gaya. A prayer has also been made for quashing the order passed by the State Level committee as contained in Annexure-20 which has been communicated to the Petitioner by the Bihar State Credit and Investment Corporation Ltd. vide letter dated 16.4.1992 whereby the Petitioner has been directed to refund a sum of Rs. 2,45,400/- (Rupees Two Lakh forty-five thousand and four hundred).

2. The Petitioners Industrial unit is carrying on business of manufacturing Aata, Suji, Maida and bran by virtue of registration etc. having been granted in its favour by the Industries Department.

3. The short facts leading to this petition are as under: To achieve the faster rate of Industrial growth and for the expansion of industrial units in new areas in the State, the concerned department of the State Government by its resolution No. 16807 dated 29th September, 1973, decided to grant certain incentives to large and medium industrial entrepreneurs for setting up industries in Bihar. By another resolution No. 14831 dated 29-6-1976 the earlier resolution dated 29th September, 1973, was modified to the extent that the exemption from the payment of sales tax on the sale of finished products granted under resolution No. 16807 was replaced with interest free sales tax loan. Besides this, certain guidelines and criteria were also laid down therein with respect to grant of loan as also to the quantum of loan. However, this resolution dated 29.6.1976 has also been amended by another resolution dated 29.11.1976. This too was amended by another resolution No. 2829 dated 8th March, 1980, on which the Petitioner is basing its claim. Further the Government has issued another Industrial resolution No. 1153 dated 20.1.81 (Annexure-3) by which certain incentives to medium and large Industries which have come into production after 1.10.1979 were granted. According to this resolution the concerned industries shall either avail total exemption from the payment of sales tax on purchase of raw materials" or to get set off of the amount paid as sales tax on the purchase of raw materials against the amount of sales tax payable on the sale of finished products. The industries shall also be entitled to get interest free sales tax loan as per the resolution (Annexure-2) after set off of the amount of sales tax paid on the purchase of raw materials against the sale of finished products.

4. Relying on the above two resolutions, vide Annexures "2" and "13", it is submitted by the learned Counsel that the Petitioner having been encouraged by the promise and incentives, has taken effective steps for setting up its industry in question for the manufacture of Aata, Maida, Suji and bran and after completing necessary formalities as required by law, i.e. of registration certificate etc. by the Industries Department, loan from the Bihar State Financial Corporation as also land for setting up of the industry, established its industry in question.

5. The Petitioner, in view of Annexures 2" and "3" applied for grant of interest free sales tax loan in respect of certain period. It is stated that the said loan was granted to the Petitioner for a sum of Rs. 15,71,550/- (Rupees Fifteen Lakhs Seventy one thousand and five hundred) and, as the assessment of the Petitioner was not complete, therefore, a sum of Rs. 11,78,400/- (Rupees Eleven lakh seventy eight thousand and four hundred) being 75% of the sanctioned amount was given to the, Petitioner. However, again for the period 1990-91, the Petitioner applied for payment of interest free sales tax loan and also for payment of the balance amount of interest free sales tax loan of the earlier period, as it is said that out of sanctioned amount of Rs. 15,71,500/- (Rupees

Fifteen Lakhs Seventy one thousand and five hundred) only a sum of Rs. 11,78,400/- (Rupees Eleven Lakhs Seventy eight thousand and four hundred) was given to the Petitioner.

6. The Petitioner has further stated that vide Annexure-20, the Officer in charge, Subsidy of Respondent Bihar State Credit and Investment Corporation Ltd., has asked the Petitioner to refund the excess amount paid to it to the tune of Rs. 2,45,400/- (Rupees Two lakh forty-five thousand and four hundred) as per details furnished in the said letter (Annexure-20).

7. The Petitioner further states that the Government has issued another Industrial resolution No. 13730 dated 1st September, 1986, by which the Government has reduced the limit of grant of interest free sales tax loan to the extent of 10% of the initial investment in fixed assets. The said resolution is at Annexure-21.

8. The dispute arises only after the issuance of Annexure-21 which reduces the limit of grant of interest free sales tax loan to the extent of 10% as indicated above.

9. The main relief claimed by the Petitioner is against Respondent No. 4 i.e. the Director of Industries, Bihar, Patna. who, repudiating the claim of the Petitioner has emerged with a plea by filling a counter affidavit that the Petitioner's unit came into production with effect from 11.10.1986, whereas Annexure-2 on the basis of which the Petitioner claims interest free sales tax loan to the extent of 50%, provides in clear terms under Clause 10 that the same is not applicable to the Petitioner inasmuch as the benefit as granted by the said resolution (Annexure-2) was in force only till 31.3.1984 so the Petitioner is not entitled to get benefit of the said resolution.

10. It is further submitted that Annexure-21 which is a resolution bearing No. 13730 dated 1.9.1986, prescribes the category of units and the Petitioner's unit being a medium industry and it having come into production on 11.10.1986 so it is entitled to interest free sales tax loan to the extent of 10% of the initial investment in fixed assets subject to a maximum of Rs. 25 (twenty five) lakhs.

11. Though, the Petitioner has filed a rejoinder affidavit to the counter affidavit filed on behalf of Respondent No. 4 basing its claim on a decision in the case of Om Flour Mills (P.) Ltd. and Another Vs. State of Bihar and Others and L.P.A. No. 600 of 1996 disposed of on 25.11.97 (wrongly mentioned by the Petitioner as L.P.A. No. 600/94) but the incentive as sought for by the Petitioner is based on Clause 10 of Annexure-2 and Clause 9.2 (b) of Annexure-21, which are being discussed, hereinbelow.

12. The submission of the Petitioner is that the Respondents are bound by the doctrine of promissory estoppel as the Petitioner has incurred expenses after altering its position on the basis of assurances given by the State Government and its officers, through the Industrial Policies vide Annexures "2" and "3" and

acting upon those resolutions the Petitioner has set its industrial unit in this State. It is submitted that had it been known that the Respondents may not provide those incentives as per their solemn promise or resolution vide Annexures "2" and "3", the Petitioner would not have set up its industry. In this regard the Petitioner has strongly relied upon the decision in the case of OM Flour Mills (supra) as also on the order dated 25.11.97 passed in L.P.A. No. 600 of 1996 (The State of Bihar, through Secretary, Ministry of Finance and Anr. v. M/s Bihar Alloy Steels Limited and Ors..)

13. As far as the decision in the case of Om Flour Mills (supra) is concerned, in this case promise was not fulfilled by the State Government for want of paucity of fund and assurance was made that promise would be fulfilled as soon as the fund is available. In this case, the Division Bench took the view that, once such promise is made the State is bound to fulfill it. As far as paucity of fund is concerned, it is held that industrial incentives are prepared after taking into consideration the financial resources available at the hands of the State and, therefore, the State cannot go back from its promise. However, in the case at hand no such case of withdrawal of incentive for want of paucity of fund is there. Apart from this in Om Flour Mills (supra) the case was for grant of subsidy but here in the present case the claim is for grant of interest free sales tax loan. These are broad distinguishable features and, therefore, decision in Om Flour Mills (supra) has no application to the facts of the present case.

14. As far as the decision in L.R.A. No. 600 of 1996 is concerned, this case also has got no application to the facts of the instant case as in L.P.A. No. 600 of 1996 the Court found that the incentive offered in the earlier resolution was not directly linked with the date of commencement of production but was directly linked with the setting up of the industry. Here in the instant case the incentive offered is directly linked with the date of commencement of production i.e. on or after 1st September, 1986, whereas the production started with effect from 11-10-1986 in Petitioner's unit. On the above ground the decision in L.P.A. No. 600 of 1996, (supra) is clearly distinguishable and is of no help to the Petitioner.

15. Besides the above submissions, Annexure-20 has also been challenged on the ground of non-observance of principle of natural justice and it is contended that no notice was even given to the Petitioner by the State Level Committee before taking a decision on the basis of Annexure-21. It is also submitted that the Petitioner has taken all effective steps fully complying with the terms of the resolutions in question vide Annexures 2 and 3 and therefore, he is entitled to interest free sales tax loan to the extent of 50% of the fixed capital investment as per Annexures 2 and 3.

16. The Petitioner, relying on Annexure-2, has based his claim for grant of interest free sales tax loan, whereas Clause 10 of the said resolution (Annexure-2) specifically provides that the incentives granted under it shall cease on 31-3-1984. It is admitted position that the Petitioner's unit came into production on 11.10.1986. Thus on the basis of this resolution (Annexure-2) how far the

Petitioner will be entitled to get interest free sales tax loan on the basis of that resolution (Annexure-2) is a mystery in itself which the Petitioner could not successfully prove in his favour and, therefore, rightly the Respondents have taken a plea that the Petitioner is not entitled to get benefit of the said resolution in view of Clause 10 of that very resolution.

17. Similarly resolution No. 13730 dated 1.9.86 (Annexure-21), the relevant Clause 9.2(b) is being reproduced herein, below for the brevity sake:

9.2.(b) In case of large and medium industries, the maximum limit of sales tax loan will be 10 per cent of the initial investment in fixed assets, subject to a maximum limit of Rs. (twenty five) lakhs for the total eligibility period of 5 (five) years. In case of industrial units located in "A" category districts, this limit will be Rs. 30 (thirty) lakhs for the total eligibility period of 5(five) years.

18. The Petitioner has submitted that Annexure-21 has no application. The industry of the Petitioner was completed much before 1.9.1986 and production started from 11.10.1986. In this regard it is also submitted that the Respondents themselves have sanctioned interest free sales tax loan to the Petitioner upto 1990-91 on the basis of resolutions which are at Annexures 2 and 3. But now a decision has been taken behind the back of the Petitioner by the State Level Committee to grant interest free sales tax loan to the extent of 10% of the initial investment in the fixed assets, which is illegal.

19. Thus, according to the above referred clause the Petitioner's unit, being a medium unit, would be entitled to sales tax loan to the extent of 10% of the initial investment in fixed assets which amount, according to the Respondents, comes to Rs. 9,33,000/- (Rupees Nine Lakhs thirty three thousand). As against this amount, the Petitioner was sanctioned Rs. 15,71,500/- (Rupees Fifteen Lakhs Seventy one thousand and five hundred) but he was given only Rs. 11,78,400/- (Rupees Eleven lakhs Seventy eight thousand four hundred). Therefore, after adjusting the admissible amount, as per Clause 9.2(b) of Annexure-21. i.e. Rs. 9,33,000/- (Rupees Nine Lakhs thirty three thousand) rightly, a demand of refund has been made for an amount of Rs. 2,45,400/- (Rupees Two Lakhs forty five thousand and four hundred) vide Annexure-20 from the Petitioner.

20. Relying on the doctrine of promissory estoppel the Petitioner's unit is basing its claim on the basis of Annexures "2" and "3" and claims interest free sales tax loan to the extent of 50% instead of 10%.

21. Therefore, the pivotal question which arises is that the incentive of interest free sales tax loan vide Annexures 2 and 3 dated 8.3.80 and 20.1.81, respectively, if withdrawn by superseding them by a subsequent resolution i.e. Annexure-21, how far the doctrine of promissory estoppel will help the Petitioner. Before dwelling much on the above aspect of the matter, we have to appreciate how far Annexure "2" helps the Petitioner. We have already discussed above that vide Clause 10 of Annexure-2, the life of the incentive given to the Petitioner

under the said resolution was only upto 31.3.1984 and not beyond that. Besides this Clause 9.2(e) of Annexure-21 is also emphatic which does not help the Petitioner in any way. Clause 9.2(e) of Annexure-21 reads thus:

9.2(e) The unit which went into production before 1st September, 1986, but which have not completed the period of eligibility for such concession available to them in resolution No. 1153 dated the 20th January, 1981, of Industries Department, will get such concession for the remaining period of their eligibility according to resolution No. 1153 dated 20th January, 1981.

Admittedly the Petitioner's unit has gone into production on-11.10.86 but not before 1st September, 1986, then how the Petitioner will be entitled for the benefit on factual matrix of the case itself and how far the decision rendered in Om Flour Mills (supra) and the order dated 25.11.97 passed in L.P.A. No. 600 of 1996 (supra) will help the Petitioner, we fail to appreciate. On the other hand, considering the factual aspects of this case, the above referred cases are of no avail to the Petitioner as discussed in detail in the preceding paragraphs.

22. Much has been, argued. by the learned Counsel appearing for the Petitioner contending that once the incentive is given to the Petitioner vide Annexures "2" and "3", the State or its agency is bound by the doctrine of promissory estoppel and can not resile from the incentive given.

23. We reiterate at the cost of repetition that Annexure-2 itself was operative upto 31-3-1984 and by subsequent resolution (Annexure-21), either expressly or impliedly, the same stands superseded. Thus how far even the doctrine of promissory estoppel helps the Petitioner?

24. No doubt in Central London Property Trust Limited v. High Trees House Limited 1947 Kings Bench Division 130 Hon"ble Justice Denning M.R. while formulating the formula propounded the principle that "if promise intended to be binding, intended to be acted on and, in fact, acted on, is binding so far as its terms properly applies." Lord Denning, as he then was, made his name as a pioneer and reformist, he too would not settle the parameter of the doctrine where its application would be treated imperatively. "The promise intended to be binding so far as its terms properly applies" has significant meaning. As we have pointed out that on the face of Annexure-2 itself, the life of the incentive granted under it was upto 31.3.1984, hence, this resolution lost its force much before the date when the Petitioner's unit came into production i.e. on 11.10.1986.

25. In our country when the era of post independence began, this doctrine of "promissory estoppel" is propounded in

26. In Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, considering numerous cases and the practice prevalent in this regard in various countries particularly in England and America, it is ruled that in our country on the basis of this doctrine where the promisor, the Government makes some promise with full knowledge that if it would be implemented or

acted upon by the promisee by incurring expenses, the promisor Government would be bound by the terms and conditions of the incentive offered by the promisor Government to the promisee and if any breach is committed by the promisor, the same would be enforceable by the order of the Court against the promisor. However, in this very case of Motilal Padampat Sugar Mills Co. Ltd. some exceptions to this rule were also stated that this doctrine will not be available to compel the promisor to perform such act or duty which is against the terms and conditions of the agreement or which is prohibited by law and which, if permitted, would result in breach of the law, or even may preclude exercise of its legislative or sovereign functions.

27. However, radical change appears to have been brought in by our Apex Court right from the case of Jit Ram Shiv Kumar and Others Vs. State of Haryana and Others, whereby it is highlighted that this doctrine will not be available against the exercise of sovereign or legislative functions of the State and the obligatory Governmental functions under the law, the Government can not be prevented by its execution. Besides, it is also highlighted that the Government is not bound by the unauthorised acts done on behalf of the Government by its officers. The implication of this doctrine was further considered in the light of the aforesaid two decisions besides others in the case of Union of India (UOI) and Others Vs. Godfrey Philips India Ltd., wherein the same view was reiterated as expressed in Motilal Padampat Sugar Mills Co. (supra). It is further propounded that this doctrine is not limited in its application only to defence but it can also found a cause of action. Thus a full, fledged right is given in favour of the promisee to approach the Court of law if he finds that the promise given to him by the promisor is breached causing loss to him.

28. After the decision, in Godfrey Philips India Ltd. (supra) a catena of decisions have been rendered on the subject including in Amrit Banaspati Co. Ltd. and another Vs. State of Punjab and another, . However, the law laid down in the above referred cases turned turtle in a celebrated case on the subject reported in Kasinka Trading and another, etc. etc. Vs. Union of India and another, where the Apex Court camej with a view, which prevails on the subject and yet till date has not been diluted that, this doctrine can not operate against the State to the detriment of the society at large. Therefore, after the promise if the Government comes to the conclusion that to fulfil the promise if it results in detriment of the society, thus besides the other grounds, it is against the statutory law or executive or public functions, the same promise the Government is not obliged to implement but may withdraw from the promise.

29. The only lever provided to the promisee is that while doing so the withdrawal of the promise should be bonafide. Thus while enforcing this doctrine against the promisor, the promisee must establish that while discharging sovereign Governmental functions or public functions, which are distinct from its executive or commercial capacity, the action taken to withdraw from the promise by the promisor is not bonafide or actuated on extraneous consideration or with

malice. If this parameter is not acted upon, the Court of law will not help the promisee for the alleged breach of promise.

30. The salient feature of Kasinka Trading (supra) is that the Government of India issued a notification dated 15.3.1979 u/s 25 of the Customs Act, 1962, exempting Polyvinyl Chloride resins when imported into India from customs duty upto 31.3.1981. However, the impugned notification dated 16.10.1980 u/s 25 of the said Act superseding the earlier notification and providing that PVC resins when imported into India would be exempted from Customs duty as in excess of 4% ad valorem was issued. The Company had claimed that it had placed order for import of the PVC resins on the standing that the PVC resins was total exempt from Customs duty and the Government must be held to be bound by its representation made by it in the exemption notification and, therefore, the Government be estopped on the basis of promissory estoppel from going back from its" promise.

However, repudiating the claim of the Petitioner, the Government emerged with the plea that the exemption has been withdrawn in public interest and the doctrine, of promissory estoppel can not operate against the State to the detriment of the society at large. The Court came to the conclusion that the promise given was found detrimental to the society at large and, therefore, repelling the submission of the Petitioner, the defence as set up by the Government was upheld.

31. Thus, from the judgment in Kasinka Trading (supra) the total tenor of the earlier judgment i.e. Anglo Afghan Agencies (supra) and Motilal Padampat Sugar Mills Co. (supra) as also Godfrey Philips India (supra) has been revised.

32. In the case of State of Punjab and Others Vs. Ram Lubhaya Bagga Etc. Etc., it is ruled by the apex Court that the State can change its policy from time to time under the changing circumstances and it is not within the domain of any Court to weigh the pros and cons of the policy or to scrutinise it and test the degree of its beneficial or equitable disposition for the purpose of varying, modifying or annulling it based on however sound and good reasoning. The exception is that of the change of policy if arbitrary or violative of any Constitutional, statutory or any other provision of law.

33. We have repeatedly observed above that on the face of Annexure-2 and Annexure-21 the Petitioner has no case. However, nothing has been brought on the record or even suggested that the change of policy vide Annexure-21 is arbitrary or violative of any Constitutional, statutory or any other provision of law.

34. The view taken in Kasinka Trading (supra) is that the notification issued in public interest can be withdrawn even before the time fixed for its operation also in public interest and while issuing such a notification no promise can be said to have been held or representation made to the importer in general on the basis of which they can insist on the doctrine of promissory estoppel that the customs duty exemption granted earlier by the first notification could not be reduced by

the second one. There, public interest is the main consideration. That is why in Shrijee Sales Corporation and Another Vs. Union of India (UOI), Hon"ble A.M. Ahmadi, C.J. (as he then was) speaking for the Bench, considered the correctness of the Kasinka Trading (supra) and held that it is not necessary for us to go into the historical analysis of the case law relating to promissory estoppel against the Government. Suffice it to say that the principle of promissory estoppel is applicable against the Government but in case there is supervening public equity, the Government would be allowed to change its stand. It would then be able to withdraw from representation made by it which induced the persons to take steps which may have gone adverse to the interest of such persons on account of such withdrawal.

35. With the touch-stone of the law as laid down in Kasinka Trading (supra) and Shri Ji Sales Corporation (supra) the facts as set out in this petition and the grounds urged pursuant thereto, if tested then even on factual matrix, as discussed above, the scheme was upto 31.3.1984 vide Annexure-2 as per Clause 10 thereof.

Therefore, the Petitioner has no case at all. Besides this, in supersession of earlier notification/resolution new notification/resolution can be issued.

36. In this regard recent decision of the Apex Court in Dr. Ashok Kumar Maheshwari Vs. State of U.P. and Another, and in Union of India (UOI) and Others Vs. Godhawani Brothers and Another, is also of much consequence wherein the case of Kasinka Trading (supra) has also been relied upon.

37. Thus, from the foregoing discussions, this petition fails and is hereby dismissed maintaining the order contained in Annexure-20 whereby-the Petitioner has been directed to refund the excess amount as mentioned in the said letter.

S.K. Singh, J.

I agree.