Rajeshwar Thakur & Anr vs Bihar State Electricity Board & Ors on 16 May, 2008

Author: S.B. Sinha

Bench: Lokeshwar Singh Panta, S.B. Sinha

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3940 OF 2008
[Arising out of SLP (Civil) No. 23809 of 2005]

Tamil Nadu Electricity Board & Anr. ...Appellants

Versus

Status Spinning Mills Ltd. & Anr. ...Respondents

WITH

CIVIL APPEAL NOs.
3941,3942,3943,3944,3945,3946,3947,3948,3949,3950,3951,3952,3953,
3954,3955,3956,3957,3958,3959,3960,3961,3962,3963,3964,3965,3966,
3967,3968,3969,3970,3971,3972,3973,3974,3975,3976,3978,3979,3980,
3981,3982,3983,3984,3985,3986,3987,3988,3989,3990,3990,3991,3992,
3993,3994,3995,3996,3997,3998,3999,4000,4001,4002,4003,4004,4005,
4006,4007,4008,4009,4010,4011,4012,4013,4014,4015,4017,4018,4019,
4020,4021,4023,4024-4033,4036,4035,4034,4037,4038-4041,4042,
4043,4044-51, 4052,4054,4055,4056,4057,4058,4060,4061, 4062,4063,
4064,4065,4066,4067-71,4072,4073,4075,4076,4077,4078,4080,
4081,4083,4084 OF 2008
[Arising out of SLP (Civil) Nos. 26309, 26387, 26382, 26368, 26345,
26355, 26372, 26366, 26378 of 2005, SLP(Civil) Nos. 2026, 1942, 1941,
1954, 1949, 1951, 1953, 1944, 1930, 1946, 1938, 1947, 1950, 1932, 1945,
1428, 1952, 1935, 1927, 1937, 1955, 1948, 1940, 1919, 1925, 1933, 2242,
2246, 2287, 2286, 2285, 2282, 2279, 2276, 2273, 2274, 2249, 2253, 2255,
2281, 2252, 2254, 2257, 2258, 2268, 2264, 2269, 4278, 4280, 4281, 4282,
4283, 4284, 4285, 4286, 4287, 4288, 4289, 4290, 4291, 4292, 6660, 6724,
6757, 6763, 6761, 6767, 6765, 18803, 18804 to 18818, 21338, 21340 to
21343, 21347, 21348, 21350 to 21357, 16509, 16510, 21723, 21600,
21604, 21602, 21605, 21616, 21613, 21631, 21633, 21608, 5299, 5300 to
5303, 4108, 4109, 4111, 21681, 21682, 21683 of 2006, SLP (Civil) Nos.
2385, 2387, 2388, 2391 of 2007)

JUDGMENT

S.B. SINHA, J :

1. Leave granted.

2. These appeals at the instance of the Tamil Nadu Electricity Board (for short "the Board") and State of Tamil Nadu are directed against a judgment and order dated 19.07.2005 passed by a Division Bench of the Madras High Court dismissing the writ appeals filed by the appellants herein arising out of a judgment and order dated 23.04.1999 passed by a learned Single Judge of the said Court.

3. The basic fact of the matter is not in dispute.

4. The State of Tamil Nadu despite the Parliamentary enactment of the Electricity (Supply) Act, 1948 (for short "the 1948 Act") enacted the Tamil Nadu Revision of Tariff Rates on Supply of Electrical Energy Act, 1978 (for short "the 1978 Act"); the relevant provisions whereof are as under:

"3. Tariff rates for consumption of electrical energy Not-withstanding anything contained in the Tamil Nadu Essential Articles Control and Requisitioning (Temporary Powers) Act, 1949 (Tamil Nadu Act XXIX of 1949), the tariff rates payable to the Tamil Nadu Electricity Board by any consumer on the electrical energy supplied by the Board shall be as specified in the Schedule to this Act.

4. Power of the State Government to amend the Schedule -

The State Government may after taking into account the Cost of production of energy, and such other matters as may be prescribed by notification, amend the provisions of the Schedule to this Act."

5. Pursuant thereto and in furtherance thereof, High Tension Supply tariff was prescribed. The State issued a G.O. bearing No. G.O.Ms No. 29 dated 31.01.1995 providing for tariff concession for High Tension industries; the relevant portions whereof are as under:

"a) In the case of new High Tension Industries to be set up in the areas other than the Madras Metropolitan areas, the following concessional tariffs shall be charged for the first three years from the date, the consumer is given service connection under high tension tariff -I-

For the first year	60 per cent of the High Tension rates.
For the second year	70 per cent of the High Tension rates.
For the third year	80 per cent of the High Tension rates.
For the fourth year	Full Tariff.

The above concession shall apply to both unit rates and maximum demand chares. This

> concession shall not however, be applicable to an industry set up before the 3rd May, 1989. The concession shall not also be applicable to a consumer, who utilizes power from his own generating units or makes other arrangements for production purposes and utilizes the power supplied by the Board for auxillary purposes only."

6. A memorandum was issued on or about 23.08.1995 to specify the time limit required for dealing with the applications for grant of electrical connections as and when applications therefor are filed which are in the following terms:

> "Adverting to the above, the following further instructions are issued regarding disposal of H.T. applications.
>
> i) The Superintending Engineers of all Elecy.

Dist. Circle are requested to bestow their efforts and thrive for clearing pending applications wherever possible.

ii) The delays in processing the H.t.

applications should be strictly avoided at all stages. The revised flow chart showing the various stages of processing of the H.T. applications is enclosed.

iii) While scrutinizing the applications the defects observed in the application may be conveyed to the applicants at the first instance itself and not on piece meal with a view to speed up the disposal.

iv) It is further to be reiterated that those H.T. applications for which supply could not be extended within 18 months may be returned immediately to the applications with a request to renew after a specific date.

v) If supply could be extended to applicants within 18 months but requires enhancement of transformer capacity, improvement of existing lines etc., the load sanction may be accorded pending execution of such improvement works stipulating the above conditions.

Depending on the readiness reported and also based on the merits of the each case of H.T. extension, supply may be effected to H.T. applicants using the powers delegated to the Chief Engineers (Distribution) vide memo.no.SE/IEMC/EE3/AEE1/802/91 dated 8.11.91.

All Superintending Engineers/Elecy. Distn. Circle are once again informed to ensure that delays do not occur beyond a reasonable time for processing the H.T. applications as H.T. services constitute major source of revenue for the Board and to bestow all efforts to achieve the target fixed for the year 95-96 without fail."

7. The flow chart annexed thereto specified the maximum period of 18 months' time to be taken from the date of filing of the application till the date of grant of connection.

8. The G.O. dated 31.01.1995 was amended on 14.02.1997 in the following terms:

> "H.T. Tariff - I There is increase in both demands and energy charges.
>
> For consumption of energy during peak hours viz. 6.00 AM to 9.00 AM and 6.00 PM to

9.00 PM, the energy charges are to be billed at 20% extra. This will be implemented on installation of `Time of Day' meters.

New industries set up on or after 15.2.97 are not eligible for any tariff concession. However, in respect of H.T. industries set up in areas other than Chennai Metropolitan area before 15.2.97 shall continue to avail the tariff concession until the expiry of 3 years period reckoned from date of service concession."

By a G.O. issued on 14.02.1997, the Schedule appended to the 1978 Act was amended as under:

> "(a) New High Tension Industries set up in any area on or after 15th February 1997, shall not be eligible for tariff concession:
>
> Provided that the High Tension Industries set up in any area other than Chennai Metropolitan area before 15th February 1997 shall continue to avail themselves of the said tariff concession until the expiry of the period of three years from the date on which the consumer is given service connection.
>
> (b) New industry to be set up in the areas other than the Chennai Metropolitan area which will work night shift only and existing industry which has only night shift between 9.30 p.m. of a day and 5.30 a.m. of the next day, shall be given a concession of 40 per cent of the appropriate rate for energy consumed during night shift only for a period of seven months from July to January during a period of five years from the date of giving service concession. This concession shall apply to energy rate arrived at after fixing the concession if any:
>
> Provided that in respect of those having one day shift and one night shift, the night shift concession shall stand reduced from 40 per cent to 20 per cent."
>
> 9. By a letter dated 1.08.1997 addressed to the Chairman of the Board, the State Government purported to clarify the meaning of the word "set up", stating:
>
> "I am to state that the words "set up" would mean "obtained service connection". The "New High Tension Industries set up in any area or after 15th February, 1997 would mean new High Tension Industries for which power service connection was actually extended on or after 15.2.97."

10. Questioning the validity of the said notification dated 14.02.1997 as also the letter dated 1.08.1997, a large number of writ applications were filed contending that the same was barred under the doctrine of promissory estoppel. Writ petitions were also filed contending that the petitioners had set up their industries before 14.02.1997 and they were entitled to the benefit of tariff concession in terms of the proviso appended to Clause (a) of High Tension Tariff - I. By a judgment and order dated 23.04.1999, a learned Single Judge of the High Court disposed of the said batch of writ applications directing:

> a) Writ petitions which challenged the validity of the Notification dated 14.2.1997 withdrawing the concessions were dismissed.
>
> b) Those petitioners who had informed the Electricity Board on or before 14.2.1997 about their readiness for getting power connection or made applications to the Board would be entitled to enjoy the tariff concessions for the full period of three years, from the date of power connection as stipulated in the Notification dated 31.1.1995.
>
> c) Those writ petitioners who had not made applications or sent intimation to the Electricity Board regarding their readiness to got power connection on or before 14.2.97 but have altered their position by establishing the industry on or before 14.2.97 would be entitled to the tariff concessions as stipulated in the Notification dated 31.1.95 "provided if they are able to establish the same before the 2nd respondent - Electricity Board.

11. Appeals were preferred thereagainst both by the Board and the State Government. Some of the industries who have challenged the notification on the plea of applicability of the doctrine of promissory estoppel also preferred appeals. Indisputably, during pendency of the said appeals before the Division Bench of the High Court, the Schedule to the 1978 Act was further amended by a notification dated 7.01.2000 whereby and whereunder the following Explanations were added:

> "Explanation 1. - For the purpose of this clause, an industry may be considered to be set up on the date of obtaining High Tension Service Connection.
>
> Explanation 2. - For the purpose of this clause "Existing Industry" means an industry, which has not completed five years from the date, the consumer is given service connection and which is still eligible to the concessional tariff rate."

12. The Division Bench of the High Court disposing of the said batch of appeals by a judgment and order dated 19.07.2005 opined that it was not necessary to discuss the individual fact of each of the respondents' case on the premise that the Secretary to the Government could not clarify the amendments to the Schedule which were made by the Governor. The said appeals were disposed of holding:

> i) "...In the present case, the meaning of the words "set up is clear.

These words mean "erect or establish", as pointed out by the Supreme Court. If the high tension industry has been erected or established before 15.02.1997, then it is entitled to the benefit of the tariff concession, even though electricity connection may not have been given to it prior to 15.02.1997.

ii) We do not agree that it is the date on which the application for electricity supply is received by the electricity board that is the relevant date. An application can be made even before setting up the industry or it can be made after setting up the industry, but that is wholly irrelevant. It is the date when the industry has been set up that is the relevant date.

iii) We also do not agree that where the industries have not been set up, but are in the process of being set up, yet, the benefit of the concession will be available, on the basis of the principle of promissory estoppel. There is no question of promissory estoppel because the language of the Notification is very clear and there is no estoppel against a Statute."

13. It is, thus, evident that two points were determined against the respondents. No appeal has been preferred therefrom by the industries in question.

14. The core questions which arise for our consideration are as under:

> i) What is the connotation of the expression "set up" in the context of the concessional tariff granted in favour of High Tension Industries for the first three years "from the date, the consumer is given service connection?.
>
> ii) Whether the expression "set up" appearing in the proviso to clause
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> (a) of High Tension Tariff would have to be construed in the context of the expression "shall continue to avail themselves of the said tariff concession" appearing in the proviso?
>
> iii) Whether the expression "set up" would also takes its colour from the context that the continued tariff concession could be availed by the High Tension Industries "until the expiry of the period of three years from the date on which the consumer is given service connection.?
>
> iv) Whether the expression "set up" be not construed to ensure certainty amongst the consumers who could continue to avail of the tariff concession and whether the date on which the consumer is given a service connection provides such certainty?
>
> v) Whether the Notification conferring tariff concessions could be construed liberally to extend the benefit thereof by construction of the expression "set up" and by introducing the element of uncertainty?

15. Mr. A.K. Ganguly, learned senior counsel appearing on behalf of the appellants would submit that the State of Tamil Nadu intended to confer benefit on a class of people. Such classes of people having been identified as consumers of High Tension Electrical Energy, it was permissible for the State not only to fix a cut-off date but also to specify the same so as to enable the industries to take the benefit only from the date when they start consuming electrical energy. It was, however, submitted that there can be some exceptional cases where despite filing of applications for grant of electrical connection, there had been some avoidable delays on the part of the Board.

It was urged that for the purpose of grant of benefit of concession in tariff rate, the Board must know who the beneficiaries were.

The learned counsel further submitted that the Division Bench of the High Court committed a serious error insofar as it failed to take into consideration that a High Tension industry gets ready to discharge the functions for which it was set up, only with certain formalities as provided for in the Indian Electricity Act, 1910 (for short "the 1910 Act") and the Rules framed thereunder, viz, the Indian Electricity Rules, 1956 (for short "the 1956 Rules") are complied with. An industry starts functioning, according to the learned counsel, only when it is ready to operationalise its machinery which can only be done when the power connection is granted. One of the essential pre-requisite therefor is certification and approval by the Inspector in terms of Section 37 of the 1910 Act and Rule 63 of the 1956 Rules.

The said Rule reads as under:

> "63. Approval by Inspector.--
>
> (1) Before making an application to the Inspector for permission to commence or recommence supply after an installation has been disconnected for one year and above at high or extra-high voltage to any person, the supplier shall ensure that the high or extra-high voltage electric supply lines or apparatus belonging to him are placed in position, properly joined and duly completed and examined. The supply of energy shall not be commenced by the supplier unless and until the Inspector is satisfied that the provisions of rules 65 to 69 both inclusive have been complied with and the approval in writing of the Inspector has been obtained by him:
>
> Provided that the supplier may energise the aforesaid electric supply lines or apparatus for the purpose of tests specified in rule 65..."
>
> Compliance of Rule 63 of the 1956 Rules, Mr. Ganguly submitted, is a definite parameter to assess the readiness of industry to discharge the functions for which it had been set up. The Government letter dated 1.08.1997 being clarificatory in nature, the same should be given effect to.

It was furthermore contended that the subsequent notification dated 7.01.2000 whereby two Explanations were introduced is also clarificatory in nature as a bare perusal of Explanation 1 would

demonstrate that it merely clarified what was inhered/ implied in the said proviso which also reflects the undertaking of the government which alone was competent to grant exemptions to concerned industries and/ or to withdraw or modify the same.

It was urged that the operative part of the order of the Division Bench should be suitably modified to reflect that the setting up of an industry prior to 15.02.1997 implies that such industry was ready to discharge all the functions for which it had been set up and that it has already become a consumer having obtained High Tension service connection from 15.02.1997 and only those industries which have been set up before 15.02.1997 shall continue to avail themselves of the said tariff concession until the expiry of the period of three years from the date on which the consumer is given a service connection.

16. Mr. K. Parasaran and Mr. S. Ganesh, learned senior counsel and other learned counsel appearing on behalf of some of the respondents, on the other hand, would contend that the amendments to the Schedule carried out by the notification are unreasonable being in contravention of the statute. The word "set up" having been interpreted by this Court in Commissioner of Wealth Tax v. Ramaraju Surgical Cotton Mills, Ltd. [1967 (1) SCR 761] which in turn having been followed in Kabini Minerals (P) Ltd. and another v. State of Orissa and others [(2006) 1 SCC 54], it must be held that the said word is in contra-distinction of the word "commence". Some of the High Tension industries having already set up their business and having gone for commercial production by reason of generators, it cannot be said that they had not been set up. For the said purpose, not only the doctrine of promissory estoppel should be applied, the wordings of the Section should be read down to mean that those industries are entitled to the tariff concession who were not only granted connection but who ought to have been granted connection.

It was pointed out that in most of the cases, not only the entrepreneurs altered their position pursuant to or in furtherance of the promise made by the State in terms of the notification dated 31.01.1995. They had applied for grant of communication much prior to the cut off date fixed by the notification dated 14.02.1997. The entrepreneurs who had acted pursuant to the promise made by the State should not be allowed to suffer for no fault on their part.

17. The learned counsel in most of these matters have drawn our attention to the factual matrix involved in each of the cases to contend that it is the Board and/or the State who is responsible for delay in granting electric energy. They have not only set up the industry and ready for commercial production but, in fact, some of them, pursuant to or in furtherance of the permission granted by the State Electricity Board in terms of the provisions of the Indian Electricity Rules, 1956 had set up diesel generating sets for the purpose of running the factory which even stands accepted by the Board.

It was urged that although no appeals have been preferred from the judgment of the Division Bench of the High Court, this Court in exercise of its jurisdiction under Order 41, Rule 33 of the Code of Civil Procedure may permit the respondents to raise the said contention. Reliance in this behalf has been placed on UCO Bank v. Rajinder Lal Cooper [(2007) 6 SCC 694].

18. The High Court unfortunately did not go into the fact of each case. It proceeded on the basis that the word "set up" should be given its dictionary meaning, i.e., erect or establish in view of a decision of this Court in Ramaraju Surgical Cotton Mills Ltd (supra). The effect for a clarificatory order has also not been considered stating that the Secretary of the Government cannot clarify an amendment to the Schedule which has been made by the Governor.

19. We wish that the Division Bench would have bestowed serious considerations on the issues, as has been done by the learned Single Judge.

20. The validity of the 1978 Act is not in question. It overrides the provisions of the 1948 Act. It empowered the State Government to amend the provisions contained in the Schedule to the Act prescribing tariff rates payable by different classes of consumers for supply of electrical energy by the Board taking into account the cost of production of energy and such other matters as may be prescribed by notification. Indisputably, the Schedule appended to the Act had been amended from time to time. The notification dated 31.01.1995 was issued amending the Schedule. It for all intent and purport substituted the then existing Schedule; Part A thereof dealt with tariff for High Tension supply. It is only in that notification some concession, as noticed hereinbefore, had been granted. The concession was to apply to both unit rates and maximum demand charges. Certain limitations for grant of the said concession had also been specified.

21. The Schedule was amended by the notification dated 14.02.1997 reflecting the operation of grant of concession tariff to those who had set up the new High Tension industries on or after 15.02.1997. What is, therefore, significant for our purpose is the meaning of the word "set up" vis-`-vis "commencement".

22. A word cannot be assigned a meaning in vacuum. It has to be read in the context in which it has been used. A decision which has been rendered on a different act dealing with a different subject matter may not be apposite while construing the same term in another statute. We may, however, at the outset notice the decision of this Court in Ramaraju Surgical Cotton Mills, Ltd. (supra) wherein this Court in the context of interpretation of Section 5 (1)(xxi) of the Wealth Tax Act held:

> "...A unit cannot be said to have been set up unless it is ready to discharge the function for which it is being set up. It is only when the unit has been put into such a shape that it can start functioning as a business or a manufacturing organisation that it can be said that the unit has been set up..."

The decision centered round an exemption provision in respect of a portion of net wealth of a company established with the object of carrying on an industrial undertaking in India, as is employed by it in a new and separate unit set up after the commencement of the Act. Although different terms "setting up" and "commencement" were used, this Court opined that the word "set up" is equivalent to the word "established" and that a business is established when it "is ready to commence business". It was furthermore opined that an establishment could not be set up to be ready to commence business if it not "set up".

The said view was reiterated by this Court in Kabini Minerals (P) Ltd. (supra) stating:

> "9. The expression "setting up" means, as is defined in the Oxford English Dictionary, "to place on foot" or "to establish", and is in contradistinction to "commence". The distinction is this that when a business is established and is ready to commence business, only then it can be said of that business that it is set up. But before it is ready to commence business it is not set up. (See CWT v. Ramaraju Surgical Cotton Mills Ltd.)
>
> 10. In the said case, it was further held that the word "set up" is equivalent to the word "established" but operations for establishment cannot be equated with the establishment of the unit itself of (sic or) its setting up."

23. What is necessary to take into consideration is that the Schedule appended to Section 3 of the 1978 Act is a part of the Act. It provides for High Tension tariff. It fixes up cut-off dates. It is a piece of subordinate legislation. A subordinate legislation validly made may have to be read in the same manner as if it is a part of the Act. For the said purpose, although the same would be amenable to constitutional challenge on well-settled principles of law, as noticed by this Court in Bombay Dyeing & Mfg. Co. Ltd. (3) v. Bombay Environmental Action Group and Others [(2006) 3 SCC 434], Vasu Dev Singh and Others v. Union of India and Others [(2006) 12 SCC 753] and State of Kerala and Others v. Unni and Another [(2007) 2 SCC 365], the validity thereof is not under challenge.

24. The notification dated 31.01.1995 postulated concession to the new High Tension industries "to be set up" for the first three years from the date the consumer is given a service connection. It did not speak of commencement of production. It intended to attain a certainty as to from which date such concession would be available. Grant of service connection was considered to be a pre-requisite for grant of the concession. It is in the aforementioned context, the impugned amendment will have to be construed. It fixes a cut off date beyond which the concession shall not be available to the industries, viz., those who had set up in any area on or after 15.02.1997.

25. The proviso appended thereto, however, saves the cases of those who had availed themselves of the said tariff concession and they who would continue to get the benefit thereof until expiry of the period of three years from the date on which the consumer is given service connection. The date on which the service connection is given, therefore, plays an important role.

The clarification issued by the State during pendency of the appeals should have, therefore, been considered by the High Court in its proper perspective. If it is clarificatory in nature, it could be given a retrospective operation. Such a question, however, should have been posed and answered. Furthermore, the letter dated 1.08.1997 was issued as some confusion arose. When a subordinate legislation is made by the State Government, it must be done in terms of the constitutional provision. An executive order is also issued keeping in view the rules and executive business. It may not have the force of law but the same may come within the purview of the well-known principle of contemporaneous exposito. Rules of executive construction are also relevant.

26. The Government placed the entire record before the learned Single Judge. In his judgment, the learned Single Judge recorded :

> "14. The learned Senior Counsel has produced the note file of the Government. From the file, I am able to see that the Chairman, Electricity Board himself while constructing the said expression `set up' has stated that `withdrawal of tariff concession to the industries set up with respect to the industries during 1994 the date of load sanction was taken into account'. The Chairman has also recommended to the effect that tariff concession which prevailed prior to 14.2.1997 can be extended to consumers who have informed readiness on or before 14.2.1997 and certified as such all Field Superintending Engineers on inspection of the industry after receipt of readiness report, and after 15.2.1997, due to the reason that it was not informed prior to 14.2.1997."

27. It does not appear that the Chief Secretary of the State had issued the letter in question upon following the procedure laid down in the Rules of Executive Business framed under Article 166 of the Constitution of India. We are, however, not much concerned therewith. It is not a case where the opinion of the Chief Secretary and/or for that matter the State was decisive. In the matter of interpretation of statute, the Court has the last say.

We have, therefore, to consider the issues raised before us independently.

28. Furthermore, concession is to be given in respect of payment of the charges for electrical energy. When can it be given would be a question of fact. When it has been given would be known to everybody. The bills are required to be paid only after electrical energy is consumed. Question of availing the benefit of concession would not arise unless a service connection is granted. For the said purpose, the definition of consumer, as contained in Section 2(1)(c) of the 1910 Act would be relevant. The benefit can be availed by the consumer keeping in view the nature of concession granted. Exemption notifications, therefore, require construction depending upon the tenor of the statute/ notification. Whether it should undergo a strict construction or a liberal construction is one thing but it is another thing that whether a person is entitled to concession on a plain reading of the notification.

It may be true that the exemption notification should receive a strict construction as has been held by this Court in Novopan India Ltd. Hyderabd v. Collector of Central Excise and Customs, Hyderabad [1994 Supp. (3) S.C.C. 606], but it is also true that once it is found that the industry is entitled to the benefit of exemption notification, it would receive a broad construction. [See Tata Iron & Steel Co. Ltd. v. State of Jharkhand (2005) 4 SCC 272 and A.P. Steel Re-Rolling Mill Ltd. v. State of Kerala (2007) 2 SCC 725].

A notification granting exemption can be withdrawn in public interest. What would be the public interest would, however, depend upon the facts of each case.

29. In State of Jharkhand v. Tata Cummins Ltd. [(2006) 4 SCC 57], this Court held:

> "6. Before analysing the above policy read with the notifications, it is important to bear in mind the connotation of the word "tax". A tax is a payment for raising general revenue. It is a burden. It is based on the principle of ability or capacity to pay. It is a manifestation of the taxing power of the State. An exemption from payment of tax under an enactment is an exemption from the tax liability. Therefore, every such exemption notification has to be read strictly. However, when an assessee is promised with a tax exemption for setting up an industry in the backward area as a term of the industrial policy, we have to read the implementing notifications in the context of the industrial policy. In such a case, the exemption notifications have to be read liberally keeping in mind the objects envisaged by the industrial policy and not in a strict sense as in the case of exemptions from tax liability under the taxing statute."

30. The word "set up", therefore, was also required to be construed keeping in view the provisions of the statute operating in the field, viz., the 1910 Act, the 1948 Act and the 1956 Rules.

31. Validity of the notifications on the ground they are unreasonable has not been raised before the High Court. We, therefore, cannot go into the issue. If that be so, it is difficult to agree with Mr. Parasaran that we should undertake an exercise to interpret the notifications in a manner which would not lead to unreasonableness. For the purpose of declaring a statute unconstitutional, foundational facts have to be laid therefor. [See M/s. Seema Silk & Sarees & Anr. v. Directorate of Enforcement & Ors. Criminal Appeal @ SLP (Crl.) No. 6812 of 2007 decided on 12th May, 2008]. Grounds are required to be raised therefor. In absence thereof it would not be possible for us to enter into the debate of constitutionality of the said provisions. The Division Bench of the High Court had rightly or wrongly opined that the doctrine of promissory estoppel has no application. The fact that the said doctrine may apply even in relation to a statute is beyond any dispute as has been held by this Court in Mahabir Vegetable Oils (P) Ltd. and Another v. State of Haryana and Others [(2006) 3 SCC 620], A.P. Steel Re-Rolling Mill Ltd. (supra), Pawan Alloys and Casting Pvt. Ltd. v. U.P. State Electricity Board and others [(1997) 7 SCC 251] and Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO and Others [(2007) 5 SCC 447]

32. Strong reliance has been placed by Mr. Parasarn on Shah v. Shah [2002 Q.B. 35 : (2001) 4 All ER 138] to contend that the doctrine of promissory estoppel is applicable even in the field of the statute. Therein, it was held:

> "In the Godden case [1997] NPC 1 an attempt was made to defeat by an estoppel the provision in section 2(1) of the 1989 Act that "a contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are being exchanged, in each". Simon Brown LJ stated that the argument that "although Parliament has dictated that a contract involving the disposition of land made otherwise than in compliance with section 2 is void, the defendants are not allowed to say so" was "an impossible argument". Simon Brown LJ regarded the principle stated in Halsbury's Laws as a "cardinal rule" the "absolute

> nature" of which cannot be "outflanked by one of the equitable techniques or types of estoppels sought to be deployed in the present case". Thorpe LJ and Sir John Balcombe agreed with Simon Brown LJ.
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> Yaxley v Gotts [2000] Ch 162 was also concerned with section 2 of the 1989 Act. An oral agreement purporting to grant an interest in land, though void and unenforceable under section 2, was held still to be enforceable on the basis of a constructive trust under section 2(5) which provides that "nothing in this section affects the creation or operation of resulting, implied or constructive trusts". Robert Walker LJ stated, at p 175:
>
> "Parliament's requirement that any contract for the disposition of an interest in land must be made in a particular documentary form, and will otherwise be void, does not have such an obviously social aim as statutory provisions relating to contracts by or with moneylenders, infants, or protected tenants. Nevertheless it can be seen as embodying Parliament's conclusion, in the general public interest, that the need for certainty as to the formation of contracts of this type must in general outweigh the disappointment of those who make informal bargains in ignorance of the statutory requirement. If an estoppel would have the effect of enforcing a void contract and subverting Parliament's purpose it may have to yield to the statutory law which confronts it, except so far as the statute's saving for a constructive trust provides a means of reconciliation of the apparent conflict."

Clarke LJ stated, at p 182, that where a particular estoppel relied upon would offend the public policy behind a statute it is necessary to consider the mischief at which the statute is directed.

Where a statute had been enacted as the result of the recommendations of the Law Commission it *44 is appropriate to consider those recommendations. He stated that in his opinion:

> "the contents of that report [Transfer of Land:
>
> Formalities for Contracts of Sale etc of Land (1987) (Law Com No 164)] will be of the greatest assistance in deciding whether or not the principles of particular types of estoppel should be held to be contrary to the public policy underlying the Act. In this regard it seems to me that the answer is likely to depend upon the facts of the particular case."

Beldam LJ stated, at p 191, that "The general principle that a party cannot rely on an estoppel in the face of a statute depends upon the nature of the enactment, the purpose of the provision and the social policy behind it."

The said decision has also been referred to Actionstrength Ltd. (trading as Vital Resources) v. International Glass Engineering IN.GL.EN SpA and another [2003 (2) All. E.R. 615 at 619], but therein it was held that the doctrine of promissory estoppel may not be applicable in case of a

statute. As would appear from the discussions hereinafter, applicability of the said doctrine would depend upon various factors including the nature and purport of the Statute, the object it seeks to achieve, the purpose for grant of concession/exemption etc.

33. It, therefore, depends on the nature of the statute as also applicability of the doctrine. As noticed hereinbefore, even such a question had not been raised before the High Court.

34. The GOMs dated 31.01.1995 granted concession for the new high tension industries to be set up. The eligibility for grant of concession therefore was for the industries which were to be set up after the said date. The exemption does not stop at that. It is given a retrospective effect. It is extended to those industries which were set up after 3.05.1989. However, exception therefor is sought to be curved out in respect of those industries who had been utilizing power from their own generating units or making other arrangements for production for the purposes and utilizing the power supplied by the Board in auxiliary purposes only. The said notification, therefore is a broad based one. It not only is to apply to those industries which were to be set up on or from 31.01.1995 but also to those which were set up after 3.05.1989.

We may notice that concessional tariffs, however, were to be granted only for three years. Those three years of concessional tariffs, therefore, were available to any industry which had been set up after 3.01.1989 till the concession is withdrawn. Unlike other notifications, no period is fixed. This Court, in a number of decisions, has considered the effect of the notifications which were applicable for a fixed period, may be three years or five years. The concession, although was to apply for a period of three years both in respect of unit as also maximum demand charges, the same was meant to be applied to all those industries who intended to set up their industries in the areas other than Madras Metropolitan areas.

Indisputably, the respondents before us have started setting up their industries after the said date. It is on the aforementioned backdrop, the impugned notification dated 14.02.1997 requires interpretation. Those who had set up their industries have acquired a right, viz. the right to obtain the tariff concession once a right is accrued in their favour. What was promised to them was that they would be granted the tariff concession for a period of three years @ 60%, 70% and 80% of the consumption charges.

35. Whether by reason of the said notification dated 14.02.1997, an accrued or vested right has been taken away or not is the question. The core question, therefore, is as to whether by reason of the said notification dated 31.01.1995, the entrepreneurs who had set up new high tension industries after the said date have acquired any right pursuant thereto.

The notification dated 31.01.1995 must be interpreted in a broad based manner, as a promise was made to grant the concessional tariff not only for the new industries which were to be set up thereafter but also to the pre-existing industries. The right accrued to them is sought to be taken away w.e.f. 15.02.1997. Those who were eligible upto 14.02.1997 to avail the benefit of the notification dated 31.01.1995 became ineligible. It is in the aforementioned context, the proviso appended to clause (a) is required to be interpreted. It has used the term `set up' in any area other

than Chennai Metropolitan area before 15.02.1997. Should the rule of liberal interpretation be applied? In our opinion, it should not be. An accrued right ordinarily cannot be taken away with retrospective effect. It is not a case where the notification has a retroactive operation. A person may apply on a particular date for grant of electrical connection. He may get the electrical connection within a few days or a few weeks or a few months. According to the State Electricity Board, keeping in view the role played by all the three players, namely, the consumer, the Board and the State, an outer limit of 18 months is taken for grant of supply.

36. There are cases before us wherefrom it appears that electrical connections had not been provided owing to default on the part of the Electrical Inspector who is an officer of the State and/or authorities of the Board, although prompt action had been taken in the matter of depositing of money and/or complying with directions by the consumers.

37. A statute, even a subordinate legislation, may have to be construed reasonably. A subordinate legislation ordinarily would not be given a retrospective effect. Retrospective effect can be granted only if there exists any power in that behalf. There is nothing to show that such a power has been conferred upon the State in terms of the Act. While saying so, we are not oblivious of the situation that the State has a statutory power to fix the tariff. It may also be true that when a statutory power is conferred, the State would have power to amend, alter, modify or rescind the same. The Court must also bear in mind that it may not cause undue hardship. What we mean to say that if construction of a statute is possible as a result of hardship is avoided, vis-`-vis, an undue hardship would be created, the court will prefer the former interpretation. The proviso is an exception to the main clause whereas all industries which were set up on or after 15th February become wholly ineligible for any tariff concession but those who had set up prior thereto shall continue to avail themselves of the said tariff concession. Legally, those who had not become consumer of electrical energy, but were the potential consumers, they had not only applied for it but they were and, in fact, some of them has also been gone into commercial production. Once they have set up the high tension industries and who had gone up for commercial production must be held to have set up the high tension industries. Once they have set up the high tension industries after 31st March, 1995, they became entitled to the benefit of concessional tariff for a period three years. Such concession was to be availed by them from the date of grant of service connection. If they had already been granted service connection, they would continue to avail themselves of the said tariff concession. However, the difficulty arises only in cases where despite applying for grant of electrical communication, actual service connection had not been granted. If a literal interpretation of the proviso is taken recourse to, the same may result in an anomaly in the sense that in one case, connection may be granted in one day and in another case, connection may not be granted for a long time. Because of the acts of discrimination on the part of the officers of the Board or the State, the entrepreneurs would suffer. It is in the aforementioned limited sense, the doctrine of promissory estoppel will have application. If doctrine of promissory estoppel applies, the right accrued in terms thereof cannot be withdrawn with a retrospective effect. [See Mahabir Vegetable Oils (P) Ltd. (supra) Southern Petrochemical Industries Co. Ltd. (supra)]

38. In MRF Ltd., Kottayam v. Asstt. Commissioner (Assessment) Sales Tax and others [(2006) 8 SCC 702], this Court held :

> "In any event, the appeal preferred by the State of Kerala was dismissed and the judgment of the High Court has therefore become final. Accordingly, it was held that Section 10(3) does not confer the power to withdraw an exemption with retrospective effect. Effect of this is that the amendment Notification SRO No. 38/98 has to be read so as not to take away or disturb any manufacturer's pre-existing accrued right of exemption for a period of 7 years. If SRO No. 38/98 is construed as now contended by the respondent, then the inevitable consequence would be that SRO No. 38/98 would itself be rendered ultra vires Section 10(3) of the Act, and therefore, illegal, bad in law and null and void."

39. Yet again, in Tata Teleservices Ltd. v. Commissioner of Customs [(2006) 1 SCC 746], this Court held:

> "10. We are of the view that the reasoning of the Bombay Bench of the Tribunal as well as that of the Andhra Pradesh High Court must be affirmed and the decision of the Delhi Tribunal set aside insofar as it relates to the eligibility of LSP 340 to the benefit of the exemption notification. The Andhra Pradesh High Court was correct in coming to the conclusion that the Board had, in the impugned circular, predetermined the issue of common parlance that was a matter of evidence and should have been left to the Department to establish before the adjudicating authorities. The Bombay Bench was also correct in its conclusion that the circular sought to impose a limitation on the exemption notification which the exemption notification itself did not provide. It was not open to the Board to whittle down the exemption notification in such a manner. The exemption notification merely reproduced the language of Entry 8525 20 17 and since the exemption notification merely reproduced the tariff entry, the limitation sought to be imposed by the Board would tantamount also to reading the limitation into the classification itself."

40. In State of Orissa and Others v. Tata Sponge Iron Ltd. [(2007) 8 SCC 189], this Court held:

> "20. In view of the clear legal provision as also the aforementioned Notification dated 23-9-1992, there cannot be any doubt whatsoever that the exemption in respect of deferment of sales tax having been provided for under the Orissa Sales Tax Act as also the notification issued thereunder, the High Court, in our opinion, is correct in taking its view."

41. In State of Kerala and Others v. Kurian Abraham (P) Ltd. and Another [(2008) 3 SCC 582], it was opined :

> "23. Tax administration is a complex subject. It consists of several aspects. The Government needs to strike a balance in the imposition of tax between collection of revenue on one hand and business-friendly approach on the other hand. Today, Governments have realized that in matters of tax collection, difficulties faced by the business have got to be taken into account. Exemption, undoubtedly, is a matter of

> policy. Interpretation of an Entry is undoubtedly a quasi- judicial function under the tax laws. Imposition of taxes consists of liability, quantification of liability and collection of taxes. Policy decisions have to be taken by the Government. However, the Government has to work through its senior officers in the matter of difficulties which the business may face, particularly in matters of tax administration. That is where the role of the Board of Revenue comes into play. The said Board takes administrative decisions, which includes the authority to grant Administrative Reliefs. This is the underlying reason for empowering the Board to issue orders, instructions and directions to the officers under it."

42. It is not a case where decisions were altered pursuant to any representation made by the State. Concessions in tariff had been granted by reason of a statutory provision. Such concessions could also be withdrawn. If the appellants have not altered their position pursuant to any promise, the doctrine of promissory estoppel would not apply. If that be so, the question of any right being vested in the appellants would also not apply. In any event, the reasonableness of the statute was not the subject matter of the writ petition. The provisions have not been sought to be declared ultra vires. Even otherwise, the State while amending statute stated about the public interest necessitated the same. When a statute is amended keeping in view the public interest even the concession can be withdrawn with retrospective effect.

43. In Kasinka Trading & Anr. v. Union of India & Anr. [(1995) 1 SCC 274], the power of the State to change its policy decision in public interest was emphasized. It was held that the power which can be used for grant of concession, namely, Section 25(1) of the Customs Act itself is the source to rescind the earlier notification, stating :

> "Since, the notification had been issued under Section 25(1) of the Act, the very same power was available to the authority for rescinding or modifying that notification and appellant ought to have known that the said notification was capable of or liable to be revoked, modified or rescinded at any time even before the expiry of 31.3.1981 if the `public interest' so demanded. To hold that after the Government had issued the Notification No.66 of 1979 indicating that it was to remain operative till 31.3.1981, it could not be rescinded or modified before the expiry of that date would amount to prohibiting the Government from discharging its statutory obligation under Section 25(1) of the Act, if it was satisfied that it was in the `public interest' to withdraw, modify or rescind the earlier notification. The plain language of Section 25 of the Act is indicative of the position that it is the public interest and public interest alone which is the dominant factor. It is not the case of the appellants that the withdrawal of Notification No.66 of 1979 by the impugned notification was not in `public interest'. Their case, however, is that relying upon the earlier notifications they had acted and the Government should not be permitted to go back on its assurance as otherwise they would be put to huge loss. The courts have to balance the equities between the parties and indeed the courts would bind the Government by its promise `to prevent manifest injustice or fraud'."

It was further held :

> "23. The appellants appear to be under the impression that even if, in the altered market conditions the continuance of the exemption may not have been justified, yet, Government was bound to continue it to give extra profit to them. That certainly was not the object with which the notification had been issued. The withdrawal of exemption "in public interest" is a matter of policy and the courts would not bind the Government to its policy decisions for all times to come, irrespective of the satisfaction of the Government that a change in the policy was necessary in the "public interest". The courts, do not interfere with the fiscal policy where the Government acts in "public interest" and neither any fraud or lack of bona fides is alleged much less established. The Government has to be left free to determine the priorities in the matter of utilisation of finances and to act in the public interest while issuing or modifying or withdrawing an exemption notification under Section 25(1) of the Act."

Kasinka Trading (supra) has been followed in many cases including, Shrijee Sales Corporation & Anr. v. Union of India [(1997) 3 SCC 398], Bannari Amman Sugars Ltd. v. Commercial Tax Officer & Ors. [(2005) 1 SCC 625], Kuldeep Singh v. Govt. of NCT of Delhi [(2006) 5 SCC 702], M.P. Mathur & Ors. v. DTC & Ors. [(2006) 13 SCC 706] and Ramchandra Murarilal Bhattad & Ors. v. State of Maharashtra & Ors. [(2007) 2 SCC 588].

44. A distinction must be made between a policy decision and a statute. Whereas prima facie a policy decision may not have any retroactive operation, a statute may have. Only because it affects a past transaction the same, by itself, would not come in the way of the legislature in enacting an enactment or the executive government to exercise its power of subordinate legislation.

45. We have noticed hereinbefore that some of the industries had even installed generators. They had to do it. They inevitably had to do it because the Board would not supply power. Would it not be too much to contend that even those industries have not been set up as they have not become consumers? We think that for the said purpose, the proviso has to be read down. It must be made applicable to them who not only had started commercial production before the said date, namely, 14.02.1997 but also had applied and were otherwise ready to take electrical connections having deposited the amount asked for.

46. Those hard cases, even according to Mr. Ganguly, should be brought within the purview of the proviso.

We, therefore, hold:

> 1. As the concession had been granted by the State, it had the power to withdraw the same.

2. It is not a case where in view of the doctrine of promissory estoppel, the State could not have in law amended the Schedule.

3. In view of existence of public interest the doctrine of promissory estoppel would have no application.

4. Even otherwise the appellants having not preferred appeals against the judgment of the Division bench of the High Court, the said questions cannot be permitted to be raised before us.

5. Proviso appended to the main provision should be read down as stated in paragraphs 44 and 45 supra.

6. In view of our findings aforementioned, we have not gone into the merit of the matter involved in each case separately.

We direct accordingly. The matters would now be examined by the Appropriate Authority of the Board, as directed by the High Court in individual cases. The appeals are allowed with the aforementioned directions. No costs.

.....J. [S.B. Sinha] .....J. [Lokeshwar Singh Panta] New Delhi;

May 16, 2008