Mahabir Vegetable Oils Pvt. Ltd. & Anr vs State Of Haryana & Ors on 10 March, 2006

Author: S.B. Sinha

Bench: S.B. Sinha, P.K. Balasubramanyan

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           CASE NO.:
Appeal (civil)  1635 of 2006

PETITIONER:
Mahabir Vegetable Oils Pvt. Ltd. & Anr

RESPONDENT:
State of Haryana & Ors

DATE OF JUDGMENT: 10/03/2006

BENCH:
S.B. Sinha & P.K. Balasubramanyan

JUDGMENT:
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J U D G M E N T [Arising out of S.L.P. (Civil) No.17730 of 2004] WITH W.P. (C) NO. 489 OF 2004 AND CIVIL APPEAL NO. 1631 OF 2006 [Arising out of S.L.P.(Civil) No. 23361 of 2004] S.B. SINHA, J :

Leave granted in S.L.Ps.

Applicability of promissory estoppel and/or the extent thereof is in question in these appeals which arise out of a judgment and order dated 22.04.2005 passed by a Division Bench of High Court of Punjab and Haryana in Amended Civil Petition No. 15025 of 1997.

The basic facts are not in dispute.

The Appellants are owners of solvent extraction plants. The State of Haryana announced an Industrial Policy for the period 1.4.1988 to 31.3.1997 wherein inter alia incentive by way of sales tax exemption was to be given for the industries set up in backward areas in the State.

The State enacted Haryana General Sales Tax Act, 1973 (for short "the Act"). Section 64 of the Act provides for rule making power. The said provision was amended by inserting sub-section (2A) therein which reads as under:

"(2A) The power to make rules under Sub-

> sections (1) and (2) with respect to clauses (ff) and (oo) of Sub-section (2) shall include the power to give retrospective effect to such rules i.e. from the date on which policy for incentives to industry is announced by the State and for this purpose rules 28A, 28B and 28C of the Haryana General Sales Tax Rules, 1975, shall have retrospective effect i.e. with effect from 1st April, 1988, 1st August, 1997 and 15th November, 1999, respectively, but such retrospective operation shall not prejudicially affect the interest of any person to whom such rules may be applicable."

Clause (ff) of sub-section (2) of Section 64 of the Act provides for the class of industries, period of exemption and conditions of such exemption, under Section 13B; whereas Clauses (oo) thereof provides for class of industries, period of deferment and the conditions to be imposed for such deferment under Section 25-A. Section 13-B of the Act was inserted on 8.9.1988.

Pursuant to or in furtherance of the said rule making power, the State made rules known as the Haryana General Sales Tax Rules, 1975 (for short 'the Rules'). Rule 28A occurring in Chapter IV A of the Rules provide for the class of industries, period and other conditions for exemption/ deferment from payment of tax as envisaged both under Sections 13B and 25A of the Act. 'Operative period' has been defined in sub-rule (2)(a) of Rule 28A of the Rules to mean "the period starting from the 1st day of April 1988 and ending on the 31st day of March, 1997". Sub-rule (2)(c) thereof defines "New Industrial Unit" to mean "a unit which is or has been set up in the State of Haryana and comes or has come into commercial production for the first time during the operative period and has not been or is not formed as a result of purchase or transfer of old machinery except when purchased in the course of import into the territory of India or when the cost of old machinery does not exceed 25% of the total cost of machinery re-establishment, amalgamation, change of lease, change of ownership, change in constitution, transfer of business, reconstruction or revival of the existing unit".

> "Negative List" has been defined in sub-rule 2(o) to mean "a list of class of industries as specified in Schedule III appended to these rules".

Schedule III appended to the Rules provide for a negative list of the industries and/ or class of industries which were not to be included therein. Solvent extraction plant was admittedly not included in the list.

On or about 3.1.1996, notice was given as regards the intention of the State to amend the rules in respect whereof a draft was circulated for information of persons likely to be affected thereby so as to enable them to file objections and suggestions thereto. Amendments in the terms of the said draft rules were notified on 16th December, 1996 substituting Schedule III appended to the Rules whereby and whereunder the solvent extraction plant was included therein. Note 2 appended thereto reads as under:

> "The Industrial units in which investment has been made upto 25% of the anticipated cost of the project and which have been included in the above list for the first time shall be entitled to the sales tax benefits related to the extent of investment made upto the 3rd January, 1996. Only those assets will be included in the fixed capital

> investment which have been installed or erected at site and have been paid for. The anticipated cost of the project will be taken on the basis of documents furnished to a financial institution or banks for drawing a loan and which have been accepted by the financial institution or bank concerned for sanction of loan."

On or about 28th May, 1997, the said rules were amended inter alia by omitting Note 2 deeming to have always been omitted.

Yet again on 3rd June, 1997, in clause (a) of sub-rule (2) of Rule 28A of the Rules instead and in place of 31st March, 1997, the words "date on which new policy for incentive to industry is announced by the Government of Haryana in Industries Department" was substituted.

On 26th June, 2001, in Section 13-B after the words "for such period", the words "either prospectively or retrospectively" were inserted.

Mahavir Vegetable Oil Pvt. Limited (Appellant in civil appeal arising out of S.L.P. (C) No. 17730 of 2004) purchased land measuring 30 kanals 17 marlas in the month of August, 1995 to set up the unit. It also obtained registration under the provisions of the Act and Central Sales Tax Act, 1956 on 06.09.1995. On 13.08.1996 it applied for a No Objection Certificate from the Haryana State Pollution Control Board which is a condition precedent for setting up a solvent extraction plant. On 15.08.1996, the Appellant entered into an agreement with M/s. Saratech Consultants and Engineers, Karnal for supply and erection of the plant for a sum of Rs. 55,55,000/- and Rs. 22,75,000/- respectively and advances were paid on different dates. Furthermore, on 6.09.1996, civil construction work started at site. Plans submitted by the Appellant for getting permission for storage of Hexane were sanctioned by the Explosives Department on 19.9.1996 and licence was finally given on 11.3.1997. On 26.09.1996, process of installation of the plant started at the site. On or about 18.11.1996, a 250 KVA power generating set costing Rs. 9,91,000/- was installed, no objection certificate wherefor was granted on 22.11.1996. The Appellant applied to the Haryana State Electricity Board for release of the power connection vide application dated 12.12.1996 and also deposited the security of Rs. 68,700/- for the same. On 26.03.1997, the Appellant started the trial production and commercial production commenced on 29.03.1997.

Bharat Rasayan Ltd. (Appellant in Civil Appeal arising out of SLP(C) No. 23361 of 2004) set up on or about 17.01.1991 its unit to manufacture pesticides at Village Makhara, Madina-Makhara Road, District Rohtak with an investment of Rs. 252.70 lakhs. Commercial production commenced on and from 17.1.1991. The unit of the Appellant falls in a backward area. On 7.8.1993, the Appellant carried out expansion with an additional investment of Rs. 181.83 lakhs and added another 250MT in the production capacity in its unit wherefor eligibility certification/ exemption certification was issued in its favour. The Appellant also got itself registered with the Sales Tax Department for the expanded unit under the Act and under the Central Sales Tax Act, 1956 with effect from 4.12.1993. On 16.11.1995, the Appellant also applied for additional licence which was required for the product manufactured by it. On 3.2.1997, the Appellant was registered with the Government of India. Furthermore, on 7.9.1997, an additional licence was granted to it by the Central Insecticides Board. After receipt of the same, the Appellant applied to the Director of Agriculture, Haryana for addition

of new items in the manufacturing licence and the Appellant commenced its commercial production in its expanded unit on 28.4.1998.

By 16.12.1996, they had invested about 80% of the total project cost. The Appellants had applied for grant of exemption from payment of sales tax as on 16.12.1996 which was rejected in the case of Mahabir Vegetable Oils Pvt. Ltd. in the following terms:

> " The Solvent extraction plants were included in negative list with effect from 16.12.1996. The industrial unit has made 45% of total investment. In the notification it was stipulated that industrial unit in which investment has been made upto 25% of the anticipated cost of the project which has been included in the negative list for the first time shall be entitled to sales tax benefit, however, this condition has been deleted vide notification dated 28.5.1997. Committee was of the view that this condition has already been deleted and certain parties have challenged in Punjab and Harayana High Court. Director of Industries was of the view that in case a particular industry is put in the negative list, benefit on account of investment made before the date of putting the unit in the negative list should be available to the unit for sales tax exemption/ deferment. Though the Higher Level Screening Committee broadly agreed with this view, yet in view of the fact that such cases were not covered in the existing notification of Commercial Taxation Department, it was decided to reject the claim of the party."

The writ petition filed by Mahabir Vegetable Oils Pvt. Ltd. before the High Court was dismissed holding:

> (i) "The power to grant exemption from the payment of sales tax is an exercise of the powers conferred by the statute on the State Government and is, thus, a delegated legislative function. The delegated legislation can be struck down if it is established that there is manifest arbitrariness. It must be shown that it was not reasonable or manifestly arbitrary."
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> (ii) "As per the records made available, a Standing Committee was constituted by the State of Haryana for revising the negative list periodically keeping in view the industries scheme of the State and its neighbourhood. Such Standing Committee considered the revision of negative list in its meeting held on 15.9.1995 wherein it was decided to include highly polluting industries, power intensive industries, conventional type of industries where sufficient capacity has already come up and any further increase in the capacity would jeopardize the health of existing industry in the negative list. There is no challenge to the decision or proceedings of such Committee on any ground indicating arbitrariness, bias, mala fide or any such like reason."
>
> (iii) In view of certain decisions of this Court, the benefit of exemption can be withdrawn in public interest.

(iv) " There is no allegation of exercise of such power to include solvent extraction plant is actuated by any mala fides, fraud or lack bona fide. It is a matter of fiscal policy of the State Government as to which industries should be granted exemption."

(v) Mahabir Vegetable Oils Pvt. Ltd. only invested Rs. 4,44,000/- in the land and purchased machinery worth Rs. 16,90,000/- on 14.12.1996.

(vi) "Thus, we hold that there is no representation on behalf of the State Government that the scheme of granting incentives by way of exemption or deferment will not be modified amended or varied during the operative period. There cannot be any restraint on the State Government to exercise the delegated legislative functions within the parameters laid down by the statute ."

In the case of Bharat Rasayan Ltd., the judgment rendered in Mahabir Vegetable Oils Pvt. Ltd. was followed without considering the factual aspect therein.

In the writ petition filed before this Court, it has been prayed:

"(a) issue an appropriate writ, order or direction especially in the nature of certiorari quashing the draft notification dated 03.01.1996, final notification dated 16.12.1996 modifying the industrial policy of 1988 and the notification dated 28.05.1997 modifying the Haryana Sales Tax Rules, 1975 as ultravires the constitution being arbitrary, malafide, unjust unreasonable, unworkable, illegal and against the principles of public policy;

(b) issue an appropriate writ, order or direction especially in the nature of Mandamus directing the respondents to grant the benefit of sales tax exemption to the petitioners as per the State's Industrial Policy of 1988;

(c) pass any such further order or orders as this Hon'ble Court may deem fit and proper under the facts and circumstances of the case."

Mr. S. Ganesh, learned senior counsel appearing on behalf of the Appellants submitted that:

(i) The Appellants had made investments pursuant to or in furtherance of the representation made by the State in making Rule 28A and as on the date when Rule 28A was amended i.e. on 16.12.1996, the Appellant had substantially complied with the provisions of the said rule.

(ii) As in Schedule III appended to the Rules, the solvent extraction plant was not included, the Appellant invested a large amount as would appear from the letter dated 4.9.1997 of the Director of Industries that it had invested 45% of the total project cost and, thus, reached an irretrievable position.

(iii) No reason has been assigned by the State as to why amendment had been made at the end of the operative period.

(iv) Withdrawal of such exemption provision with retrospective effect is otherwise bad in law.

(v) The Director committed a manifest error in rejecting the application for grant of exemption of the Appellants on a wrong premise and despite the fact that the provisions of the Statute have rightly been construed by the higher authorities, the High Court also committed a manifest error in holding that no right came into existence before commercial production started.

(vi) The Note 2 appended to the notification dated 16.12.1996 recognizes equity and in that view of the matter the representation was also made in terms thereof.

(vii) The State did not have any competence to amend the rules by deleting Note 2 with retrospective effect as sub-section (2A) of Section 64 came into force in the year 2001.

(viii) The State in its return filed in the High Court did not raise any contention that there existed a larger public interest in withdrawing the exemption notification.

Mr. Manjeet Singh, learned counsel appearing on behalf of the State, on the other hand, submitted that:

(a) draft rules having been published by the State by way of a notification dated 3.1.1996 all the prospective entrepreneurs were aware that the said rules may be amended.

(b) There was no reason for the Appellants' being misled by reason of the existing rules.

(c) As on the date of final notification, the Appellants did not commence commercial production, they did not acquire any legal right to obtain any exemption.

(d) The State has the requisite jurisdiction to make amendments with retrospective effect.

(e) In any event, the right of the entrepreneurs being not an indefeasible right, the same could be withdrawn before commencement of production.

It is not in dispute that when the Appellants herein started making investments, Rule 28A was operative. Representation indisputably was made in terms of the said Rules. The State, as noticed hereinbefore, made a long term industrial policy. From time to time it makes changes in the policy

keeping in view the situational change.

The State intended inter alia to grant incentive to include industrial units by way of waiver and/ or deferment of payment of sales tax wherefor Rule 28A was made. The sales tax laws enacted by the State, as noticed hereinbefore, contain a provision empowering the State to grant such exemption.

The relevant provisions of the Act and the Rules framed thereunder indisputably were made keeping in view the industrial policy of the State. Such industrial policies by way of legislation or otherwise, subject, of course, to the provisions of the statute have been framed by several other States.

It is beyond any cavil that the doctrine of promissory estoppel operates even in the legislative field. Whereas in England the development and growth of promissory estoppel can be traced from Central London Property Trust Ltd. v. High Trees House Ltd.[(1947) 1 KB 130], in India the same can be traced from the decision of this Court in Collector of Bombay v. Municipal Corporation of the City of Bombay and others [AIR 1951 SC 469]. In that case the government made a grant of land (which did not fulfill requisite statutory formalities) rent free. It, however, claimed rent after 70 years. The government, it was opined, could not do so as they were estopped. It was further held therein that there was no overriding public interest which would make it inequitable to enforce estoppel against the State as it was well within the power of the State to grant such exemption.

In M/s. Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh and Others [(1979) 2 SCC 409] this Court rejected the plea of the State to the effect that in the absence of any notification issued under Section 4-A of the U.P. Sales Tax Act, the State was entitled to enforce the liability to sales tax imposed on the petitioners thereof under the provisions of the Sales Tax Act and there could be no promissory estoppel against the State so as to inhibit it from formulating and implementing its policy in public interest.

The question came up for consideration before this Court in Pournami Oil Mills and Others v. State of Kerala and Another [1986 (Supp) SCC 728] wherein it was held:

> "Under the order dated April 11, 1979, new small scale units were invited to set up their industries in the State of Kerala and with a view to boosting of industrialisation, exemption from sales tax and purchase tax for a period of five years was extended as a concession and the five-year period was to run from the date of commencement of production. If in response to such an order and in consideration of the concession made available, promoters of any small scale concern have set up their industries within the State of Kerala, they would certainly be entitled to plead the rule of estoppel in their favour when the State of Kerala purports to act differently. Several decisions of this Court were cited in support of the stand of the appellants that in similar circumstances the plea of estoppel can be and has been applied and the leading authority on this point is the case of M.P. Sugar Mills. On the other hand, reliance has been placed on behalf of the State on a judgment of this Court in Bakul Cashew Co. v. STO. In Bakul Cashew Co. case this Court found that there was no clear material to show any definite or certain promise had been made by the Minister to

> the concerned persons and there was no clear material also in support of the stand that the parties had altered their position by acting upon the representations and suffered any prejudice. On facts, therefore, no case for raising the plea of estoppel was held to have been made out. This Court proceeded on the footing that the notification granting exemption retrospectively was not in accordance with Section 10 of the State Sales Tax Act as it then stood, as there was no power to grant exemption retrospectively. By an amendment that power has been subsequently conferred. In these appeals there is no question of retrospective exemption. We also find that no reference was made by the High Court to the decision in M.P. Sugar Mills' case. In our view, to the facts of the present case, the ratio of M.P. Sugar Mills' case directly applies and the plea of estoppel is unanswerable."

Yet again in Assistant Commissioner of Commercial Taxes (Asst.) Dharwar and Others v. Dharmendra Trading Company and Others [(1988) 3 SCC 570], this Court, on the fact situation obtaining therein, rejected the contention of the State that any misuse was committed by the respondent therein and thus the State cannot go back on its promise.

It was observed:

> "The next submission of learned counsel for the appellants was that the concessions granted by the said order dated 30-6-1969 were of no legal effect as there is no statutory provision under which such concessions could be granted and the order of 30- 6-1969 was ultra vires and bad in law. We totally fail to see how an Assistant Commissioner or Deputy Commissioner of Sales Tax who are functionaries of a State can say that a concession granted by the State itself was beyond the powers of the State or how the State can say so either. Moreover, if the said argument of learned counsel is correct, the result would be that even the second order of 12-1-1977 would be equally invalid as it also grants concessions by way of refunds, although in a more limited manner and that is not even the case of the appellants."

Mangalore Chemicals and Fertilisers Limited v. Deputy Commissioner of Commercial Taxes and Others [1992 Supp (1) SCC 21] is a case where this Court had the occasion to consider as to whether subsequent change in the eligibility criteria can undo the eligibility for the condition stipulated in the earlier notification and answered the same in the negative.

This Court reaffirmed the legal position in Pawan Alloys & Casting Pvt. Ltd., Meerut v. U.P. State Electricity Board and Others [(1997) 7 SCC 251] holding:

> "As a result of the aforesaid discussion on these points the conclusion becomes inevitable that the appellants are entitled to succeed. It must be held that the impugned notification of 31-7-1986 will have no adverse effect on the right of the appellant-new industries to get the development rebate of 10% for the unexpired period of three years from the respective dates of commencement of electricity supply at their units from the Board with effect from 1-8-1986 onwards till the entire three

> years' period for each of them got exhausted. This result logically follows for the appellants who have admittedly entered into supply agreements with the Board as new industries prior to 1-8- 1986."

The question came up for consideration before this Court recently in State of Punjab v. Nestle India Ltd. and Another [(2004) 6 SCC 465] wherein this Court surveyed the growth of the said doctrine.

In that case the State, pursuant to its promise, did not issue any notification. The High Court, in the writ petition filed by the Respondent therein was of the opinion that the State was bound by its promise to abolish purchase tax and as the Respondent acted on the representation made, absence of a formal notification which was no more than a ministerial act would not make the Respondents therein to pay purchase tax with effect from 1.4.1996 to 3.6.1997.

The learned counsel appearing on behalf of the State, however, has placed strong reliance on the judgment of this Court in State of Rajasthan and Another v. J.K. Udaipur Udyog Ltd. and Another [(2004) 7 SCC 673], wherein the question which fell for consideration was as to whether in absence of any specific promise, the scheme of grant of exemption of sales tax payable by all the existing units as also the new industrial units would constitute a promise. It was held:

> "In this case the Scheme being notified under the power in the State Government to grant exemptions both under Section 15 of the RST Act and Section 8(5) of the CST Act in the public interest, the State Government was competent to modify or revoke the grant for the same reason. Thus what is granted can be withdrawn unless the Government is precluded from doing so on the ground of promissory estoppel, which principle is itself subject to considerations of equity and public interest. (See STO v. Shree Durga Oil Mills) The vesting of a defeasible right is therefore, a contradiction in terms. There being no indefeasible right to the continued grant of an exemption (absent the exception of promissory estoppel), the question of the respondent Companies having an indefeasible right to any facet of such exemption such as the rate, period, etc. does not arise."

(Emphasis supplied) The said decision itself is an authority for the proposition that what is granted can be withdrawn by the Government except in the case where the doctrine of promissory estoppel applies. The said decision is also an authority for the proposition that the promissory estoppel operates on equity and public interest.

In Bannari Amman Sugars Ltd. v. Commercial Tax Officer and Others [(2005) 1 SCC 625], it was stated:

> "19. In order to invoke the doctrine of promissory estoppel clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and bald expressions without any supporting material to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press into aid the

> doctrine. The courts are bound to consider all aspects including the results sought to be achieved and the public good at large, because while considering the applicability of the doctrine, the courts have to do equity and the fundamental principles of equity must for ever be present in the mind of the court."

It is true that the State issued a notification on or about 3.1.1996 expressing its intention to amend the rules. By reason thereof, however, the State neither stated nor could it expressly state, that the rules shall stand amended. It is now well-settled principle of law that draft rules can be invoked only when no rule is operative in the field. Recourse to draft rules for the purpose of taking a decision in certain matters, can also be taken subject to certain conditions. [See Union of India Through Govt. of Pondicherry and Another v. V. Ramakrishnan and Others, (2005) 8 SCC 394, para 23 and 24] The promises/representations made by way of a statute, therefore, continued to operate in the field. It may be true that the Appellants altered their position only from August, 1996 but it has neither been denied nor disputed that during the relevant period, namely, August, 1996 to 16.12.1996 not only they have invested huge amounts but also the authorities of the State sanctioned benefits, granted permissions. Parties had also taken other steps which could be taken only for the purpose of setting up of a new industrial unit. An entrepreneur who sets up an industry in a backward area unless otherwise prohibited, is entitled to alter his position pursuant to or in furtherance of the promises or representations made by the State. The State accepted that equity operated in favour of the entrepreneurs by issuing Note 2 to the notification dated 16.12.1996 whereby and whereunder solvent extraction plant was for the first time inserted in Schedule III, i.e., in the negative list.

Both the provisions contained in Schedule III and the Note 2 formed part of subordinate legislation. By reason of the said Note, the State did not deviate from its professed object. It was in conformity with the purport for which original Rule 28A was enacted.

We, in this case, are not concerned with the quantum of exemption to which the Appellants may be entitled to, but only with the interpretation of the relevant provisions which arise for consideration before us.

We may at this stage consider the effect of omission of the said Note. It is beyond any cavil that a subordinate legislation can be given a retrospective effect and retroactive operation, if any power in this behalf is contained in the main act. Rule making power is a species of delegated legislation. A delegatee therefor can make rules only within the four-corners thereof.

It is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. [See West v. Gwynne, (1911) 2 Ch. 1] A retrospective effect to an amendment by way of a delegated legislation could be given, thus, only after coming into force of sub-section (2A) of Section 64 of the Act and not prior thereto.

By reason of Note 2, certain rights were conferred. Although there lies a distinction between vested rights and accrued rights as by reason of a delegated legislation, a right cannot be taken away. The amendments carried out in 1996 as also the subsequent amendments made prior to 2001, could not,

thus, have taken away the rights of the appellant with retrospective effect.

For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. The appeals are allowed and the matter is remitted to the Director of Industries to consider the matter afresh.

In view of our findings aforementioned no direction is required to be issued in the writ petition filed by the appellants. The writ petition is disposed of accordingly.