

(1986) 02 OHC CK 0021

In the Orissa High Court

Case No : O.J.C. No's. 1854 and etc. of 1983, 1551, 2094 and etc. of 1984, 521 and 522 of 1985

Sri Jagannath Roller Flour Mill and Others etc.

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 12-02-1986

Acts Referred:

Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 115

Citation : (1986) 61 CLT 369 : (1987) 65 STC 384

Hon'ble Judges : R.C. Patnaik, J;D.P. Mohapatra, J

Bench : Division Bench

Advocate : Bijoy Mohanty, P.K. Mohanty and Akhil Mohapatra, for the Appellant; Standing Counsel (C.T.), A.S.C. (C.T.), Y.S.N. Murty, R.N. Panigrahi, B. Rath, N.C. Mishra, J.K. Mishra, A.K. Padhi, S.K. Padhi, M. Panda, G.R. Nai, B.N. Patnaik, K.M. Jena and A.K. Mohapatra, for the Respondent

Judgement

D.P. Mohapatra, J.—The core question for consideration in all these writ applications is whether, in the facts and circumstances of these cases, the petitioners are entitled to the concession enumerated in the industrial policy Resolution dated 18th July, 1979 operative during the period 1979 to 1983, despite its revision on 31-7-1980.

2. The petitioners are entrepreneurs who have set up rolling mills at different places in the State. They have filed these writ applications being aggrieved by the acts/ omissions of the opposite parties in not granting them the concession relating to the octroi and sales tax for a period of five years commencing from the dates their unit went into commercial production. From the pleadings of the parties, it is clear that there is no controversy regarding the material facts in these cases. The grievance of all the petitioners is of similar nature and they raise similar questions of law. In these circumstances, with the consent of the parties, the writ applications were heard together and are disposed of by this common judgment.

The Secretaries of the Department of Industries, the Department of Housing and Urban Development and the State Government have been impleaded as opposite parties in the writ applications. In addition, the Regional Manager, Food Corporation of India, the District Manager, Food Corporation of India, the Director of Industries, the Executive Officer of the concerned Municipality, the Managing Director of the State Civil Supplies Corporation and in some cases the Octroi Superintendent and the Chairman of the Municipality concerned have also been impleaded as opposite parties.

3. The gist of the case of the petitioners is that the State Government in the Industries Department announced its Industrial Policy effective from the first April 1977 up to March, 1979 by resolution dt. 1st April, 1977. In the said resolution the State Government, in order to attract entrepreneurs to set up new industrial units in the State offered several concessions. To state a few of them, it was declared that in view of the fact that the entire State was industrially backward, the State Government would provide a cash subsidy of 10% of the capital cost of the project or Rs. 10 lakhs whichever was less, for all new as well as for expansion of the existing units all over the State, but this subsidy would not be available for the units set up in the districts already declared by the Government of India as specially backward as these units would be eligible for 15% cash subsidy from the Central Government.

Item No. 6 of the concessions referred to sales tax loan, it was stated therein that the new industrial units including expansion of the existing units would be eligible for an interest-free sales tax loan every year for 5 years of production, i.e., from the 2nd year of production to the 6th year of production and the loan amount would be equal to the sales tax paid by them on their finished products to the State Government during the previous year subject to the condition that the loan amount in any one year should not exceed 8% of the gross fixed assets of the units. In respect of large industries, however, the applicability of this scheme would be declared by the State Government on the merits of each case.

Item No. 7, relating to octroi duty stated that machinery brought for the purpose of setting up new industries or expansion and renovation of the existing industries shall be exempted from payment of octroi tax. Raw materials would also be exempted from payment of octroi duty in respect of the new industries for a period of five years.

The above resolution was followed by another Policy Resolution issued by the same department on 1st April, 1979 which was to remain operative for the period 1979-1983. The concessions mentioned in the earlier resolution particularly those relating to exemptions from octroi duty and sales tax were repeated in the subsequent resolution.

According to the petitioners, being lured by the concessions including those relating to sales tax and octroi duty, they took steps to set up new rolling flour mills in small scale industries sector. On obtaining necessary permission from the

State Government in the Food and Civil Supplies Department in 1979 to set up the said mill, they registered their units with the District Industries Centre, arranged funds from banks and other financial institutions on payment of heavy interest, constructed the mill premises, installed machineries and went into production within the period the aforesaid policy was in vogue. The dates of commencement of production of their units were duly intimated to the authorities. The petitioners submit that they hopefully expected that the State Government would abide by its promise granting exemption from payment of octroi duty on the machineries and raw materials brought by them and also the concession relating to sales tax as indicated in its Policy Resolution referred to above. But the authorities of the concerned Municipalities paid no heed to the decision of the State Government enumerated in the aforesaid Policy Resolution and demanded octroi duty from the petitioners. Similar was the conduct of the some of the assessing authorities under the Sales Tax Act. In the result, the petitioners have been put to heavy financial loss and their hopes, that the nascent industrial units would be, able to make good progress in view of the concessions granted by the State Government, have been shattered. The petitioners further contend that in view of the declared policy of the State Government holding out the promise that the entrepreneurs would enjoy the concessions mentioned therein, and the petitioners, relying on the said promise, having set up new industrial units and having acted to their detriment and having changed their position thereby the former is estopped from going back upon its promise.

The fact in O. J. C. No. 2026 of 1983 are slightly different. Therein the petitioner, M/s. Lingaraj Flour Mills (P) Ltd. was granted letter of intent on 2-8-1972 when the Industrial Policy Resolution for 1971-76 was in force. But the mill was completed in June, 1980, within the period extended (up to 30-9-1980) by the State Government. Thus when the unit was completed and went into production the Industrial Policy Resolution for 1979-83 was in vogue.

On the above averments the petitioners have prayed for the following reliefs : --

- (a) To quash the revised Industrial Policy of the State Government dt. 31st July, 1980 to the extent it denies the petitioners the incentive/benefits/reliefs guaranteed to them under the Industrial Policy Resolution for the year 1979 to 1983 as bad in law and ultra vires the Constitution;
- (b) To direct the State Government to honour its promises and assurances contained in the Industrial Policy Resolution for the years 1979-83 and for a clarification/direction that the petitioners are entitled to purchase wheat from the Food Corporation of India free of octroi tax for a period of 5 years effective from 15-6-1982, i.e., the date of commencement of commercial production; and
- (c) In the alternative, for a direction that the petitioners are covered under the Industrial Policy Resolution for the years 1979-83 and therefore are entitled to full benefits thereunder and that they are not in any manner affected by the

Revised Industrial Policy dt. 31st July. 1980 and for other consequential direction to the opposite parties to make the aforesaid reliefs effective.

4. The opposite parties in their counter-affidavits do not dispute the facts stated in the foregoing paras. However, they join issue with the petitioners on the question whether they are entitled to the reliefs sought in the writ applications. It is their contention that it is open to the State Government to revise its Policy decision from time to time and that the petitioners are not entitled to claim enforcement of the policy as it initially stood ignoring its subsequent revision. The opposite parties accept the position that the concessions/exemptions relating to exemption of octroi duty and sales tax were held out to the entrepreneurs in the Industrial Policy decision dt. 1st of April, 1979, but subsequently, on further scrutiny, the State Government decided by its resolution dt. 31st July, 1980 that the said exemptions shall not be admissible to certain classes of Industrial units including flour mill. This decision was again revised by resolution dt. 1st/4th Oct. 1982 of the Industries Department whereunder it was decided that various incentives announced in the Industrial Policy Resolution would be available to rice mills, flour mills and pulse mills etc. established on medium scale and investment in fixed assets exceeding Rs. 20 lakhs.

It is the contention of the opposite parties that such revision in the policy decision from time to time was within the competence of the State Government and that the petitioners are not entitled to enjoy the facilities in the nature of concession as matters of right. It is their further contention that since admittedly the flour mills of the petitioners commenced commercial production after declaration of the revised policy of the State Government on 31-7-1980 they have done so with the knowledge that they would not be entitled to incentive/facilities declared in the resolutions dt. 1-4-1979.

5. The authorities of the Municipalities concerned have taken the stand in the counter affidavit that the Municipalities are independent authorities governed under the provisions of the Orissa Municipal Act, 1950 which empowers them to impose and collect octroi duty on goods brought within the municipal limits for sale/use/consumption in the manner prescribed under the statute. They have so imposed octroi duty in exercise of their statutory powers and the petitioners are bound to pay the same. The industrial policy decision of the State Government in no way binds the Municipalities.

6. The contention raised by the learned counsel for the petitioners is that the doctrine of promissory estoppel applies to the facts and circumstances of these cases. The State Government and the authorities under it are duty-bound to stand by and enforce the promise held out in the policy resolution relating to the concessions/exemptions in the matters of octroi duty and sales tax.

On the other hand, it is the submission of the learned counsel for the opposite parties that the principle has no application to these cases and therefore the petitioners are not entitled to the reliefs sought in the writ applications.

As noticed earlier, the main plank on which rests the case of the petitioners is the principle of promissory estoppel. The doctrine of "promissory estoppel" otherwise variously called "requisition estoppel", "quasi estoppel" and "new estoppel" has been the subject matter of consideration by the Supreme Court on several occasions. To mention a few cases AIR 1968 SC 718 (Union of India v. Anglo Afghan Agencies) Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another, Excise Commissioner, Uttar Pradesh, Allahabad and Others Vs. Ram Kumar and Others, Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, and Jit Ram Shiv Kumar and Others Vs. State of Haryana and Others,

On scrutiny of these decisions, the accepted principles that emerge are :

(a) The true principle of promissory estoppel seems to be that where one party has, by his words or conduct, made to the other a clear and unequivocal promise which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be accepted (acted?) upon by the other party to whom the promise is made and it is, in fact, so acted upon by the other party, the promise would be binding on the party making it, and he would not be entitled to go back upon it if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties and this would be so irrespective of whether there is any pre-existing relationship between the parties.

(b) The doctrine of promissory estoppel need not be inhibited by the same limitation as estoppel in the strict sense of the term. It is an equitable principle evolved by the courts for doing justice and there is no reason why it should be given only a limited application by way of defence.

(c) What is necessary for the principle to apply to a given case is only that the promiser should have altered his position in reliance on the promise.

(d) The doctrine of promissory estoppel is also applicable against Government and the defence based on executive necessity has been categorically negated.

(e) If Government does not want its freedom of executive action to be hampered or restricted, it need not make a promise knowing or intending that it would be acted on by the promisee and the promisee would alter his position relying upon it. But if Government makes such a promise and the promisee acts in reliance upon it and alters his position, there is no reason why Government should not be compelled to make good such promise like any other private individual,

(f) Since the doctrine of promissory estoppel is an equitable doctrine, it must yield when equity so requires. If it can be shown by Government that having regard to the facts as they have subsequently transpired, it would be inequitable to hold Government liable for the promise made by it the Court would not raise an equity in favour of the promisee and enforce the promise against Government. But in such a case Government would have to place material before

the Court that in the changed facts and circumstances or facts which have transpired since the making of the promise, public interest would be jeopardised if Government were required to carry out the promise. On the material to this effect, it would be for the court to decide which way equity lies.

(g) Mere claim of change of policy would not be sufficient to exonerate Government from the liability.

(h) "Promissory estoppel" has no application while exercising legislative power and cannot be invoked to compel Government to do an act prohibited by law.

(i) Government cannot be compelled to abide by a promise made by an Officer or other authority not competent to make such promise.

7. Keeping in view the principles noticed earlier, it has to be examined if on the facts and in the circumstances of these cases the doctrine of "Promissory estoppel" is applicable and if so, whether the cases of the petitioners come under any of the recognised exceptions of the said principle. The promise of exemption from sales tax and octroi tax was contained in the Industrial Policy Resolution in force during the years 1979 to 1983 having emerged from the State Government in the appropriate Department, there is no question of the promises being made by any authority not competent to make it. So far as octroi duty is concerned, there is no doubt that it is within the competence of the Municipal Council to impose the levy u/s 131(l)(kk) of the Orissa Municipal Act. But such levy is subject to the concurrence of the State Government. u/s 131-A of the Act the State Government is empowered to abolish any tax which in its opinion causes hardship to the residents of the locality of the (M.C.) subject to the limitation that exercise of such power shall be in consultation with the Municipal Council. u/s 188(A) of the Municipal Act, the State Government in consultation with the Municipal Council may exempt any class of goods or any new industry from payment of octroi imposed by the Municipal Council. From these provisions, it is clear that the Government had ample power to exempt new industries to be set up during the particular period from payment of octroi in respect of the plant and machineries brought by the entrepreneurs setting up such industries as well as raw materials used in such industries. It was for the State Government to proceed in accordance with the procedure laid down under the Statute (Orissa Municipal Act, 1950) to give effect to its promise in this regard. As noticed earlier the exemption from Octroi, as declared in the Industrial Policy Resolution, was to "be available to new industries for a period of 5 years from the date the unit goes into commercial production and this was in accord with limitation provided u/s 188(A) of the Act. Therefore, it cannot be said that the State Government acted against any express provision of law while making the promise. There is no controversy that no legislative function in question is involved in the present case. The policy decision of the State Government though executive in character could be enforced by a citizen, if he, relying on such promise, has changed his position. Hence, there is no reason why the promise held out by the State Government in the Policy Resolution cannot be enforced by the petitioners under

Article 226 of the Constitution.

8. Coming to the case of the opposite parties, the State Government has taken the plea that subsequently on close scrutiny, it was felt that the exemptions in question need not be extended to flour mills, since it was not necessary to offer such allurements to the entrepreneurs intending to set up such industries and in justification of further revision of the policy in offering to the flour mills of a particular category i. e., capital outlay of more than 20 lakhs, it is urged that sufficient number of such larger units of flour mills were not there in the State. It is not stated by the opposite parties in their counter-affidavit that any reconsideration was made on development of facts that took place after the promises were held out in the Industrial Policy Resolution dt. 1-4-1979. These facts if true, were available to be considered by the State Government at the time of formulating its Policy decision and we assume that the State Government with the vast bureaucratic machinery and man power at its disposal was well aware of all relevant facts at that time. It is also not shown that the circumstances that occasioned the revision were such that enforcement of the promise held out earlier would have prejudiced public interest. Indeed, no material is placed on this aspect on behalf of the State Government. It is common knowledge that an entrepreneur who wants to set up a new industrial unit has to carefully select the type of unit he would set up. Such selection depends on several factors, like easy availability of raw materials, market facilities for the goods to be produced, the cost involved in the project, infrastructure facilities for installation, finance, and the other incentives offered by the State Government, Central Government and other authorities for setting up such unit etc. An entrepreneur, who being attracted by the tax holiday offered by the Government, takes steps to set up an industrial unit definitely alters his position in such a manner that in most of the cases, it is not possible for him to restore status quo ante in case the exemption is suddenly withdrawn by the State Government. The importance of a definite industrial policy to be implemented for a period of time by the State Government cannot be over emphasized. On it depends the industrial growth, the employment potential to be available to its citizens and ultimately the overall growth and development of the country. Therefore, it is all the more necessary that Government should carefully make up its mind to what length it would go to offer incentives to the entrepreneur intending to set up industries in the State and having taken such a decision should seriously and efficiently implement its promise.

9. On the discussions in the foregoing paras we hold that on the facts and in the circumstances of these cases the State Government was competent to make a promise of exemption from levy of octroi on plant and machinery brought within the Municipal limits for setting up new industrial units and the raw materials used in such units for a period of 5 years from the date of commencement of commercial production, and having made that promise in the Industrial Policy Resolution applicable for the period from 1979 to 1983 was bound to enforce that promise in respect of all units that were established and went into commercial

production during that period. The subsequent revision of the policy denying the exemption to the flour mills was hit by promissory estoppel.

10. The aforesaid discussions would also hold good so far as exemption from payment of sales tax is concerned, but the matter is much simplified in the circumstances stated hereunder. The State Government in the Finance Department issued notification dt. 31-7-1980, whereunder in exercise of power conferred by Section 6 of the Orissa Sales Tax Act, 1947, (Orissa Act 14 of 1947), it amended the earlier notification No. 20206/F, CTA 14/76, dt. the 23rd April, 1976 with effect from 1-8-1980. By the said amendment it introduced item No. 26-A in the aforesaid notification. The said item reads as follows :

SINo

Description of goods Condition and exception subject to which exemption has been allowed

1 2 3

""26. A. Purchase or sale of -

(a) raw materials that is to say, goods which directly go into the composition of the finished products,

(b) machinery and spare parts thereof actually required for starting and maintaining the unit;

(c) Packing materials required for packing the finished product in the same form as manufactured by the unit, when sold to or purchased by a registered dealer who is certified by the Director of Industries as a Village/Cottage/Small Scale Industry starting production inside the State on or after 1st August, 1980;

Provided that the finished products of such industrial unit are sold inside Orissa or in course of inter-State trade or export from Orissa."

The exemption shall be allowed for a period of five years from the date of certification of the unit by the Director of Industries, Orissa irrespective of the change in the ownership, if any, provided that the dealer or his authorised agent furnishes a declaration in Form 1-A appended below.

A reading of provisions under item 26-A shows that the petitioners come within the purview of exemption provided therein since they satisfy the condition for claim of such exemption. In view of the abovementioned statutory notification, which has come into force from 1-8-1980 and has not been amended or deleted till now, the petitioners are entitled to claim the benefits of the provisions in accordance with the procedure laid down thereunder. This position is fairly conceded by the learned Standing Counsel appearing for Commercial Tax Department as well as Additional Government Advocate representing the State Government.

11. On the discussions in the foregoing paragraphs we hold that the petitioners

are entitled to exemption from levy of octroi and sales tax to the extent and in the manner specified in the Industrial Policy Resolution dated 1st April, 1979 of the State Government notwithstanding its subsequent revision in August, 1980. The State Government would take appropriate steps to exempt the units of the petitioners from levy of octroi on the plant and machineries brought for establishment of the units of the petitioners and raw materials used therein for a period of 5 years from the date of commencement of commercial production of the respective units, in accordance with the procedure laid down in the Orissa Municipal Act, 1950. This shall be done within a period of 3 months hence. The petitioners are also entitled to be exempted from levy of sales tax in respect of goods described in item 26-A quoted above used in their flour mills for a period of 5 years from the date of certification of their units in the manner and to the extent stated in the Industrial Policy Resolution 1979-83. An appropriate writ of mandamus shall issue to the opposite parties. The writ applications succeed to the extent indicated above. Parties are to bear their respective costs.

R.C. Patnaik, J.

I agree.