

(1994) 01 PAT CK 0025

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 11529 of 1993

Sone Vanaspati

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 10-01-1994

Acts Referred:

Citation : (1994) 01 PAT CK 0025

Judgement

S.B. Sinha and Aftab Alam, JJ.—This application is directed against an order as contained in Annexures 6-A and 6-C to the writ application whereby and where under a demand notice had been served upon the petitioner and the assessment proceeding has been directed to be continued.

2. Bereft of all unnecessary details the fact of the matter is as follows:

The petitioner is an existing company, incorporated under the Indian Companies Act, 1956, and carrying on business in Vanaspati at Barun in the district of Aurangabad, whereas its factory is situate.

3. The State adopted a resolution on 21st February, 1990 known as Industrial Policy, 1990 with a view to accelerate growth of Industry in the State of Bihar and by reason thereof a new scheme was inter alia introduced granting benefits of Sales-tax to the small and medium scale industries.

The petitioner-Company was incorporated on 31st March, 1990. A term loan of Rs. 5.30 lakhs was sanctioned to the petitioner. A Factory for manufacturing vanaspati was set up at Barun by the petitioner which is a medium scale industry and its trial production started from 21st May, 1993.

4. The State of Bihar again adopted a policy decision on 10th June, 1993 known as "Industrial Incentives Policy, 1993". A copy of the said resolution is contained in Annexure-3 to the writ application.

In terms of the said policy decision the Industries which have commenced or may commence production in between the period from 1.4.1993 to 31st March,

1998 are to get the benefit of exemption from payment of Sales-Tax for a period of ten years from the date of production.

5. The petitioner allegedly exercised its option in terms of the aforementioned policy decision, which is contained in Annexure-2 to the writ application.

According to the petitioner despite the said fact the authorities of the Commercial Taxes Department did not allow the petitioner to obtain the benefit of exemption from payment of Sales Tax.

The petitioner on 3rd August, 1993 wrote a letter to the respondent No. 3 bringing to his notice the aforementioned fact.

In answer to the said letter, the respondent No. 4 by his letter dated 7th September, 1993 as contained in Annexure-5 to the writ application informed the Assistant Commissioner Commercial Taxes, Aurangabad (Respondent No. 5) that the notification in question under the Bihar Finance Act, 1981 was expected to be issued shortly.

6. According to the petitioner despite the same it has been threatened that a proceeding for imposing of penalty under Bihar Finance Act, 1981 would be taken and pursuant thereto five notices as contained in Annexures 6 to 6/D had been issued.

Mr. Gopal Subramaniam, the learned Counsel appearing on behalf of the petitioner has raised two contentions in support of this application.

The learned Counsel firstly submitted that in view of the fact that the policy decision dated 10.6.1993 itself has been published in a Gazette, it was not necessary to issue a formal notification in terms of Sub-section (3) of Section 7 of the Bihar Finance Act.

7. The learned Counsel in support of his contention has relied upon a Full Bench decision of this Court in Tara Steel industries v. Assistant Commissioner reported in 1986 BBCJ 201.

8. It was next contended that in any event, the policy decision shall operate despite non-publication of the notification u/s 7(3) of the Bihar Finance Act as the State is bound thereby and it is stopped and precluded from demanding the Sale Tax in view of its own policy decision.

The learned Counsel in support of the aforementioned contentions has relied upon a decision of the Vasantkumar Radhakisan Vora Vs. The Board of Trustees of the Port of Bombay, .

9. Mr. S. Rafat Alam, the learned Standing Counsel appearing on behalf of the State, on the other hand, submitted that in terms of the Policy decision dated 10.6.1993 itself (Annexure-3) a notification u/s 7(3) of the Bihar Finance Act is required to be published and the terms and conditions for grant of exemption are required to be fixed.

10. The learned Counsel in this connection has placed before us Clause 10.5 of the said resolution as also the note appended thereto.

11. The question, which, therefore, arises for consideration in this application are:

(i) Whether in view of the aforementioned Industrial incentive Policy decision dated 10.6.1993 as contained in Annexure-3 to the writ application, it was necessary for the State of Bihar to issue a notification in terms of Sub-section (3) of Section 7 of the Bihar Finance Act, 1991.

(ii) Whether the State is bound to give effect to its policy decision despite non-issuance of such a notification in view of the fact that it is bound by the doctrine of estoppel by conduct.

12. Re-Question (1):

Clause 10.5 of the resolution dated 10.6.1993 reads thus:

10.5. Bikri Kar Asthagan awam Bikri Kar chut ke sambandh me Banijaya kar Bibgah ke dwara alag se adesh adisuchna/adesh se ankit sarten hi antim rup se manya hogi.

13. It is, therefore, clear that in terms of the aforementioned resolution not only a notification has to be published but the terms and conditions for grant of such exemption have to be formulated.

14. It further appears that the State has also issued a clarification to the effect that by way of abundant caution the concerned Industrial Units in their own interest should realise Sales Tax till acceptance or as application for exemption from payment of Sales Tax and deposit the same before the concerned authorities.

It was further stated therein that in the event such application for exemption is ultimately allowed in terms whereof the unit is found to be entitled to obtain the benefit of exemption from payment of Sales Tax, the amount deposited by it would be refunded, but if application is rejected, the unit would be liable to pay the entire dues.

15. In *Tam Steel's Case* (supra) the Full Bench inter alia held as follows:

In fairness to Mr. Keshav learned Counsel for the respondent State, a somewhat hypertechnical stand taken by him must also be noticed. It was sought to be argued that even though Annexure-7 was admittedly a resolution of the Government of Bihar and had been duly published in the official gazette in the name of the Government and by the order of the Governor of Bihar it was nevertheless not a notification *stricto sensu* which could exempt the petitioner from the incidence of Sales Tax. Reference was made to Section 4 (3) of the 1959 Act and Section 7 of the Bihar Finance Act, 1981 which provide that the State Govt. may, by notification and subject to such conditions and restrictions, as it may impose, exempt from the levy of purchase tax, etc. It was submitted

that unless the notification was made under the aforementioned sections and by express reference thereto, there could be no valid exemption in the eye of law.

Negating the aforementioned contention it was held:

Now it seems plain from the above (and no other provisions to the contrary could be brought to our notice) and indeed, it was common ground that the law has not prescribed any particular or peculiar form for a notification generally or those under the Sales tax Act. That being so, where a formal resolution of the Government expressly issued in its name and recorded by the order of the Governor is duly published in the gazette, specifying in express terms the exemptions to be granted, can it possibly be said that it would not come within the ambit of the notification referred to in the Sales Tax Act? The answer plainly seems to be that the same would be a notification in terms or in any case a substantial compliance with the law which would render any distinction betwixt the two as one without a legal difference. The same would come squarely within the import and ambit of Sections 4(3) of the Sales Tax Act and 7(3) of the Bihar Finance Act.

16. The aforementioned Full Bench decision has no application in this case inasmuch as unlike the resolution in question which fell for consideration before it, the same did not contain a Clause like 10.5 in Annexure-3 as reproduced hereinbefore.

In our opinion, as the petitioner intends to take benefits of the said resolution, the same has to be read as a whole for the purpose of coming to the conclusion as to whether it can be given effect to in law or not, irrespective of the fact that no separate notification as contemplated u/s 7(3) of the Act has been published.

It has neither been denied nor disputed that the Bihar Finance Act 1981 is a self contained Code. In terms of the provisions of the said Act an exemption can be granted subject to the conditions laid down therein.

Sub-section (3) of Section 7 of the Act specifically provides for issuance of a notification in the matter of grant of exemption.

17. Even assuming that exemption can be granted by adopting a policy decision adopted by the State in that regard as the same has been published in, gazette but as in the instant case, the resolution of the State of Bihar itself postulates issuance of a separate notification in terms of Sub-section (3) of Section 7 thereof as also fixation of terms and condition for grant of exemption the petitioner is not entitled to such exemption from payment of Sales Tax, unless a notification under Sub-section (3) of Section 7 of the Act is published in the Gazette and his application is allowed upon such terms and conditions as may be determined by the State of Bihar in terms of the rules which may be framed by it in this regard.

If the contention of Mr. Subramaniam is accepted, the same would render Clause 10.5 of the Policy decision redundant and otiose.

18. It is now well known cannot of interpretation that a statutory instrument has to be read as a whole and this Court cannot add thereto or substract any Clause therefrom.

19. Further the Commercial Taxes authorities while dealing with an assessment or other proceedings under the Bihar Finance Act. 1981 Act as statutory authorities and thus they are bound by the terms thereof.

Thus unless a notification under Sub-section (3) of Section 7 is issued or is deemed to be issued, while discharging their statutory functions, they cannot grant exemption to the assessee from payment of Salex-Tax.

20. The note appended to the said resolution as contained in Annexure-3 to the writ application has been issued ex-majori cautela. By reason of the said note, the Industrial Units are reminded of their liabilities.

It is, however, explanatory in nature and the same does not control any of the provisions contained in the notification in question including Clause 10.5 thereof.

The first contention of Mr. Subramaniam is, therefore, rejected.

21. Re: Question No. 2.

The second contention raised by Mr. Subramaniam has also no substance.

Mr. Subramaniam concedes that in view of the fact that the petitioner had not altered its position pursuant to any promise made by the State of Bihar in terms of the aforementioned resolution dated 10.6.1993, the doctrine of promissory estoppel has no application in the facts and circumstances of this case, as it established its factory much prior to issuance of the Industrial Incentive Policy. 1993 and, thus the question of its altering its position pursuant to any promise made by the State does not arise.

However, as noticed hereinbefore, the learned Counsel sought to invoke the doctrine of estoppel by conduct.

22. It is now well known that essential factors of an estoppel is; (i) a representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made; (ii) an act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made; (iii) detriment to such person as a consequence of the Act or omission.

23. In this case it is accepted that the petitioner has not altered its position pursuant to any promise made by the State of Bihar. Thus it cannot be said that the State by its conduct has made any promise or representation and in that view of the matter, the question of the petitioner acting to its detriment pursuant thereto does not arise.

It is one of the essential elements of estoppel by conduct that the party against whom it is pleaded should have made some representation intended to induce

the other party.

Reference in this connection may be made to *Anil Kumar v. State of West Bengal* reported in 1983 L.I.C. 806.

24. In the matter of levy of tax the rule of estoppel can be invoked against the Government or Government agency only in exceptional circumstances namely, if a person in good faith is prevented from paying the tax.

25. In *Vasantkumar Radhakisan Vora Vs. The Board of Trustees of the Port of Bombay*, upon which strong reliance has been placed by Mr. Subramaniam the law has been laid down in the following terms:

It cannot be invoked to compel the Govt. to do an act prohibited by law. There may be no promissory estoppel against exercise of legislative functions. Legislature can never be precluded from exercise of its legislative functions by resorting to doctrine of promissory estoppel. The plea of executive necessity, though was rejected, its rigour was mellowed down to the above extent indicated above.

The Apex court further held:

It is equally settled law that the promissory estoppel cannot be used compelling the Government or a public authority to carry out a representation or promise which is prohibited by law or which was devoid of the authority or power of the officer of the Government or the public authority to make. We may also point out that the doctrine of promissory estoppel being an equitable doctrine, it must yield place to the equity, if larger public interest so requires, and if it can be shown by the Government or public authority for having regard to the facts as they have transpired that it would be in equitable to hold the Government of public authority to the promise or representation made by it. The court on satisfaction would not, in those circumstances raise the equity in favour of the persons to whom a promise or representation against Government or the public authority.

Equally promissory estoppel should not be extended, though it may be founded on an express or implied promise estemmed from the conduct or representation by an office of the State or public authority when it was obtained to play fraud on the Constitution and the enforcement would defeat or tend to defeat the constitutional goals. For instance a right to reservation either under Article 15(4) or 16(4) in favour of the Scheduled Castes, Scheduled Tribes or Backward Class was made with a view to ameliorate their status socially, economically and educationally so as to assimilate those sections into the main stream of the society. The persons who do not being to those classes, but produce a certificate to mask their social status and secure an appointment to an office or post under the State or public employment or admission into an educational institution maintained by the State or receiving aid from the State, on later investigating though belated, was found that the certificate produced was false and the

candidate was dismissed from the post or office or debarred or sent out from the institution or from the balance course of the study, the plea of promissory estoppel would always found favour with the courts and being easily extended in favour of the candidate or party that played fraud on the Constitution. It would amount not only putting a premium on the fraud on the Constitution, but also a denial to a reserved candidate and the general candidate as well. Therefore, the plea of promissory estoppel should not be extended to such areas.

Though executive necessity is not always a good defence, this doctrine cannot be extended to legislative Acts or to Acts prohibited by the statute.

26. In this case, therefore, the principles of estoppel by conduct cannot be invoked in view of the provisions contained in Sub-section (3) of Section 7 of the Bihar Finance Act read with Clause 10.5 of the Industrial Policy Resolution, 1993. (Annexure-3).

27. In *Amrapali Films Ltd. v. State of Bihar* reported in 1989 PUR 199, the law has been stated thus:

The doctrine of promissory estoppel is a branch of law which has developed a lot during the last 40 years. The doctrine of estoppel previously was in the realm of law of evidence.

Doctrine of estoppel in England had all along been permitted to be used only as a shield and not as a sword.

However, in India it has been held that the promissory estoppel/equitable estoppel confers a right which can be enforced in a court of law which includes a writ application under Articles 226 and 227 of the Constitution of India, in the High Court.

In *Corpus Juris Secundum* Volume 31 page 283 the law with regard to an estoppel by representation has been stated in following terms:

Generally an estoppel by misrepresentation arises when and if a false representation is knowingly or negligently made by the person to another ignorant of the facts with the intention that such other Act thereon and such other does reasonably rely and Act thereon in his prejudice. Where a person will fully makes a representation intended to induce another to Act on the faith of it or where, whatever his intention, a reasonable man in the situation of that other would believe that it was meant that he should act on it, and in either case that other does not Act on it as true and alters his position, there is an estoppel in pais (sic) to conclude the former from averting against the latter a different state of things as existing at the same time. An estoppel arising out of an express misrepresentation being an equitable estoppel, all of the essential elements of such an estoppel, considered in Sections 66-67 (supra), must be present. Hence, for an estoppel by misrepresentation to arise there must exist a false representation by the person sought to be estoppel, made with knowledge, actual or constructive of its falsity, to the person seeking the benefits of the

estoppel, with the intent that such person Act in reliance thereon, and that he actually did reasonable rely and Act on such representation to his prejudice.

For estoppel may be predicated on representation not made with fraudulent intent if the person making the same should have known of their falsity, and if of such character as to induce a reasonably prudent man to believe that they were intended to be acted on. If the representations not such as should induce a prudent person to rely thereon, the person making it will not be estoppel thereby.

In some jurisdiction it is essential that the party to whom the representation is made must have in good faith been ignorant of the fact and have had no convenient opportunity of ascertaining the fact. In this connection diligence in using means at command to learn the truth is essential except where a confidential relation exists between the parties.

A representation which is uncertain and vague cannot serve as a basis for estoppel.

In American Jurisprudence 2nd Volume 28. Section 28 at page 630 it has been stated as follows:

The proper function of equitable estoppel is the prevention of fraud, actual or constructive and the doctrine should always be so applied as to promote the ends of justice and accomplish that which ought to be done between man and man. Such an estoppel cannot arise against a party except when justice to the rights of others demands it, and when to refuse it would be inequitable. The doctrine of estoppel should be applied cautiously and only when equity clearly requires it to be done. Hence in determining the application of the doctrine the counter requisites of the parties are entitled to due consideration. It is available only in defence of a legal or equitable right or claim made in justice, or wrong of any character. Estoppel is to be applied against wrong doers, not against the victim of a wrong, although estoppel is never employed as a means of inflicting punishment for an unlawful or wrongful Act.

In Halsburys Laws of England, Volume 16 at page 1682. "Estoppel by Conduct" have been dealt with in para 1809 and in para 1528 at page 1073 "representation induced by party complaining" have been dealt with. It has been pointed out therein that a representation would be deprived of any effect as an estoppel if the making of it has been contributed to by breach of duty on the part of the person seeking to take advantage of it. It has further been mentioned that it is not necessary that the representation should be false to the knowledge of the party making it, though in the earlier cases it had been held such representation must have been acted upon as true by the party to whom it was made. A representation made to the person and acted on by him cannot be taken advantage of by another to whom it was not made and who has not acted on it.

It is further well known that for attracting the principle of estoppel by

representation it must be shown that in acting upon the representation the party to whom it was made should have altered his position.

In "Estoppel by Representation" by Turner, 3rd Edition in Chapter XIV of the said treatise, the learned author has considered in details the development in the branch of law of promissory estoppel and the author further says that the new estoppel does not. give rise to a permanent modification of the rights of the parties (inter se). It has further been stated that in general their original rights inter se are modified only for so long as is equitable, and the represent or may revert to the status quo, claiming on the original basis in respect of obligations falling due thereafter either by giving sufficient notice, or by restoring the representee to a relative position equivalent to that which he originally occupied. This last may be brought about by Act of the represent or may take place by the happening of some event outside the control of the parties, or by efflux of time.

In the instant case, the whitener has not pleaded that it altered its position pursuant to or in furtherance of any representation made by the respondents. Alteration of position is a sine qua non for invoking the doctrine of promissory estoppel. Further as held by the Supreme Court in the aforementioned decision the doctrine of promissory estoppel will have no application, where notice in that regard is issued by the State. The said doctrine will also have no application in a case where the same would be violative of any provisions of a statute.

In the instant case, the law has undergone a radical change in view of the ordinances promulgated whereby and where under the said Act was amended.

In C.W.J.C. No. 3188 of 1980 it has been held by this Court that previously there was no statutory provisions imposing bar upon the authorities concerned to grant permission for paying the entertainment tax under composition scheme for a period exceeding six months but as such statutory period has been brought in for the first time by insertion of the first proviso appended to Section 3 of the said Act under the provisions of the Ordinance aforementioned. Before the coming into force of the Ordinances the authorities of the State, therefore, had the power to grant permission for payment of tax under a composition scheme for a period exceeding six months and in that state of affairs, it was permissible for the petitioner to invoke the principles of promissory estoppel. But such is not the position now.

In the instant case the authorities of the State of Bihar could not have granted such permission in view of the insertion of the first proviso aforementioned, which as stated hereinbefore, has been given retrospective effect and retroactive operation. If by reason of the legal fiction created in terms of the first proviso, it is presumed that the authority had no statutory power to grant permission to the petitioner for payment of its liability by way of composition scheme, it necessarily follows that the authorities acted beyond the scope of and contrary to the statutory directions. In the case of *Chetlal Sao v. State of Bihar* 1986 PUR 149; 1986 BBCJ 109) a Full Bench of this Court considered both the principle and

principle and precedence in this regard and held as follows:

To conclude on this aspect, the answer to question No. 3 is rendered in the negative and it is held that the State is not bound by the doctrine of promissory estoppel for the acts of its subordinate done in violation of its directions or administrative instructions.

The ratio of the aforementioned Full Bench decision has been reiterated in Rita Mishra and others and 12 Other cases Vs. Director, Primary Education, Bihar, and Others, , wherein it has been held as follows:

...No concept of promissory estoppel arises against the State of its servants either act beyond the scope of their duty or contrary to its direction or standing administrative instructions...

If the doctrine of promissory estoppel has no application in relation to an act of subordinate in violation of administrative instruction, needless to add, the same will certainly have no application in relation to the action on the part of the servant of State in violation of the express provisions of the State.

28. In paragraph 2037. Phipson on his Evidence state that an estoppel by conduct may arise from agreement, misrepresentation or negligence.

29. In this case none of the aforementioned ingredients of estoppel by conduct have been pleaded.

In Estoppel by Representation by Turner at page 319, the law has been stated thus:

Estoppel by conduct is of comparatively recent development Commencing with Pickard V Sears (1837) 6 A. & E. 469, the doctrine has gradually been elucidated until its true principles have been placed on a distinct footing by the Privy Council in 1892 in the case of Sarat Chunder Day v. Gobal Chunder Laha (1898) L.R. I . A 19 . 2C3; Lord Shand (who spoke for Lord Watson, Lord Morris and Sir Richard Couch, as well as himself) stated the fundamental ground-work of estoppel in terms that entirely relieve this case of any doubt. When its true foundations are stated, it will be seen that estoppel is separated from waiver in point of principle by a very broad line of demarcation. First of all, the law of estoppel looks chiefly at the situation of the person relying on the estoppel; next, as a consequence of the first, the knowledge of the person sought to be estoppel is immaterial; thirdly, as a further consequence, it is not essential that the person sought to be estoppel should have acted with any intention to deceive; fourthly, conduct, short of positive Acts, is sufficientIt is quite plain that estoppel may be established where waiver cannot, and conversely waiver may be found where estoppel does not exist.

30. As indicated hereinbefore, it is conceded at the bar that the petitioner had no occasion to rely on the representation made by the State of Bihar and its establishment came into being prior to coming into force of the new Industrial

Policy decision upon which the reliance is sought to be placed.

31. For the reasons aforementioned, there being no merit in either of the contentions raised by Mr. Subramaniam, this application is accordingly dismissed, but in the facts and circumstances of the case, there will be no order as to costs.