

State Of Gujarat & Ors vs Essar Oil Ltd. & Anr on 17 January, 2012

Equivalent citations: AIR 2012 SUPREME COURT 1146, 2012 AIR SCW 1008, 2012 (1) SCALE 397, AIR 2012 SC (CIVIL) 793, (2012) 3 CIVILCOURT 401, (2012) 2 MAD LJ 810, (2012) 3 RECCIVR 667, (2012) 1 SCALE 397, (2012) 2 WLC(SC)CVL 437, 2012 (4) KCCR SN 254 (SC)

Bench: Jagdish Singh Khehar, Asok Kumar Ganguly

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO_599_ OF 2012

(Arising out of SLP (C) No.17130/2008)

State of Gujarat & others

...Appellant(s)

- Versus -

Essar Oil Limited and another

...Respondent(s)

J U D G M E N T

GANGULY, J.

1. Leave granted.

2. This appeal is directed against the judgment of the High Court of Gujarat dated 22.04.2008 in Special Civil Application No.24233/2007, whereby the Respondent No. 1 herein, Essar Oil Limited (hereinafter "Essar") was given the benefit of Sales Tax incentive under the Government of Gujarat "Capital Investment Incentive to Premier/Prestigious Unit Scheme, 1995-2000" (hereinafter "the said Scheme")

3. The State Government in the Industries and Mines Department vide Resolution dated 11.09.1995 introduced the said scheme to accelerate development of the backward area of the State and to create large-scale employment opportunities.

4. The operative period of the said scheme was from 16.08.1995 upto 15.08.2000, during which new units have to go into commercial production.

5. The Scheme envisaged grant of Sales Tax incentives by way of Sales Tax Exemption or Sales Tax Deferment or Composite Schemes, for Premier/Prestigious Units according to the location, investment and status of the project. Essar fell in the category of premier unit i.e. new industrial unit having a project cost of more than Rs.1,000/- crores and employing 100 workers on a regular basis and following the employment policy of the State Government. Clause

(v) of the Scheme defined premier unit in the following terms:-

"(v) PREMIER UNIT A new industrial unit or industrial complex fulfilling the following criteria will be considered for granting status of a "Premier Unit".

(a) The industrial unit shall have a project cost of Rs.500 crores or more. Such units having project cost of Rs.1,000 crores and above shall be entitled for extended period to avail incentive as provided under para 6 B.

(b) Only one unit per taluka will be eligible for the Premier Unit status. In banned area no unit is permitted.

(c) The unit shall employ at least 100 workers on a regular basis and shall follow the employment policy of the State Government."

6. Part II of the said Scheme provided that the rate of incentive would depend on the location, investment and status of the project. The incentives offered were sales-tax exemption or sales-tax deferment or composite scheme. There is no dispute about the fact that Essar opted for sales-tax deferment scheme. As per clause 6(i)(B), the rate of incentive applicable to Essar was the rate available for the most backward area. The extent of exemption was 125% of eligible fixed capital investment.

7. Part II Clause (iii) (b) provided that Under the Sales Tax Deferment incentive scheme, the recovery of sales tax connected by the unit on sale of goods manufactured by it including intermediate products, by products and scrap/waste generated as incidental to manufacturing activities and turnover tax, leviable to Government will be deferred and amount so deferred will be recovered in six equal annual installments by Sales Tax Department beginning from the financial year subsequent to the year in which the unit exhausts limit of incentive granted to it under the scheme or after the expiry of relevant period or time limit during which deferment is available or whichever is earlier.

8. Since Essar's investment was going to be more than Rs.1,000 crores, the duration of incentive of sales-

tax deferment was to be for a period of 17 years from the date of commercial production.

9. Clause 6(v) of the said Scheme provided for effective steps for extending date of commercial production in the following terms :

"6(v) Effective steps for extending date of commercial production :

The unit which cannot go into commercial production before expiry of the scheme will be allowed to go into commercial production beyond the last date of the scheme provided it has taken the following effective steps: (1) The industrial unit should have obtained provisional registration as a Prestigious/Premier unit before 15th August 2000.

(2) 25% of project cost should have been incurred before 15th August 2000. The unit which has taken above effective steps will be allowed to go into commercial production as shown below:

(a) The unit with project cost above Rs.100 crores but below Rs.300 crores should go into commercial production on or before 15th August 2002.

(b) The unit with project cost more than Rs.300 crores should go into commercial production on or before 15th February 2003.

Such units shall have to apply to industries Commissioner for extending date of commercial production by 31st August 2000."

10.A High Power State Level Committee (hereinafter "HPSLC") was the Sanctioning Authority for granting permanent registration of all the Prestigious/Premier Units

11.Part III provides the procedure for Registration for Premier/Prestigious Status, the relevant clause of the said Part in respect of instant case is set out below:

"An Industrial unit eligible for Prestigious/Premier status under the scheme will apply to Industries Commissioner in prescribed form before expiry of the scheme along with details of following effective steps.

i) Possession of plot or shed in GIDC Estate.

For units located outside GIDC Estate, the unit must be in legal possession of land with valid non-agricultural use permission of industrial use or as per Revenue Act as modified from time to time.

ii) The Letter of intent/Letter of Approval or Registration/ obtained receipt against filling of IEM to the appropriate authority.

iii) NOC of GPCB (Gujarat Pollution Control Board)

iv) Detailed Project Report.

The following procedure will be adopted for granting the temporary and permanent Prestigious/Premier registration.

(a) The Industries Commissioner shall give provisional registration to the eligible prestigious/premier unit after approval of committee where applicable.

(b) The eligible unit after completion of project will apply to Commissioner for prestigious/premier

Industries Commissioner will carryout the assets verification and submit a verification report to the High Power State Level Committee, for granting permanent registration."

12. Some relevant facts which arose prior to the floating of the Scheme and which are necessary for appreciating the said Scheme, as contended by Essar and which the records also shows, are as under.

13. Essar was encouraged by the State Government to set up a major venture at Vadinar in Jamnagar District of Gujarat as a 100% export oriented unit for refining of petroleum products with a capacity of 9 Million Tons per annum at an estimated project cost of Rs. 1900 crores in collaboration with M/s Bechtel Inc., USA.

14. By letter dated 11th April, 1990, the then Chief Minister of the State of Gujarat wrote to the Ministry of Planning, Government of India, stating that the project was expected to generate foreign exchange earnings of over Rs.3000 crores within a period of 5 years and that it was expected to be set up in 36 months. It was anticipated by the State Government that the project would "completely change the face of the Vadinar area, which is traditionally a backward area of Gujarat offering direct and indirect employment and will encourage growth of various other ancillary industries in that region".

The letter further said that the project had the full support of the Government of Gujarat and it was being accorded highest priority and that Essar's proposal for setting up the oil refinery should be cleared by the Government of India urgently. The clearance for setting up the oil refinery was then granted by the Government of India.

15. In January, 1993, Essar applied to the Gujarat Pollution Control Board (GPCB) for grant of a 'No Objection Certificate' to establish the refinery for manufacturing several kinds of petroleum products.

By letter dated 15th February, 1993, the GPCB stated that it had no objection from the Environmental Pollution potential point of view in the setting up of the refinery project subject to certain environmental pollution control measures to be taken by the appellant. Essar's proposal regarding the environmental pollution control system was approved by the GPCB on 17th April, 1993 and a Site Clearance Certificate was issued on that date.

16. On 10.11.1994, Essar filed an application for right of way over 15.49 hectares of forest land for laying Submarine Crude Oil Pipeline, Cooling Water/Return Water Pipeline and Product Jetty for establishment of its Refinery Project at Vadinar, District Jamnagar, to the Conservator of Forests, Marine National Park, Jamnagar. Undisputedly, 15.49 hectares of forest land applied for includes 8.79 hectares of Jamnagar Marine National Park and Sanctuary. Therefore, permission under Section 2 of the Forest Conservation Act ("FCA") was required for the entire 15.49 hectares. At the same time, permission of State Government was required under the Wildlife Protection Act ("WPA") for 8.79 hectares.

17. On 13.02.1995, the State Government requested the Chief Conservator of Forests, Regional Office, Western Region, Bhopal, to move the Government of India to issue suitable orders to allow Essar to make geophysical survey in Marine National Park/Sanctuary area. The proposal was forwarded by the Chief Conservator of Forests, Bhopal to the Government of India on 15.05.1995.

18. The Conservator of Forests recommended and forwarded the proposal of Essar for Right of Way to the Chief Conservator of Forests (WL) by letter dated 2nd June, 1995 along with an application in the prescribed form seeking prior approval from the Central Government under Section 2 of FCA. The application with its enclosures together with the recommendation of the State Government that 15.49 hectares of forest land be made available to the appellant, was forwarded to the Central Government by the Central Chief Conservator of Forests on 3rd February, 1997.

Upon receipt of the proposal of the State Government, the Central Government constituted a team for joint inspection of the area. The report of the joint inspection team was that the proposed activity of the appellant would not have much ramification from the forestry point of view and the damage would only be temporary in nature in a localized area during the construction phase.

19. On 08.09.1995, the State Government in its Forests and Environment Department informed the Government of India in the Ministry of Environment and Forests, inter alia, that the approval "in principle" was granted to Essar to install Single Buoy Mooring / Crude Oil Terminal / Jetty and connecting pipeline in the National Marine Park and Sanctuary area in Vadinar, District Jamnagar on the terms and conditions to be decided in due course by the State Government.

20. On 11.09.1995 the said Scheme was announced and thereafter on 01.02.1996 Essar applied in the new format to the Industries Commissioner, Gandhinagar for registering the Industrial Undertaking as a "Premier/Prestigious Unit" under the said Scheme.

21. On 29.05.1996 the Forest and Environment Department, State of Gujarat made a proposal to Government of India seeking approval under Section 2 of FCA for diversion of 15.49 hectares of forest land for construction and operation of certain offshore and onshore facilities for a grass root refinery project of Essar.

22. On the basis of the letter-dated 30.09.1997 of the Principal Chief Conservator of Forests, the State Government conveyed on 16.10.1997 its permission under section 29 of WPA to Essar's proposal of right to way through the National Park and Sanctuary subject to Essar's compliance with certain terms and conditions including obtaining permission of the Central Government under the FCA, 1980 (which was granted on 08.12.1999, mentioned later) and also getting clearance under the Coastal Regulation Zone (CRZ) Regulations, which was granted on 03.11.2000.

23. This permission was conveyed to Essar by the Conservator of Forests under cover of his letter-dated 18.10.1997. The permission was, however, restricted to the Kandla Port Trust area. Kandla Port Trust granted permission to Essar to install "marine facilities" on 10.10.1997.

24. On 27.11.1997 the Ministry of Environment & Forest, Government of India granted "in-principle" approval to Essar under FCA, 1980 for diverting 15.49 hectares of forest land for non-forest purpose.

25. On 25.06.1999 Essar was issued the provisional Premier Registration Certificate by the Industries Commissioner. The provisional certificate was valid upto 15.08.2000 i.e. the last date of Scheme, within this time period Essar was obliged to start commercial production, failing which Essar would have to apply for extension of date of commercial production.

26. In the meantime in view of the permissions granted to install "marine facilities", Essar started construction work of laying of water in-take jetty and product jetty in the forest area of Marine National Park and Marine Sanctuary. Essar's grievances are that despite the aforesaid permissions being given to them for construction, the State Forest Department forced Essar to stop work and

further lodged on 19.3.1999 a criminal complaint against Essar and its contractor, for offence committed under sections 17(A), 29, 35(6), 51(1) and 58 of the WPA and section 26 of the Indian Forests Act.

27. In April 1999, a writ petition being Special Civil Application No.2840/1999 in the nature of Public Interest Litigation was filed before the High Court of Gujarat by one Halar Utkarsh Samiti (hereinafter "Samiti") alleging serious violations of several environmental legislations on the part of Essar, who was impleaded as Respondent No.4 in the petition.

28. By interim order-dated 20.04.1999 passed in that PIL High Court directed Essar not to carry on any construction activity in the Marine National Sanctuary and Marine National Park in violation of the statutory provisions including the provisions contained in Wild life (Protection) Act, 1972.

29. By order-dated 20.08.1999 the High Court disposed of the said PIL in which Essar undertook to file an Undertaking to the effect that they would not carry out any construction activities at the site in question, without obtaining the approval from the authorities. Pursuant to the said order, on 28.09.1999 Essar filed an undertaking to the following effect:

"...no construction activities or marine facilities will be undertaken without obtaining the approval from the authorities including those which are under process before the authorities.

This undertaking is given without prejudice to the rights and contentions of the Respondent No.4.

This undertaking will come to an end as and when the permission is granted by the authorities."

30. In the meantime on 09.09.1999, a charge sheet was filed against the officers of Essar and its contractor in respect of earlier mentioned offences allegedly committed by them under the WPA and FCA.

31. On 08.12.1999 the Ministry of Environment and Forest, Government of India granted approval under section 2 of the FCA for the total land of 15.49 hectares of forest land.

32. In April 2000, said Samiti filed another PIL being Special Civil Application No.1778, and subsequently two other PILs were also filed by one Jan Sangarsh Manch and one Shri Alpesh Y. Kogje, being Civil Application Nos.5476 and 5928 of 2000, (hereinafter "second PILs") in the High Court of Gujarat challenging, inter alia, the permission granted by the State Government to one Bharat Oman Refineries Ltd. ('BORL') to lay pipeline in the Marine National Park and Sanctuary Area. It is pertinent to note here that Essar was not a party to these petitions.

33. On 29.04.2000 the Government of Gujarat discontinued the said Scheme with effect from 01.01.2000.

However, vide the same Government Resolution dated 29.04.2000, it was specifically mentioned that industry units in pipelines cases which have been registered should start production within two years from January 1, 2000 failing which such units shall be rendered ineligible for sales tax incentive.

Therefore, the time to start commercial production was thus extended to 01.01.2002. It is common ground that Essar, being a registered unit, was entitled to the benefit of the said extension.

34. Before the High Court, when proceedings in respect of the second PILs were going on, the counsel of Government of Gujarat placed a copy of the letter-

dated 25.07.2000. Relying on the letter, the High Court noted that there were two more pending proposals for laying pipeline in the Marine Park/Sanctuary Area with the State Government - one from Essar and the other from one Gujarat Poshitra Port Ltd.

35. Before the High Court, the State Government submitted that the proposal from Essar for laying down pipelines in Marine National Park and Marine Sanctuary, Vadinar in Jamnagar District has been only approved 'in principle' vide letter-dated 08.09.1995. However, formal sanction under section 29 of the WPA, 1972 is yet to be given by the State Government.

36. By judgment and order dated 13.07.2000, 18.07.2000, 20.07.2000, 27.07.2000 and 03.08.2000 the High Court, in the second PILs, restrained the Government of Gujarat from granting any more authorization and permission for laying down any pipeline in any part of the sanctuary or the national park. As a result of this order, Essar was not given permission to lay down pipelines by the State Government.

37. Being aggrieved, inter alia, on the ground that it was not a party to the second PILs, Essar filed a review/recall application before the High Court being MCA No.250 of 2011 in SCA No.1778 of 2000, inter alia, seeking review and recall of the judgment and order dated 13.07.2000, 18.07.2000, 20.07.2000, 27.07.2000 and 03.08.2000 passed in the second PILs by the High Court and a further declaration to the effect that Essar's project at Vadinar was not affected in any manner by the said judgment.

38. By judgment and order dated 23.02.2001 the High Court rejected the said application for review on the ground that there was a factual controversy between Essar and the State Government and that therefore the grievance of Essar was beyond the scope of review.

39. Meanwhile, on 12.04.2001 the Government of Gujarat extended the time for going into commercial production upto 15.08.2003 for various pipeline units including Essar, vide Government Resolution dated 12.04.2001. By that time Essar had obtained Provisional Premier Unit Registration before 15.08.2000 and had also incurred 25% of the Project Cost before 15.08.2000 and therefore, it was entitled to the benefit of this extension.

40.Essar challenged the aforesaid judgment and order dated 13.07.2000, 18.07.2000, 20.07.2000, 27.07.2000, 03.08.2000 and 23.02.2001 of the High Court delivered in the second PILs and the rejection of its review petition in that second PILs respectively by way of filing Special Level Petition being (SLP) CC No.3654 of 2001 [later SLP No.9454- 9455 of 2001] before this Hon'ble Court.

41.By interim order-dated 11.05.2001 this Court granted stay of the judgment of the High Court in so far as Essar was concerned in SLP No.9454-9455 of 2001 i.e. SLP filed by Essar. The text of the order of this Court is set out:

"Permission to file Special Leave Petition is granted.

Issue notice.

Stay of the High Court judgment in so far as the petitioner is concerned.

Counter affidavit be filed within four weeks. Rejoinder be filed within four weeks thereafter. List after eight weeks."

42.In view of the above stay order granted by this Court, Essar moved the State Government for permitting it to proceed with the construction of jetty and laying the pipeline. By letter dated 29.10.2001, the State Government in the Forests and Environment Department specifically called Essar to ensure that no construction activities were commenced before obtaining all necessary clearances from different Government departments, agencies and the conditions stipulated by the Ministry of Environment and Forests, Government of India as well as the Forests and Environment Department of the State Government were strictly complied with.

However, Essar did not commence the construction of jetty or laying down the pipeline in the National Marine Park/Sanctuary area. One thing which is of some importance is that despite the stay of this Court and the Government letter dated 29.10.2001, Essar did not challenge the Government stand in the pending special leave petition filed by it in this Court.

43. It is also pertinent to note that the Government of Gujarat had also challenged the judgment and order dated 13.07.2000, 18.07.2000, 20.07.2000, 27.07.2000 and 03.08.2000 of the High Court passed in the second PILs by way of filing Special Leave Petition being (SLP) CC No.5123-5125 of 2001 (later SLP No.17694-96 of 2001) before this Court, wherein by interim order dated 24.09.2001 this Court passed the following operative order:

"Issue notice.

Tag with SLP(C) 9454-9455/2001. There will be status quo as of today with the result that any permission which has been granted is not stayed. It will be open to the State Government to consider the granting of further permission which will be subject to the outcome of this appeal."

44.Essar just requested by its letter dated 11.04.2002 the Industries Commissioner to extend the date of commercial production to 30.11.2004 instead of 15.08.2003 for the purpose of availing the incentive benefit under the Scheme and cited that the delay in completing the project and consequent delay in starting commercial production was due to the factors beyond the control of Essar. Further by letter-dated 07.05.2002 Essar in continuation of the letter-dated 11.04.2002 requested the Industries Commissioner to extend the date of commercial production to August 2006.

45.The Industries Commissioner refused to grant any further extension of time vide its letter-dated 28.05.2002 and also made it clear to Essar to go into commercial production within the specified time i.e. till 15.08.2003. Essar, therefore, submitted a representation dated 19.06.2002 to the Chief Minister pointing out the circumstances which had delayed the completion of the project. Similar representations were thereafter made to different authorities of the State Government on 27.06.2002, 14.03.2003, 30.07.2003, 02.12.2003 and 26.12.2003.

It appears that the said representations were not responded to.

46.By an order-dated 19.01.2004, this Court quashed and set aside the judgment dated 03.08.2000 of High Court and directed the State Government to issue the authorization to Essar in the requisite format under Sections 29 and 35 of the Wild Life (Protection) Act within a fortnight after disapproving the interpretation placed by the High Court on the provisions of the Wild Life (Protection) Act, 1972.

This Court took the view that the permission granted by the State Government on 16.10.1997 was the permission contemplated by Section 29 of the Wild Life (Protection) Act.

47. In compliance with the above judgment, by letter dated 12.02.2004, the State Government authorized the Chief Wild Life Warden, Gujarat State under Sections 29 and 35 (6) of the Wild Life (Protection) Act to permit Essar for laying oil pipeline in the National Marine Park/Sanctuary area. The Chief Wild Life Warden also issued the requisite permission on 27.02.2004.

48. In the meantime, the accused i.e. officials and contractors of Essar involved in the Criminal Case of 1999 moved an application for discharge before the Metropolitan Magistrate at Khambalia. By order-

dated 27.05.2004 the Magistrate allowed the said application and discharged the accused persons from all the charges levelled against them.

49.In view of the above permission granted by the Chief Wild Life Warden under Sections 29 and 35 of the Wild Life (Protection) Act, Essar again sent representations dated 06.04.2004, 12.07.2004, 27.07.2004 and 22.12.2004 to the Government requesting extension of time limit for commencement of commercial production for the purpose of sales tax deferment incentive scheme. In view of the above representations, the State Government in the Industries and Mines Department vide Resolution dated 10.05.2006 constituted a Committee comprising of the Advisor to the Chief

Minister, the then Additional Chief Secretary, Finance Department and the then Principal Secretary, Industries and Mines department. The Committee was constituted to consider various such representations of Essar and other Companies.

50. On 26.11.2006 Essar commenced commercial production and started paying sales tax on the products sold by it, under protest.

51. As nothing was heard from the said Committee constituted in the year 2006 and the representations made by Essar in respect of granting Sales Tax Deferment were undecided, Essar filed a writ petition being Special Civil Application No. 24233/2007 before the High Court contending that for no fault of it, Essar was prevented from completing the project and that it was on account of being so prevented, Essar could not commence the commercial production within the time limit of 15.08.2003.

52. It is pertinent to note at this stage that before the High Court, Essar had expressly withdrawn the allegation that Department of Forest and Conservation, Government of Gujarat was guilty of delay. This is noted in para 6.2 of the High Court judgment which is set out below:

"6.2 While in the memo of the petition some allegations/submissions have been made attributing the delay to the Forests and Conservation Department of State Government, but the petitioner Company is not interested in pursuing those allegations and in fact would like to withdraw those allegations and the petitioner would like to invoke the following maxims of equity:-

(i) "An act of the Court shall prejudice no man", and

(ii) "The law does not compel a man to do that which he cannot possibly perform."

53. Before the High Court Essar contended that reason for delay in commencement of commercial production was on account of the injunction granted by the High Court on 13.07.2000/03.08.2000, restraining the State from granting further permission under Section 29 of the WPA in the second PILs (where Essar was not a party). And this situation continued till 27.02.2004, when pursuant to the judgment-dated 19.01.2004 of this Court the Chief Warden granted the said permission. Therefore Essar was entitled to get benefit of the exclusion of the said intervening period of from 13.07.2000 to 27.02.2004 i.e. three years and 230 days in calculating the time limit for commencement of commercial production.

54. By impugned order-dated 22.04.2008 the High Court excluded the aforesaid intervening period and as such extended the time limit for commencement of commercial production from 15.08.2003 to 02.04.2007 after observing in the impugned judgment as under:

"17. ...In the facts of the present case also, the State Government had granted the permission on 16.10.1997 and the Central Government had granted the permission on 08.12.1999. The very fact that the Chief Wild Life Warden issued the permission

on 27.02.2004 after the decision of the Apex Court on 19.01.2004 is itself sufficient to show that the request made by the petitioner for excluding the intervening period between 13th July/3rd August, 2000 and 27.02.2004 is reasonable."

55. It is also pertinent to note herein that in the impugned order, a direction was given to the State Government that while considering Essar's application for the incentives, the State Government shall stipulate the following conditions, provided the final eligibility certificate is issued within one month from the date of receipt of the judgment:-

"22. ...

(i) The petitioner shall not be given the benefit of deferment of Sales-tax/Value Added Tax beyond 14th August, 2020.

(ii) The amount of Sales-tax/VAT already paid/payable by the petitioner for the period upto today shall not be refunded to the petitioner.

(The above amount is stated by the petitioner company to be above Rs.300 crores)

(iii) Without adjusting the Sales-tax/VAT paid for the period upto today as aforesaid, the amount otherwise computable under the Incentive Scheme on the basis of the eligible capital investment made by the petitioner in the unit under consideration shall be reduced by Rs.700 crores."

56. The above direction is based on the submissions of the counsel of both the parties, which were made without prejudice to their respective cases. The counsel of Essar submitted a proposal that Essar was ready to make the above mentioned concessions no.

(i) & (ii) if the State Government does not challenge the decision of the High Court and within one month from that day the State Government grants Essar the benefit of the Sales Tax/VAT deferment as per the said scheme. In response to the said proposal the learned counsel for the State Government replied that assuming that Essar was found to be eligible under the said Scheme, the amount otherwise computable under the Incentive Scheme on the basis of the eligible capital investment made by Essar in the unit under consideration shall be reduced by Rs.700 crores.

57. The learned counsel for the respondents made an attempt to urge that the judgment of the High Court was virtually rendered by way of a concession and the impugned judgment is a consent order. As such the appeal, at the instance of the State, is not maintainable. Learned counsel for the State strongly opposed this contention and submitted that the same contention was raised at the time of admission of the special leave petition. Then, further affidavit was filed by the State with the leave of the Court.

The Court was satisfied and then issued notice.

58. Ultimately, the matter was argued on merits before this Court and it was common ground that the impugned judgment is not by consent.

59. The impugned judgment of the High Court is based on two basic line of reasoning that the respondents are entitled to the benefit of Sales Tax Waiver Scheme firstly on the principle of restitution and secondly, that the respondents cannot be made to lose the benefit under the Sales Tax Waiver Scheme, for an act of Court. In this regard it has been urged that the respondents could not set up the plant for the purpose of commercial production within 15th August, 2003 as it was prevented from doing so by an order of injunction of the High Court. An order of injunction is an act of Court and an act of High Court cannot prejudice anyone. The loss of time suffered by the respondent as a result of the injunction order cannot cause any prejudice to the respondent.

60. Examining the aforesaid two contentions, this Court finds that there is an overlapping area between the two. The concept of restitution is basically founded on the idea that when a decree is reversed, law imposes an obligation on the party who received an unjust benefit of the erroneous decree to retribute the other party for what the other party has lost during the period the erroneous decree was in operation. Therefore, the Court while granting restitution is required to restore the parties as far as possible to their same position as they were in at the time when the Court by its erroneous action displaced them. In the case of Lal Bhagwant Singh v. Sri Kishen Das reported in AIR 1953 SC 136, Justice Mahajan speaking for a unanimous three-Judge Bench of this Court explained the doctrine of restitution in the following words:-

"...the principles of the doctrine of restitution which is that on the reversal of a judgment the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost and that it is the duty of the Court to enforce that obligation unless it is shown that restitution would be clearly contrary to the real justice of the case..."

61. Subsequently, in Binayak Swain v. Ramesh Chandra Panigrahi and another (AIR 1966 SC 948) this Court relied on the principles in Bhagwant Singh (supra) and explained the concept of restitution as follows:-

"...The principle of the doctrine of restitution is that on the reversal of a decree, the law imposes an obligation on the party to the suit who received the benefit of the erroneous decree to make restitution to the other party for what he has lost."

62. The concept of restitution is virtually a common law principle and it is a remedy against unjust enrichment or unjust benefit. The core of the concept lies in the conscience of the Court which prevents a party from retaining money or some benefit derived from another which he has received by way of an erroneous decree of Court. Such remedy in English Law is generally different from a remedy in contract or in tort and falls within a third category of common law remedy which is called quasi contract or restitution.

63.If we analyze the concept of restitution one thing emerges clearly that the obligation to restitute lies on the person or the authority that has received unjust enrichment or unjust benefit (See Halsbury's Laws of England, Fourth Edition, Volume 9, page 434).

64.If we look at Restatement of the Law of Restitution by American Law Institute (1937 American Law Institute Publishers, St. Paul) we get that a person is enriched if he has received a benefit and similarly a person is unjustly enriched if the retention of the benefit would be unjust. Now the question is what constitutes a benefit. A person confers benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other or in a way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another but also where he saves the other from expense or loss. Thus the word "benefit" therefore denotes any form of advantage (page 12 of the Restatement of the Law of Restitution by American Law Institute).

65.Ordinarily in cases of restitution if there is a benefit to one, there is a corresponding loss to other and in such cases; the benefiting party is also under a duty to give to the losing party, the amount by which he has been enriched.

66.We find that a person who has conferred a benefit upon another in compliance with a judgment or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set-

aside, unless restitution would be inequitable (page 302 of the Restatement of the Law of Restitution by American Law Institute).

67.Equity demands that if one party has not been unjustly enriched, no order of recovery can be made against that party. Other situation would be when a party acquires benefits lawfully, which are not conferred by the party claiming restitution, Court cannot order restitution.

68. From the facts of the case which has been discussed above it is debatable whether the respondent's inability to avail benefit under the said Scheme is because of its own act or because of the act of the appellant. There is a reasonable basis in the argument of the appellant that after this Court granted the stay order on 11.5.2001 on the special leave petition filed by Essar, the respondents should have made an effort of obtaining the necessary licence by again coming to the Court.

Admittedly Essar did not do it. Essar merely represented to the State for grant of licence.

Assuming that the State had not responded favourably to the representation of Essar by giving the clearance, it was open to Essar to approach this Court for some order as its special leave petition was pending before this Court. Essar did not do it.

Therefore, the question remains whether Essar acted with due diligence in obtaining the equitable remedy of restitution. It is well known that due diligence must be exhibited by the party to seek

equity.

69. Now, if we take the case of Essar on a higher plain that it has done its duty even then it has been denied of the benefit of the said scheme, even then there is no question of restitution by the State for the simple reason that it is nobody's case that State has received any unjust benefit or any unjust enrichment in view of stay order given by the High Court in the second PILs filed in the High Court. On the contrary, it is clear from the record that the State contested those proceedings and specially, challenging the orders of the Gujarat High Court dated 13.07.2000, 18.07.2000, 20.07.2000, 27.07.2000 and 03.08.2000 on the second PILs, the State has filed its SLP. Therefore, the State has not at all gained or received any benefit as a result of the orders passed by the High Court on the second PILs.

Therefore, the principle of restitution cannot be applied against the State, the appellant before us.

The judgment of the High Court to that extent is erroneous.

70. The second principle that an act of court cannot prejudice anyone, based on latin maxim "*actus curiae neminem gravabit*" is also encompassed partly within the doctrine of restitution. This *actus curiae* principle is founded upon justice and good sense and is a guide for the administration of law.

71. The aforesaid principle of "*actus curiae*" was applied in the case of *A.R. Antulay v. R.S. Nayak & another* reported in (1988) 2 SCC 602, wherein Sabyasachi Mukharji, J (as his lordship then was) giving the majority judgment for the Constitution Bench of this Court, explained its concept and application in para 83, page 672 of the report. His lordship quoted the observation of Lord Cairns in *Rodger v. Comptoir D'escompte De Paris*, [(1869-71) LR 3 PC 465 at page 475] which is set out below:

"Now, their Lordships are of opinion, that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the Suitors, and when the expression 'the act of the Court' is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those Tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court."

72. In the *Antulay* case (*supra*), it was found that directions of this Court in its order-dated 16.02.1984 in the previous *Antulay* Case {*R.S. Nayak v. A.R. Antuley*, (1984) 2 SCC 183} was given *per incuriam* and without noticing the provisions of section 6 and 7 of the Criminal Law Amendment Act, 1952 and also the binding nature of the Larger Bench decision in *The State of West Bengal v. Anwar Ali Sarkar & another* (AIR 1952 SC 75).

73. It was made clear in the *Antulay* Case [(1988) 2 SCC 602] that when Court passes an order, which is rendered *per incuriam*, and the party suffered because of the mistake of the Court, it is the Court's

duty to rectify the said mistake. It is in that context that the concept of actus curiae can be invoked. In the instant case the order passed by the High Court in the second PILs was overturned by this Court by its order-dated 19.01.2004 on a different interpretation of section 29 of the WPA.

74.This Court while giving a different interpretation of section 29 of WPA never held that High Court acted per incuriam in rendering its judgment on second PIL filed by the Samiti. Therefore in the case of a mere erroneous judgment of a Court the principle of "actus curiae" cannot be invoked.

75.The learned counsel for Essar in support of the applicability of Doctrine of Restitution has cited the case of South Eastern Coalfields Ltd. v. State of M.P. & others reported in (2003) 8 SCC 648 wherein this Court through R.C. Lahoti, J (as his Lordship then was) in para 27 had observed that:

"Section 144 C.P.C. is not the fountain source of restitution, it is rather a statutory recognition of a pre-existing rule of justice, equity and fair play. That is why it is often held that even away from Section 144 the Court has inherent jurisdiction to order restitution so as to do complete justice between the parties."

76.His Lordship at para 28 observed as under:

"That no one shall suffer by an act of the court is not a rule confined to an erroneous act of the court; the 'act of the court' embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the Court being wrongful or a mistake or error committed by the Court; the test is whether on account of an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the act of such party. The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made."

77.As discussed earlier a mere mistake or error committed by Court cannot be a ground for restitution. Now in view of the above, two questions arise for consideration:

(i) Whether the orders dated 13.07.2000, 18.07.2000, 20.07.2000, 27.07.2000 and 03.08.2000 of the High Court whereby the appellant was restrained from giving any further permission for laying pipelines has resulted in any undue advantage to appellant?

(ii) Whether in respect of the order dated 13.07.2000, 18.07.2000, 20.07.2000, 27.07.2000 and 03.08.2000 of the High Court, later on reversed by this Court on 19.01.2004 on a different interpretation of Section 29 of WPA, the actus curiae principle can be invoked.

78. Coming to the first question, as mentioned above, it is clear that the appellant had also challenged this restraining order before this Court. It cannot be said by this restraining order the appellant had gained any undue advantage. On the contrary, twin objects of development of the backward areas and employment opportunities, which were sought to be achieved by the appellant by floating the said scheme, were adversely affected.

79. Therefore the principles in *South Eastern Coalfield Ltd. (supra)* are not attracted here.

80. In *Mumbai International Airport Pvt. Ltd v. Golden Chariot Airport & another*, (2010) 10 SCC 422, after a Civil Court returned the plaint filed by respondent, the respondent came up in appeal against the said order before the High Court and expressly gave up its claim of irrevocable license in order to revive the suit and on such stand, the High Court remanded the suit for trial. Thereafter the respondent therein tried to urge the same plea of irrevocable license before the Trial Court and this Court. This Court did not accept the plea holding that the common law doctrine of approbation and reprobation is well established in our jurisprudence and applicable in our laws too. That principle has no application to the facts of this case.

81. The principles decided in the case of *Karnataka Rare Earth & Anr. v. Senior Geologist, Department of Mines & Geology and Anr.*

, reported in (2004) 2 SCC 783 is equally of no assistance to Essar. In that case both the doctrines of "actus curiae" and "restitution" were discussed together. We have already held that these equitable doctrines are not applicable in the facts of the present case. In *Karnataka Rare Earth (supra)*, the appellants, on the basis of an interim order granted by this Court, extracted minerals and disposed of the same.

Ultimately the interim order was vacated by this Court and the appeal filed by *Karnataka Rare Earth* was dismissed. In that context this Court held that the appellants cannot enjoy the benefits earned by them under the interim order of this Court and this Court held that the demand of the State for the price of mines and minerals from the appellant is neither unreasonable nor arbitrary.

82. Reliance was placed on the judgment of this Court in *Bareilly Development Authority v. Methodist Church of India & Anr.*, reported in (1988) Supp SCC 174. In that case no principle was decided but the case was decided on its facts. In *Bareilly Development Authority (supra)*, a commercial complex was to be constructed within a time schedule. During the said period of construction, the work had to be stopped in view of the demolition order passed by the authority. This Court held that the said period has to be excluded in computing the period of completion. It was not a case of construing any exemption scheme. What was construed was condition 6 of the construction sanction plan. Therefore principles of *Bareilly Development Authority (supra)* cannot be applied.

83. In the case of *Hitech Electrothermics & Hydro Power Ltd. v. State of Kerala & Ors.*, reported in (2003) 2 SCC 716 it is true that this case is one relating to grant of concessional tariff rate. However the fact shows that in that case the Electricity Board provided power to the appellant only in the year

1998 and the Court found that the delay in giving power was for sheer inaction on the part of Electricity Board. In that context this Court held that literal construction to the entitlement of concessional tariff rate should not be done and the Court also noted that the appellant enjoyed concessional tariff rates on the basis of interim order of Court.

84. In the instant case, no inaction on the part of appellant was pleaded by Essar. In fact before the High Court, Essar expressly gave up its plea of delay against the appellant. In fact the High Court passed the injunction order not because of the inaction of the appellant but the said order was passed in a proceedings which was opposed by appellant right upto this Court. Therefore, the case of Hitech Electrothermics (supra) is clearly distinguishable on facts.

85. The learned counsel for Essar relied on a decision of this Court in Ishwar Dutt v. Land Acquisition Collector & another reported in (2005) 7 SCC 190.

But no question of issue estoppel was argued before the High Court and no such question actually has fallen for consideration in the course of argument before this Court. Therefore reliance on the principle of issue estoppel on the basis of Ishawar Dutt (supra) is not relevant at all.

86. In this case we are to interpret the provisions of exemption scheme.

87. In Novopan India Ltd. Hyderabad v. Collector of Central Exercise and Customs, Hyderabad [(1994) Supp 3 SCC 606] the question for consideration before this Court was that, in case of ambiguity, which rule of construction will be applicable to exemption provision. This Court relied on the case of Union of India & others v. Wood Papers Ltd & another reported in (1990) 4 SCC 256, wherein at para 4, page 260 this Court observed as under:

"...Truly speaking liberal and strict construction of an exemption provision are to be invoked at different stages of interpreting it. When the question is whether a subject falls in the notification or in the exemption clause then it being in nature of exception is to be construed strictly and against the subject but once ambiguity or doubt about applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction."

88. This Court held that the principle that in case of ambiguity, a taxing statute should be construed in favour of the assessee, does not apply to the construction of an exception or an exempting provision, as the same have to be construed strictly. Further this Court also held that a person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision and in case of doubt or ambiguity, benefit of it must go to the State.

89. In this case, Essar was categorically told by letter dated 28.05.2002, which is much prior to the expiry of the period, that time for availing the exemption cannot be extended. Admittedly, Essar failed to meet the deadline. In that factual scenario, the exercise undertaken by the High Court in the impugned judgment by directing various adjustments which virtually re-wrote the State's

exemption scheme, is an exercise which is, with great respect, neither warranted in law nor supported by precedents. There is no question of equity here, an exemption is a stand alone process. Either an industry claiming exemption comes within it or it does not.

90. For the reasons aforesaid we allow the appeal. The High Court judgment is set aside.

91. The parties are left to bear their own costs.

.....J.

(ASOK KUMAR GANGULY)

.....J.

(JAGDISH SINGH KHEHAR)

New Delhi

January 17, 2012