Bannari Amman Sugars Ltd vs Commercial Tax Officer And Ors on 22 November, 2004

Equivalent citations: AIRONLINE 2004 SC 923

Author: Arijit Pasayat

Bench: Arijit Pasayat, C.K. Thakker

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           CASE NO.:
Appeal (civil)  8605 of 2002

PETITIONER:
BANNARI AMMAN SUGARS LTD.

RESPONDENT:
COMMERCIAL TAX OFFICER AND ORS.

DATE OF JUDGMENT: 22/11/2004

BENCH:
ARIJIT PASAYAT & C.K. THAKKER

JUDGMENT:
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JUDGMENT 2004 Supp(6) SCR 264 The Judgment of the Court was delivered by ARIJIT PASAYAT, J. : These two appeals involve identical questions and, therefore, are disposed of by this common judgment after noticing the factual position, so far as they are relevant. The appellants question correctness of the judgment rendered by a Division Bench of the Madras High Court which held that the withdrawal of benefits extended to the appellants as subsidy was in order. The appellants questioned legality or the G.O.Ms No. 989 dated 1.9.1988 directing discontinuance of purchase tax exemption in case of mills which exceeded the ceiling of Rs. 300 lakhs during the period of five years, and Government letter dated 28.12.1988 which made the aforesaid G.O. Ms. No. 989 of 1.9.1988 operative retrospectively from 1.4.1988. Initially the writ petitions were filed before the High Court, but after constitution of the Tamil Nadu Taxation Special Tribunal (hereinafter referred to as the 'Tribunal') the writ petitions were transferred to the Tribunal which held that on application of the principles of promissory estoppel and legitimate expectation, the withdrawal of benefit was not sustainable in law. The State questioned correctness of the judgment before the High Court which, as noted above, held the G.O.Ms, and the Govt. letter to be valid, reversing the conclusions arrived at by the Tribunal. The judgment forms subject matter of challenge in these appeals.

In support of the appeals the primary stands raised by the appellants are :

1. The doctrines of promissory estoppel and legitimate expectation were applicable to the facts of the case. There was no material to show existence of any overriding public interest to rule out application of the aforesaid doctrine there was no scope for retrospective withdrawal. In any event, before withdrawal of the benefits, no opportunity of hearing was granted. The High Court erroneously came to hold that the State Government had not filed any counter. The materials which were produced before the High Court and on the basis of which it is decided that the decision of the Government is in order were not even pleaded in the pleadings and during arguments. The appellants were taken by surprise by production of materials which were not even disclosed to the appellants. The contents of the files which were produced before the High Court and on which reliance was placed to hold against the appellants are not known to the appellants. In other words, there was clear violation of the principles of natural justice. The Government's letter dated 28.12.1988 refers to some decision, but in the absence of any authentication as required under Article 166 of the Constitution of India, 1950 (in short the 'Constitution') the same is ineffective. In any event, the retrospective withdrawal of the benefit on the basis of an executive decision is impermissible.

In response, learned counsel for the respondent-State submitted that the appellants have failed to adduce any evidence or material to show that were in any way induced by any governmental action to set up industries. In fact, the Government of Tamil Nadu vide G.O.Ms. No. 1294 dated 24.10.1975 granted exemption from purchase tax on sugarcane in favour of sugar mills established in "co-operative and public sectors" in the form of annual subsidy equivalent to purchase tax on sugarcane. There was no scope for any mis-understanding that it applied to any private sector participation in the sphere of sugar manufacturing. The commercial productions were started in case of appellants in C.A. No. 8606/2002 i.e. Ponni Sugars (Erode) Ltd. v. Govt. of Tamil Nadu & Ors., on 27.1.1984 and in C.A. 8605/ 2002 i.e. Bannari Amman Sugars Ltd v. Commercial Tax Officer & Ors. on 22.1.1986. The appellants only made representation to Government subsequently claiming exemption at par with the cooperative and public sector mills. As there was no inducement or assurance, the question of any promissory estoppel did not arise. So far as legitimate expectation aspect is concerned, it is too well known that the benefit extended can be withdrawn and with this knowledge if the units are set up, the principle of legitimate expectation does not apply. The High Court recorded the following findings on the factual aspects.

(1) The respondents have established their units prior to the Government orders granting the subsidy and they have no vested right to claim exemption.

(2) No inducement was made in the Government orders to establish the units.

(3) The respondents have not acted on the basis of the Government Orders for establishing the units.

(4) The grant of subsidy is a concession and the Government has got good reasons for modifying the scheme in public interest.

(5) No prejudice is caused to the respondents since the scheme was interested to make the units viable and the modified scheme provides for safeguards to that extent.

(6) The Order granting subsidy can be withdrawn in public interest. The Government has exercised their right to modify the scheme in the interest of public revenue.

The stand taken by the present appellants before the Tribunal and the High Court was rejected. With reference to the files produced, certain factual conclusions were arrived at, the correctness of those form the core challenge in these appeals. Estoppel is a rule of equity which has gained new dismensions in recent years. A new class of estoppel has come to be recognized by the courts in this country as well as in England. The doctrine of 'promissory estoppel' has assumed importance in recent years though it was dimly noticed in some of the earlier cases. The leading case on the subject is Central London Property Trust Ltd. v. High Trees House Ltd., [1947] 1 KB 130. The rule laid down in High Trees case (supra), again came up for consideration before the King's Bench in Combe v. Bombe, [1951] 2 KB 215. Therein the court ruled that the principle stated in High Trees's case (supra), is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word. But that principle does not create any cause of action, which did not exist before; so that, where a promise is made which is not supported by any consideration, the promise cannot bring an action on the basis of that promise. The principle enunciated in the High Trees case (supra), was also recognized by the House of Lords in Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd., [1955] 2 All ER 657. That principle was adopted by this Court in Union of India v. Indo-Afghan Agencies Ltd., AIR (1968) SC 718 and Turner Morrison and Co. Ltd. v. Hungerford Investiment Trust Ltd., [1972] 1 SCC

857. Doctrine of "Promissory Estoppel" has been envolved by the courts, on the principles of equity, to avoid injustice. "Promissory Estoppel" is defined in Black's Law Distionary as "an estoppel which arises when there is a promise which promissor should reasonable expect to induce action or forbearance of a definite and substantial character on the part of promisee, and which does include such action or forbearance, and such promise is binding if injustice can be avoided only by enforcement of promise". So far as this Court is concerned, it invoked the doctrine in Indo Afghan Agencies's case (supra) in which is was, inter alia, laid down that even though the case would not fall within the terms of Section 115 of the Indian Evidence Act, 1872 (in short the 'Evidence Act') which enacts the rule of estoppel, it would still be open to a party who had acted on a representation made by the Government to claim that the Government should be bound to carry out the promise made by it even though the promise was not recorded in the form of a formal contract as required by Article 299 of the Constitution. [See Century Spinning Co. v. Ulhasnagar Municipal Council, AIR (1971) SC 1021, Radhakrishna v. State of Bihar, AIR (1977) SC 1496, Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P., [1979] 2 SCC 409, Union of India v. Godfrey Philips Indian Ltd., [1985] 4 SCC 369 and Dr. Ashok Kumar Maheshwari v. State of U.P. & Another, (1998) 2 Supreme 100].

In the backdrop, let us travel a little distance into the past to understand the evolution of the doctrine of "promissory estoppel". Dixon, J. an Australian Jurists, in Grundt v. Great Boulder Gold Mines Prorietary Ltd., [1939] 59 CLR 641 (Aust) laid down as under : "It is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to no misunderstanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumptions were deserted that led to it". The principle, set out above, was reiterated by Lord Denning in High Trees's case (supra) This principle has been evolved by equity to avoid injustice. It is nether in the realm of contract nor in the realm of estoppel. Its object is to interpose equity shorn of its form to mitigate the rigour of strict law, as noted in Anglo Afghan Aencies 's case (supra) and Sharma Transport Represented by D.P. Sharma v. Government of A.P. and Others, [2002] 2 SCC 188.

No vested right as to tax holding is acquired by a person who is granted concession. If any concession has been given it can be withdrawn at any time and no time limit should be insisted upon before it was withdrawn. The rule of promissory estoppel can be invoked only if on the basis of representation made by the Government, the industry was established to avail benefit if of exemption. In Kasinka Trading and Anr. v. Union of India and Anr., [1995] 1 SCC 274 it was held that the doctrine of promissory estoppel represents a principle evolved by equity to avoid injustice.

A person may have a 'legitimate expectation' of being treated in a certain way by an administrative athority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. The doctrine of legitimate expectation has an important place in the developing law of judicial review. It is, however, not necessary to explore the doctrine in this case, it is enough merely to note that a legitimate expectation can provide a sufficient interest to enable one who cannot point to the existence of a substantive right to obtain the leave of the court to apply for judicial review. It is generally agreed that 'legitimate expectation' gives the applicant sufficient locus standi for judicial review and that the doctrine of legitimate expectation to be confined mostly to right to a fair hearing before a decision which results in negativing a promise or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightway from the administrative authorities as no crystallized right as such involved. The protection of such legitimate expectation does not require the fulfilment of the expectation where an overriding public interest requires otherwise. In other words, where a person's legitimate expectation in not fulfilled by taking a particular decision then decision maker should justify the denial of such expectation by showing some overriding public interest. (See Union of India and Others. v. Hindustan Development Corporation and Others, AIR (1994) SC 998).

While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action

qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heart beat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validity for discernible reasons, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does if really satisfy the test of reasonableness. Where a particular mode is prescribed for doing an act and there is no impediment in adopting the procedure, the deviation to act in different manner which does not disclose any discernible principle which is reasonable itself small be labelled as arbitrary. Every State action must be informed by reason and it follows that an act uninformed by reason is per se arbitrary.

This Court's observations in G.B. Mahajan v. Jalgaon Municipal Council, AIR (1991) SC 1153 are kept out of lush field of administrative policy except where policy is inconsistent with the express or implied provision of a statute which creates the power to which the policy relates or where a decision made in purported exercise of power is such that a repository of the power acting reasonably and in good faith could not have made it. But there has to be a word of caution. Something overwhelming must appear before the Court will intervene. That is and ought to be a difficult onus for an applicant to discharge. The Courts are not very good at formulating or evaluating policy. Sometimes when the Courts have intervened on policy grounds the Court's view of the range of policies open under the statute or of what is unreasonable policy has not got public acceptance. On the contrary, curial views of policy have been subjected to stringent criticism.

As Professor Wade points out (in Administrative Law by H.W.R. Wade, 6th Edition) there is ample room within the legal boundaries for radical differences of opinion in which neither side is unreasonable. The reasonableness in administrative law must, therefore, distinguish between proper course and improper abuse of power. Nor is the test Court's own standard of reasonableness as it might conceive it in a given situation. The point to note is that the thing is not unreasonable in the legal sense merely because the Court thinks it to be unwise.

In Hindustan Development Corporation's case (supra), it was observed that decision taken by the authority must be found to be arbitrary, unreasonable and not taken in public interest where the doctrine of legitimate expectation can be applied. If it is a question of policy, even by ways of change of old policy, the Courts cannot intervene with the decision. In a given case whether there are such facts and circumstances giving rise to legitimate expectation, would primarily be a question of fact.

As was observed in Punjab Communications Ltd. v. Union of India of Others, AIR (1999) SC 1801, the change in policy can defeat a substantive legitimate expectation if it can be justified on "Wednesbury reasonableness." The decision-maker has the choice in the balancing of the pros and cons relevant to the change in policy. It is, therefore, clear that the choice of police is for the decision-maker and not the Court. The legitimate substantive expectation merely permits the Court to find out if the change of policy which is the cause for defeating the legitimate expectation is

irrational or perverse or one which no reasonable person could have made. A claim based on merely legitimate expectation without anything more cannot ipso facto give a right. Its uniqueness lies in the fact that it covers the entire span of time; present, past and future. How significant is the statement that today is tomorrows' yesterday. The present is as we experience it, the past is a present memory and future is a present expectation. For legal purposes, expectation is not same as anticipation. Legitimacy of an expectation can be inferred only if it is founded on the sanction of law.

As observed in Attorney General for New Southwale v. Quinn, [1990] 64 Australian LJR 327 to strike the exercise of administrative power solely on the ground of avoiding the disappointment of the legitimate expectations of an individual would be to set the Courts adrift on a featureless sea of pragmatism. Moreover, the negotiation of a legitimate expectation (falling short of a legal right) is too nebulous to form a basis for invalidating the exercise of a power when its exercise otherwise accords with law. If a denial of legitimate expectation in a given case amounts to denial of right guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power of violation of principles of natural justice, the same can be questioned on the well known grounds attracting Article 14 but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. It can be one of the grounds to consider, but the Court must lift the veil and see whether the decision is violative of these principles warranting interference. It depends very much on the facts and the recognised general principles of administrative law applicable to such facts and the concept of legitimate expectation which is the latest recruit to a long list of concepts fashioned by the Courts for the review of administrative action must be restricted to the general legal limitations applicable and binding the manner of the future exercise of administrative power in a particular case. It follows that the concept of legitimate expectation is 'not the key which unlocks the treasure of natural justice and it ought not to unlock the gates which shuts the Court out of review on the merits,' particularly, when the elements of speculation and uncertainty are inherent in that very concept. As cautioned in Attorney General for New Southwale's case the Courts should restrain themselves and respect such claims duly to the legal limitations. It is a well meant caution. Otherwise, a resourceful litigant having vested interest in contract, licences, etc. can successfully indulge in getting welfare activities mandated by directing principles thwarted to further his own interest. The caution, particularly in the changing scenario becomes all the more important.

If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities and adopt trade policies. As noted above, the ultimate test is whether on the touchstone of reasonableness the policy decision comes out unscathed.

Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interest of the general public and not from the standpoint of the interests of persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved the nature of the right alleged to have taken infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time enter into judicial

verdict, the reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country. (See Parbhani Transport Co-operative Society Ltd. v. Regional Transport Authority, Aurangabad and Others, AIR (1960) SC 901; Shree Meenakshi Mills Ltd. v. Union of India, AIR (1974) SC 365; Hari Chand Sarda v. Mizo District Council and Another, AIR (1967) SC 829; Krishnan Kakkanth v. Government of Kerala and Others, AIR (1997) SC 128 and Union of India and Another v. International Trading Co. and Another, [2003] 5 SCC 437.

Article 166 of the Constitution deals with the conduct of Government business. The said provision reads as follows :

> "166. Conduct of business of the Government of a State. - (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.
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> (2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.
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> (3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocating among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion."

Clause (1) requires that all executive action of the State Government shall have to be taken in the name of the Governor. Further is no particular formula of words required for compliance with Article 166(1). What the Court has to see is whether the substance of its requirement has been complied with. A Constitution Bench in R. Chitralekha Etc. v. State of Mysore and Ors., AIR (1964) SC 1823 held that the provisions of the Article were only directory and not mandatory in character and if they were not complied with it could still be established as a question of fact that the impugned order was issued in fact by the State Government or the Governor. Clause (1) does not prescribe how an executive action of the Government is to be performed; it only prescribes the mode under which such act is to be expressed. While clause (1) is in relation to the mode of expression, clause (2) lays down the ways in which the order is to be authenticated. Whether there is any Government order in terms of Article 166; has to be adjudicated from the factual background of each case.

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 and doctrine the 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.

In Shrijee Sales Corporation and Anr. v. Union of India, [1997] 3 SCC 398 it was observed that once public interest is accepted as the superior equity which can override individual equity the principle would be applicable even in cases where a period has been indicated for operation of the promise. If there is a supervening public equity, the Government would be allowed to change its stand and has the power to withdraw from representation made by it which induced persons to take certain steps which may have gone adverse to the interest of such persons on account of such withdrawal. Moreover, the Government is competent to rescind from the promise even if there is no manifest public interest involved, provided no one is put in any adverse situation which cannot be rectified. Similar view was expressed in M/s. Pawan Alloys and Casting Pvt. Ltd. Meerut Etc. Etc. v. U.P. State Electricity Board and Others, AIR (1997) SC 3910 and in Sales Tax Officers and Anr. v. Shree Durga Oil Mills and Anr., [1999] 1 SCC 573, it was further held that the Government could change its industrial policy if the situation so warranted and merely because the resolution was announced for a particular period, it did not mean that the government could not amend and change the policy under any circumstances. If the party claiming application of the doctrine acted on the basis of a notification it should have known that such notification was liable to be amended or rescinded at any point of time, if the government felt that it was necessary to do so in public interest.

In view of the factual position recorded by the High Court that at the point of time the appellants' units were set up and the commercial production started there was no assurance or promise. The doctrine of promissory estoppel had no application to the facts of the case at that stage. We find no substance in the plea that before a policy decision is taken to amend or alter the promise indicated in any particular notification, the beneficiary was to be granted an opportunity of hearing. Such a plea is clearly unsustainable. While taking policy decision, the government is not required to hear the persons who have been granted the benefit which is sought to be withdrawn.

The question of legitimate expectation arises according to the appellants after the benefits were granted by the concerned G.O.Ms. At this juncture we would like to take note to certain factual positions highlighted by the appellants which are practically undisputed by the respondents. Contrary to what the High Court has stated, it appears from record that counter affidavits were filed. The reasons which have weighed with the High Court to uphold the action of the State were not pleaded before the High Court specifically, and the High Court cull out those from the files which were produced before it. Though the appellants were not entitled to any opportunity of hearing before alteration of the benefits flowing from the notifications or withdrawal of any benefit, yet when the State has not taken any specific stand justifying the withdrawal and the High Court referred to the files to put its seal of proof, notwithstanding non- requirement for granting any opportunity before the withdrawal, principles of natural justice certainly were applicable, since the High Court with reference to the files recorded findings on the basis thereof. As noted above no specific grounds or reasons were indicated to justify the withdrawal in the affidavits filed before the

Tribunal or the High Court, as the case may be. As the correctness of factual basis justifying withdrawal is in issue, fair play certainly warranted grant of opportunity to the appellants to present its side of the picture.

Further, a definite plea was taken that there was no scope for retrospective withdrawal of benefit by an executive order. The High Court has not dealt with the issue. The same also needs to be examined.

Above being the position, decision of the High Court by placing reliance on the files to hold that the withdrawal was justified, is not tenable in law and in the fitness of things, the High Court should hear the matter afresh and taken decision on those two issues. It is made clear that we have not expressed any opinion on those issues on the facts of the present case.

It is to be noted that no privilege was claimed from production of the file as the files were produced before the High Court and in fact the High Court referred to the materials on the files to affirm State's action.

We direct that the State Government, if it so chooses, shall file its further counter-affidavits before the High Court within six weeks from today indicating the reasons which warranted the withdrawal of the benefits extended. The plea of the appellants regarding legitimate expectation shall be considered by the High Court in the light of materials to be placed by the respondents by affidavits as directed above. We make it clear that we have not expressed any opinion on the factual aspects except indicating the principles underlying legitimate expectation. Another point which was specifically raised before the High Court but has not been dealt by it is the legality of the action in directing retrospective withdrawal of the benefit by a letter of the Government. Whether the same is permissible in law has to be decided by the High Court.

To the aforesaid limited extent, the matter is remitted to the High Court for fresh consideration.

The appeals are disposed of accordingly without any order as to costs.