

K. P. Power Pvt. Ltd. & Anr vs State Of Maharashtra & Ors on 21 December, 2018

Equivalent citations: AIRONLINE 2018 BOM 1373

Author: Bharati H. Dangre

Bench: S.C. Dharmadhikari, Bharati H.Dangre

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2329 OF 2003

1 K.P. Power Private Limited,
a Company incorporated under
the Companies Act, 1956 and
having its Registered Officer
at 200, Varun II, Raheja
Township, Malad (East)
Mumbai 400097.

2 Ajay S. Dhumal, of Mumbai
residing at 602-A, Leela Sterling
Opposite Yashodhan High
School, Goregaon (east),
Mumbai 400063.

.. Petitioners

Versus

1 State of Maharashtra

2 The Maharashtra Energy
Development Agency, a Government
of Maharashtra undertaking having
its office at 2nd floor, MHADA
Commercial Complex, Opp Tridal
Nagar, Yerawada Pune.

3 Maharashtra State Electricity
Distribution Company Limited
(formerly Maharashtra State
Electricity Board a Statutory Board)
a Company incorporated under
the provisions of the Companies
Act, 1956 having its regd office at
Prakashgad Bandra (E),
Mumbai 400051.

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4 The Under Secretary, Department of Industries of the State of Maharashtra having its office at Mantralaya, Mumbai 400032.

5 The Under Secretary, Department of Energy of the State of Maharashtra having its office at Mantralaya, Mumbai 400032. .. Respondents

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Mr. Iqbal Chagla, Senior Counsel with Mr.Fredun De'Vitre, Senior Counsel, Mr.Naval Agarwal, Mr.Jehan Mehta, Ms.Pooja Kothari, Mr.Prakhar Parekh and Ms.Sanaea Laskari I/b Federal & Rashmikan for the petitioners.

Mr.Anil Sakhare, Senior Counsel with Mr.Yashwant Dhanegave, Mr.Rohan Mirpury and Ms.Geeta Shastri, Addl.G.P. and Ms.Jyoti Chavan for respondent nos.1 and 2.

Mr.Kiran Gandhi i/b Little and Co. for respondent no.3.

CORAM: S.C. DHARMADHIKARI &
SMT. BHARATI H.DANGRE, JJ.

RESERVED ON: 3rd AUGUST 2018
PRONOUNCED ON : 21st DECEMBER 2018

JUDGMENT (Per BHARATI H. DANGRE, J)

1 The petitioner, a Private Limited Company, incorporated under the Companies Act, 1956 and having its registered office at Bombay along with the petitioner no.2, a Tilak 3 WP-2329-03.doc shareholder and Director of Petitioner no.1 instituted the present writ petition in the year 2003 seeking the following relief.

(a) That this Hon'ble Court be pleased to order and declare that the Petition No.1 is entitled to a final approval/NOC for its 30 MW Wind Mill Power Generation Project together with the benefits/incentives under the Package Scheme of Incentives, 1993

as amended from time to time.

(b) That this Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction directing the Respondents to grant final approval/NOC to petitioner no.1 in respect of the aforesaid 30 MW Wind Mill Power Generation Project together with the benefits/incentives under the Package Scheme of Incentives, 1993 as amended from time to time.

(c) That pending the hearing and final disposal of this Petition, this Hon'ble Court be pleased to issue such writs and orders as are appropriate directing Respondent No.1 and 2.

(i) to forthwith permit Petitioner No.1 to commission its 30 MW Wind Mill Power Generation Project and complete the project by 31st March 2005 in accordance with the Package Scheme of Incentives, 1993.

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(ii) to further consider and decide the application made by Petitioner No.1 for the benefits/incentives under the Package Scheme of Incentives, 1993 as amended from time to time and to communicate its decision to the Petitioners.

The aforesaid writ petition was admitted on 16 th December 2003 after hearing the learned counsel for the petitioner and learned Advocate General appearing for the respondent authorities. No interim relief was granted in the facts and circumstances of the case, however, the petitioners were held entitled to commission the project. The hearing of the writ petition came to be expedited.

2 The Writ Petition was listed before us for final hearing and we have heard the learned Senior Counsel Shri Iqbal Chagla for the petitioner and learned Senior Counsel Shri Anil Sakhare for respondent nos.1 and 2. The respondent no.3 is represented by Advocate Shri Gandhi I/b Little and Co. Tilak 5 WP-2329-03.doc 3 The Writ Petition impleads the State of Maharashtra as respondent no.1 in the said petition. The Maharashtra Energy Development Agency (hereinafter referred to as "MEDA"), a Government of Maharashtra undertaking which is the authority regulating the 100 Mega Watt Wind Mill Power Generation Projects in the State of Maharashtra is impleaded as respondent no.2. In the original petition, the Maharashtra State Electricity Board (For short 'MSEB') which is a statutory Board constituted under Section 5 of the Electricity (Supply Act) 1948 was impleaded as party respondent. However, during the pendency of the petition since the respondent no.3 was re-structured into four Companies, pursuant to the Maharashtra Electricity Reforms Transfer Scheme 2005, and thereafter the Maharashtra State Electricity Distribution Company Ltd (hereinafter referred to as "MSEDCL") which is responsible for distribution of electricity has been substituted as respondent no.3. The Department of Industries and Department of Energy of the State of Maharashtra are impleaded as respondent nos.4 and 5 through the Under Secretary of the respective departments.

Tilak 6 WP-2329-03.doc 4 The State of Maharashtra formulated a policy to promote generation of energy through non-conventional sources to supplement the ever increasing demand of electricity in the State. On taking note of the fact that there is an immense potential of generation of Wind Power in the State, the State of Maharashtra selected eight different sites for the said purpose and it announced its policy of generation through non-conventional sources in the year 1996. This policy, however, received lukewarm response. During the intervening period, the Government of India had also issued certain guidelines regarding Wind Energy generation. In this backdrop, the State Government issued a resolution on 12 th March 1998 partially modifying its existing policy to promote wind energy generation in the State and the new policy was pitched with salient features like the tariff, banking facility, transmission losses and most important conferment of certain sales tax benefits. The said factors were introduced as measures of incentives for investing in the Wind Power generation projects and as far as the sales tax benefits were Tilak 7 WP-2329-03.doc concerned, the promoter was held entitled to avail the sales tax benefits upto the amount of qualifying investment. The policy enunciated that the detail instructions about the modus operandi of sales tax benefits will be separately issued by the Finance Department. It also covered a provision of capital subsidy where MEDA had undertaken to provide a subsidy upto 30% of the fixed capital investment (limited to Rs.20 lakhs) to the promoters subject to certain stipulations. Provision was also made for re-imbursement for entry tax/octroi, as paid by promoters while making capital expenditure. All the aforesaid benefits were made integral part of the said policy so as to encourage the promoters to promote the Wind Energy generation in the State.

5 A German Corporation known as GESSELLSCHAFT SUR NUTSUNG ERNEUERBARER URS MbH (hereinafter referred to as M/s.GNEE) depicted interest in promoting the Wind Power project in the State and on 27 th October 1998, a meeting took place between a delegation from M/s.GNEE and MEDA, the respondent no.2 where the German Company was Tilak 8 WP-2329-03.doc appraised about the Wind Power generation policy of the State and its terms and conditions. It is worth to mention that M/s. GNEE was engaged in development, financing, construction and ownership of Wind Power projects in Germany and, therefore, it showed its inclination to develop the Wind Mill power generation in State of Maharashtra. The discussions between M/s.GNEE and the respondent were carried forward towards commissioning of 100 mega watt (MW) Wind Mill Power generation project in the State of Maharashtra. This fructified into issuance of a Letter of Intent (LOI) in favour of the said Company on 29th January 1999. The LOI was executed between the Governor of Maharashtra exercising the executive power of the Government of Maharashtra and M/s.GNEE which was in form of an agreement where the State Government agreed to provide the Company with detailed information concerning the sites including the wind data and expected the Company to review and assess during the period commencing on the date thereof and ending on the date which was slated after six months, on receipt by the Company of such information from the Government. Such a review was expected Tilak 9 WP-2329-03.doc to be conducted for the purpose of determining whether it is economically feasible and commercially viable to develop a Wind Power project on one or more sites. The Letter of Intent thus evinced the intent to conduct the feasibility review contemplated and to negotiate in good faith the possible development of one or more projects. The LOI stipulated that it will expire at the end of assessment period if either the Government or the Company did not elect to pursue the development of any project and upon such expiration, neither party owed any further obligation to the other party under the Letter of Intent.

As a step towards compliance of the conditions stipulated in the LOI, M/s.GNEE entered into a Memorandum of Understanding with an Indian Company by name King Prawns Limited, who was in possession of land at Palghar, District Jawhar in the State of Maharashtra, which was found suitable for setting up a wind energy farm. In the mean while, the State Government issued another resolution on 1st October 1999 thereby revisiting the procedure for availing sales tax benefits on the non-conventional energy generation projects Tilak 10 WP-2329-03.doc such as wind energy units, wind electricity generating units etc. As per the new Government Resolution, the sales tax benefit could be availed by the promoter from the date of obtaining the entitlement certificate for a period of continuous six years and for every year, such benefit was limited to 1/6 th of the qualifying investment. The said Government Resolution further made it imperative that the capacity of wind energy generated should be minimum 200 kilo watts.

6 Though the LOI was issued in favour of M/s.GNEE, the NOC could not be obtained by the said Company as the procedure prescribed contemplated the developer to apply to respondent no.2 for NOC of the project and the respondent no.2 would recommend the application to the State Government who was empowered to grant, in principle NOC. The respondent no.1 adopted this procedure and granted a period of 15 days i.e. between 15/12/1999 to 31/12/1999 to obtain such an NOC and it is the specific case of the petitioner that M/s.GNEE was not made aware of such a procedure and therefore, they did not make an application seeking such a Tilak 11 WP-2329-03.doc requisite NOC. It is the specific grievance of the petitioner that the respondent no.1 had selectively communicated this procedure adopted by it after 15/12/1999 to various parties enabling them to apply for NOC for their project on or around 28/12/1999 for getting the in-principle sanction of respondent no.1. The respondent no.1 granted in-Principle sanction vide letter dated 31/12/1999 addressed to the respondent no.2 who, in turn, informed the parties of the said sanction. M/s.King Prawns Limited approached the respondent no.1 when it came within its knowledge that such a procedure has to be followed and such an application was made in January 2000. The respondent no.1 then informed it that it has stopped issuing the No Objection Certificates after 31/12/1999. The respondent no.1 also issued clarifications to all General Managers, District Industries Center, the General Manager SICOM Limited, Mumbai as to the date of completion of the final effective steps under the Package Scheme of Incentives (PSI) 1993 and clarified that all parties should make applications for setting up their project before 31/12/1999 and should take final effective steps by 31st March 2002. Tilak 12 WP-2329-03.doc 7 The petitioner no.1 came to be incorporated as the subsidiary of King Prawns Limited on 21st May 2001 pursuant to Memorandum of Understanding entered between King Prawns Limited and M/s.GNEE. The petitioner no.1 came to be incorporated with the object of production, generation, accumulation, distribution, transmission and supply of electricity and electro motive force by Wind Power or Wind Mills and to form collaborations with the parties such as M/s.GNEE.

8 The State Government issued another resolution on 25th July 2001 in the backdrop of the inquiries made about the eligibility of entrepreneurs for the benefits under the Common Incentive plan and the last date for completion of the final effective phases. The said Government Resolution stipulated as to when a project would be considered to be in pipeline and also set out the criteria when it could be said to be in pipeline. The specific case of the petitioner is that the petitioner project was not to be considered to be in pipeline but it was entitled to Tilak 13 WP-2329-03.doc the

benefit of Common Incentive Plan since a LOI was already issued in its favour on 29th January 1999. The respondent no.2 in fact addressed a communication to the petitioner M/s. K.P.Limited on 20th June 2001, supplying list of the potential sites for Wind Power projects in Maharashtra as approved by the Ministry of Non-Conventional Energy Sources, Wind Power Division. The petitioners were also directed to obtain an NOC from the respondent no.3 under Section 44 of the Electricity Act. The respondent no.2 forwarded to the petitioner no.1 a list of potential sites for Wind Power projects in Maharashtra as approved by the Ministry of non-conventional energy sources - Government of India but the site selected by the petitioner was not included in the said list. The petitioner, therefore, started identifying the alternate site and made arrangements for acquiring the land at Bramanwel in District Dhule from the Maharashtra Industrial Development Corporation. It is the case of the petitioner that effective steps were taken for development of the Wind Mill power generation project of 100 mega watts capacity and the petitioners made huge financial commitments and incurred great expenditure, inter alia, by Tilak 14 WP-2329-03.doc purchasing 44 machines at a price of approximately 150 crores. The petitioner no.1, accordingly, made an application for seeking an NOC and in its letter dated 2nd August 2001, it set out all actions taken by it including the acquisition of 1200 acres of land and being tied up for additional 1500 acres of land at village Vedi, District Thane. All the necessary steps taken in furtherance of setting up of the projects, including the purchase of wind turbine generators, was also mentioned in the said letter. The petitioner no.1 was however, advised to restrict its NOC to 30 mega watts and not to pursue for the balance 70 mega watts. Accordingly, petitioner no.1 addressed a letter dated 4th September 2001 restricting the NOC to 30 Mega Watt. An application was also made to respondent no.3 in prescribed form VI for issuance of NOC for 30 mega watt capacity wind farm project. Repeated correspondence was made by the petitioner with respondent no.3 for No Objection Certificate under Section 44 of the Electricity Act so as to obtain a further in-principle NOC from the State Government. A request was made to expedite the said NOC as the completion date of the entire project was slated to be 31 st December 2001. The Tilak 15 WP-2329-03.doc authorities were informed that the petitioner no.1 had obtained the latest machinery which had better generation capacity with certain additional features and that they desired to install the said machines. Resultantly, the respondent no.3 issued an NOC on 18th September 2001 to the petitioner under Section 44 of the Electricity Act and the said NOC mentioned that the same would be valid only if it qualified as per Government Resolution dated 25th July 2001. The said NOC was to remain valid for a period of one year from the date of its issuance and it included a stipulation that wind energy project should be commissioned and connected to the grid of respondent no.3 within that time.

The case of the petitioner is that on receipt of the NOC from respondent no.3, it made all infrastructure arrangements required to be made under the said NOC such as providing 37 km long transmission line at the cost of Rs.5.70 crores and also paid the supervision charges in respect of the same. The petitioner also acquired 750 acres of land and carried out its development for setting up the first phase of the project of 30 Mega Watt capacity and as per the petitioner, the total amount spent on the infrastructure costs was estimated to Tilak 16 WP-2329-03.doc 8.6 crores. The respondent no.3 also confirmed by its letter dated 19th October 2001 that the petitioner no.1 has been granted an NOC to install 30 mega watt project. 9 The respondent no.2 further intimated to the petitioners that on the basis of the LOI issued to it, the case has been further forwarded to respondent no.1 for necessary permission and on receipt of such permission, necessary action would

be initiated. The letter further recorded that the petitioner no.1 was already granted in-principle NOC from respondent no.3 and documents mentioned therein were asked to be submitted to respondent no.2. Accordingly, the petitioner no.1, by its letter dated 29th October 2001, forwarded the requisite documents and requested the respondent no.2 to issue the final NOC. A request was also made by the petitioner to the Ministry of Department of Energy by his letter dated 15 th December 2001 for grant of final NOC for atleast 30 mega watt capacity project. In the meanwhile, the respondent no.1 by issuing a Resolution on 7th January 2002, extended the deadline for commissioning the 443 mega watt capacity power project Tilak 17 WP-2329-03.doc sanctioned by respondent no.1 from 31/12/1999 to 31/3/2002. Since the name of the petitioner was not included in the said Government Resolution, the petitioner corresponded with the Hon'ble Minister for Energy and it is the case of the petitioner that the proposal was forwarded to the Hon'ble Chief Minister and the petition further states that a meeting was convened by Hon'ble Chief Minister on 14th March 2002 and it was decided to recommend the proposal of petitioner no.1 for grant of final NOC to the cabinet at its meeting scheduled to be held on 27th March 2002. However, for certain administrative reasons, the issue was not taken up and referred to the concerned Departments for necessary clearances and approval. The petitioner also made a consistent effort to get the date of completion extended. All these efforts by the petitioner, however, did not yield the desired result though he continued to pursue the said project by presenting his project before the concerned authorities from time to time. This action of the respondent authorities in not granting him an NOC for commissioning the 100 mega watt project though it was subsequently restricted to 30 mega watt constrained the Tilak 18 WP-2329-03.doc petitioner to approach this Court by filing the present Writ Petition.

10 In support of the petition, we have heard the learned Senior Counsel Shri Chagla who has placed before us a brief note on the list of dates and has also tendered a compilation of documents. According to the learned Senior Counsel, the State Government was desirous of promoting the wind projects and therefore, it issued a resolution on 12 th March 1998 whereby the MSEB had resolved to purchase the Wind Power @ 2.25 per unit along with the escalation. According to the learned senior counsel, the MSEB was to initially bear the expenditure of erection of high tension sub-stations and transmission infrastructures and respondent no.3 - MEDA was authorized to recover 50% of the same from the promoters and give it to respondent no.3. This included the entitlements to the sales tax benefits, stipulated as an incentive for investing in the Wind Power project. The learned Senior counsel after taking us through the chronology of events would submit that the LOI was granted in favour of M/s.GNEE by the Tilak 19 WP-2329-03.doc Government of Maharashtra on 29th January 1999 and this LOI was to expire at the end of Assessment Year if either the Government of Maharashtra or the Company elected not to pursue the development of the project. According to the learned counsel, steps were taken in furtherance of the said LOI and a Memorandum of Understanding was entered between M/s.GNEE and King Prawns Limited and the petitioner no.1 was incorporated as a subsidiary of King Prawns Limited in pursuance of the Memorandum of Understanding and GNEE transferred the rights it had acquired under the LOI to the petitioners. According to Shri Chagla, the attempt of the State Government was to promote the wind energy generation and it therefore, floated a policy on wind generation and conferred on the promoter the status of the small scale industry and in order to provide an impetus, the scheme contained a provision to the effect that the respondent no.3 would purchase the energy developed

from the Wind Power plants to be set up by the parties @ Rs.2.25 paise per unit and also conferred certain sales tax benefits on the promoters. The submission of the learned counsel is that the petitioner stepped into the shoes of Tilak 20 WP-2329-03.doc M/s.GNEE and it was so recognized by the State Government through its various correspondence. The learned senior counsel would place reliance on the reference made to the Law and Judiciary Department from the Industries Energy and Labour Department and where an advise was sought on the issue as to whether a Memorandum of Understanding signed before registration of the petitioner company could be treated as valid in the backdrop of the fact that the MSEB had issued No Objection Certificate to M/s.K.P. Power Pvt.Ltd under Section 44 of the Electricity (Supply) Act 1948 for installation of 30 mega watt wind energy power project and this K.P. Power Pvt.Ltd Company has been registered on 21st May 2001 whereas King Prawns Limited has signed the Memorandum of Understanding with M/s.GNEE on 16th October 2000. The issue that was made over to the Law and Judiciary was whether M/s.K.P. Power Ltd i.e. the petitioner shall be eligible to get the incentives of Package Scheme framed by the Government vide resolution dated 25th July 2001. The Law and Judiciary responded to the query by opining that the formation of the petitioner Company is as per the provisions of the Companies Tilak 21 WP-2329-03.doc Act 1956 and once the Company comes into existence, it can enter into contract and on registration, such a contract can be treated as valid. The Law and Judiciary Ministry opined that in the instant case, the Company had taken effective steps for installation of the project and in view of this, it can be said that the Memorandum of Understanding entered between M/s.K.P. Power Limited and M/s.GNEE is valid even if the Company is registered later on. As far as the point about availing sales tax benefits are concerned, the Law and Judiciary has opined that the Company has not started its production and when the production would start, the incentives and concessions conferred by Government Resolution dated 25th July 2001 shall be automatically applicable. Shri Chagla also placed reliance on several minutes of meetings which took place in relation to the claim of the petitioner for an NOC to drive home his point that the State Government was ready and willing to permit the petitioner to commission the power project plant. Shri Chagla also placed reliance on the opinion of the then Advocate General as regards the interpretation of the Letter of Intent and whether it has lapsed and he would seek benefit of the positive Tilak 22 WP-2329-03.doc opinion of the learned Advocate General who had opined that there was no question of the LOI lapsing as the contingency did not arise and that he concurred with the opinion of the Law and Judiciary Department.

The learned Senior counsel would press into service the judgment of the Hon'ble Apex Court in case of State of Bihar & ors Vs. Kalyanpur Cement Limited 1 to support his submission of promissory estoppel and his precise submission is that the petitioner no.1 has made a huge investment and spent approximate amount of Rs.164 crore in the project and according to him, the State Government always held that the petitioner Company was selected for the installation of power project plant and in such circumstances, the State Government cannot be allowed to rely on its own lapses and in not implementing its policy. He would invite our attention to the law laid down by the Hon'ble Apex Court as regards the principle of promissory estoppel and he would specifically rely upon the observations of the Hon'ble Apex Court to the effect that the Government cannot claim to be exempted from the 1 (2010) 3 SCC 274 Tilak 23 WP-2329-03.doc liability to carry out the promise on some indefinite and undisclosed ground of necessity or expedience. He would submit that mere claim of change of policy would not be sufficient to exonerate the Government from

discharging its liability. Mr.Chagla would also place reliance on the judgment of the Hon'ble Apex Court in case of Rabindra Nath Sadhukhan and Anr Vs. State of West Bengal² 11 The petition is opposed by the State Government by filing two affidavits. The first affidavit is filed by the Section Officer in the Energy Department on 10 th December 2003. In the said affidavit, the claim of the petitioner is contested and it is stated that the LOI itself had contemplated that any time on or before the end of the assessment period, the first respondent Company was expected to negotiate in good faith the development of the project and the terms and conditions thereof, but this was never done and therefore, the life of an LOI has come to an end. Apart from this, the relief sought by the petitioner is opposed on the ground that the first petitioner 2 (1994) 1 CHN 294 Tilak 24 WP-2329-03.doc came into picture for the first time on 13 th October 2000 when the alleged Memorandum of Understanding with M/s.GNEE, a German Company was entered into. According to the said affidavit, the said MOU cannot have the effect of turning the Letter of Intent or enabling the first petitioner to claim the benefit thereof. The gist of the response of the State Government is the claim of the petitioner to be entitled to the benefit of Letter of Intent and its understanding for all times that the Letter of Intent was issued in favour of petitioner no.1 which is nothing but a misconception.

The affidavit proceeds to state that the Letter of Intent was signed with M/s.GNEE and not with the present petitioner who appeared to have signed the MOU with the M/s.GNEE at a much later date i.e. 16th October 2001 which is after the expiry of the assessment period as mentioned in the LOI as well as the policy itself which expired on 28 th July 1999. According to the State Government by the said purported MOU, the M/s.GNEE appears to have transferred its so-called rights under the Letter of Intent to the present petitioner which was totally without the approval of Government of Maharashtra and Tilak 25 WP-2329-03.doc such a transfer is neither contemplated under the Letter of Intent nor permitted under the Government policy for wind power development. An alternative case is also set out in the affidavit to the effect that even assuming the Letter of Intent is considered to be still valid in absence of the definite act of not electing to pursue the project either on the part of the Government of Maharashtra or the Company, it would be valid only as far as the said M/s.GNEE is concerned. It is further stated that the said M/s.GNEE having once elected not to pursue the project, the LOI has expired and therefore, any negotiations between the Government of Maharashtra and M/s.GNEE about the development of the project is not possible and even if for the sake of arguments, it is stated that if the Letter of Intent is still valid and the Government of Maharashtra can still negotiate, it can be only with M/s.GNEE and cannot be made applicable to the present petitioners. No privileges and advantages conferred by the LOI can be transferred to the petitioners at their will or discretion. Another affidavit is filed on behalf of the Dy. Secretary of the Industries Department which is sworn on 2 nd December 2003 Tilak 26 WP-2329-03.doc and it is limited to the Industries Department, insofar as the Package Scheme of Incentives is concerned. The Department of Industries proceeds to state in the affidavit that the State Government had enunciated its policy on generation through non-conventional sources in January 1996 and has modified its policy on Wind Power generation by issuing a resolution on 12 th March 1998. The affidavit further proceeds to state that under the Package Scheme of Incentives(PSI) 1993, the Government had appointed SICOM as the implementing agency for medium and large scale industries and District Industries Centre for Small Scale Industries. The applications of the units received on or before 31st December 1999 along with the documents showing that the initial

effective steps have been issued Letter of Intent and they have been directed to complete the final effective steps, as per the scheme. It is further stated that after completion of the final effective steps, the eligible units are permitted to make 100% investment within the prescribed period i.e. 2 years for non-pioneer units and three years for pioneer units after completion of final effective steps. After starting commercial production, the implementing agencies Tilak 27 WP-2329-03.doc issue the eligibility certificate and after getting the entitlement certificate from the Sales Tax Department, the Sales tax Incentive can be availed by the unit. It is clarified in the affidavit that after completion of all the initial effective steps, the units which have applied on or before 31 st December 1999 are eligible for incentives including Sales Tax incentive and the last date for completing all the final steps was 31 st March 2002 as contemplated by Government Resolution dated 12th May 2000. It is further stated that the implementing agencies issued the requisite certificates to the eligible units after fulfilling the criteria under 1993 Package Scheme of Incentives. 12 In support of the stand of the State Government, we have heard the learned senior counsel Shri Sakhare who would vehemently oppose the petition by questioning the locus of the petitioner. According to Shri Sakhare, the Letter of Intent has come to an end on 28th July 1999. His specific submission is that the LOI had a limited life and was dependent on the contingency stipulated in it, i.e. for the Assessment period. He would invite our attention to the relevant clause of the LOI Tilak 28 WP-2329-03.doc which stipulate that the Government of Maharashtra had agreed to provide the Company with detail information concerning the sites as the Company reasonably required including the wind data and the Company was expected to review and assess the same during the period commencing on the date of issuance of the LOI i.e. 29 th January 1999 and ending on the date which is six months after receipt by the Company of such information from the Government of Maharashtra and which was stipulated as 'the assessment period'. According to Shri Sakhare, the terms and conditions of the LOI stipulated as to when it would come to an end and once this LOI, according to him, has come to an end, neither the petitioner nor the German Company is entitled for availing any tax benefits flowing therefrom. The further submission of the learned senior counsel is that the Government was dealing with the German Company and it never indulged with the petitioner, though the petitioner claims that he was inducted by a Memorandum of Understanding. According to the learned senior counsel, the said Memorandum of Understanding was not entered into by a prior permission of the State Government Tilak 29 WP-2329-03.doc nor did it receive any recognition at the hands of the State Government. According to Shri Sakhare, the petitioner company is a stranger to the Government and there is no privity of contract between the petitioner company and the Government of Maharashtra since it had never issued any LOI to it nor did it intended to convey any benefit upon the petitioner. In short, the submission of Shri Sakhare is that once the LOI has expired, nothing survives to be conferred on the German Company and far more, upon the petitioner since the Government never dealt with the petitioner as far as installation of wind projects are concerned. As far as the submission of learned senior counsel Shri Chagla and his attempt to demonstrate that the correspondence was constantly going on between the State Government and the petitioner, and the petitioner himself was entertained by the State Government as a successor to the German Company, Shri Sakhare would submit that there was no decision ever taken by the competent authority and mere notings in the file could not be said to be the decision of the State Government. For the said purpose, he would rely upon the judgment of the Hon'ble Apex Court in Tilak 30 WP-2329-03.doc case of Jasbir Singh Chhabra Vs. State of Punjab reported in 2010 4 SCC 192, wherein it has been held that issues and policy matters which are required to be

decided by the Government or dealt with by several functionaries and some of whom may record notings on the files favoring a particular person or group of persons. However, a final decision is required to be taken by the designated authority, keeping in view the larger public interest and the notings recorded in the files cannot be made basis for recording a finding that the ultimate decision taken by the Government is tainted with malafides or influenced by extraneous consideration and the Court is duty bound to carefully take note of the same. He would also place reliance on the judgment of the Hon'ble Apex Court in case of Rajasthan Cooperative Dairy Federation Limited Vs. Maha Laxmi Mingrate Marketing Service Pvt.Ltd 3 and others to explain the scope of "Letter of Intent" and he relies upon para 7 of the said judgment wherein the Hon'ble Apex Court has succinctly held that the Letter of Intent merely express an intention to enter into a contract and if the 3 1996(10)SCC 405 Tilak 31 WP-2329-03.doc conditions stipulated in the LOI were not fulfilled by one party, then other party was entitled to withdraw the LOI and it would not create any binding relationship.

13 The submission of learned counsel Shri Sakhare precisely is to the effect that the respondent no.2 was not bound to keep the policy floated by it alive in eternity and though the policy was to encourage non-conventional energy resources to be tapped and public participation was called for, the respondent State was perfectly justified in limiting the time for carrying each step to achieve the ultimate goal of encouraging the said entrepreneurs to participate in Power Generation project. According to Shri Sakhare, the time limit for availing the benefits under the said scheme has already expired and according to him, the claim of the petitioner at this stage is bereft of any consideration on two counts; namely, for the reason that the petitioner is not entitled for availing any of the benefits as the LOI was not granted in his favour and secondly on the count that the petitioner did not take steps within the period stipulated. According to Shri Sakhare, the Tilak 32 WP-2329-03.doc relief sought by the petitioner deserves to be rejected and he would urge that no mandamus can be issued to assist the petitioner since there is no failure in discharge of any mandatory/statutory duty on part of the respondent authority. 14 With the assistance of the respective counsel, we have perused the entire petition along with its annexures and also the affidavits filed by the respondent. The petitioner has based its claim on the promise held out to him in form of the policy decision of the State Government for commissioning of Wind Mill power generation projects, which initially was extended for installation of 100 mw windmill project. The State came out with a policy as contained in the resolution dated 12th March 1998 issued by its Industries, Energy and Labour department since on the basis of the survey, it was found that there was immense potential for generation of wind power in the State. In order to encourage participation at the hands of entrepreneurs to promote wind energy generation in the State, it introduced certain incentives on undertaking such projects in the State of Maharashtra. One such incentive was in Tilak 33 WP-2329-03.doc form of a promise that the Maharashtra State Electricity Board shall purchase the energy generated from the Wind Power plants @ 225 paise per unit. The promise held out that on 1994-95 being taken a base year would be subjected to an increase @ 5 % p.a and this 5% escalation will be available to the developers for first 10 years of the project life and it was clarified that for the next three years, there will be no escalation and the rate would be kept constant and thereafter the balance life of the project i.e. 7 years, an escalation of 5% p.a would be available to the developer. Further, the State Government also held out to the developer that he would be given permission to bank the energy generated from Wind Power plants with the MSEB. Further incentives were

provided in the form of an arrangement which directed the MSEB to initially bear the expenditure of the erection high tension sub- station and transmission infrastructure which would be subsequently recovered @ 50% by MEDA from the wind power project promoters and would be given to MSEB. Under the policy, MEDA was directed to bear the cost of construction of roads to the project sites. The most important incentive was in Tilak 34 WP-2329-03.doc form of sales tax benefits and the policy enunciated that the investment in plant and machinery, new building, land development, technical development and design in a wind power project would be considered as qualifying investment and the promoter was held entitled to sales tax benefits upto the amount of qualifying investment which would be availed in six equal instalment over a period of six years on a condition that the plant has successfully operated every year with a minimum of 12% plant load factor. It was also clarified that the aforesaid benefit can also be availed by any other company associated with the promoter.

It is this promise which was enunciated in the policy of the State Government which attracted the developers like M/s.GNEE to invest in commissioning of the wind energy project in the State of Maharashtra. The Maharashtra Energy Development Agency (MEDA) was constituted as an undertaking of the State of Maharashtra and was entrusted with the duty of granting final approval of the Wind Mill power generation project. In furtherance of its duty, the State had identified the sites with high terrain for installing the said wind Tilak 35 WP-2329-03.doc power project. A German Company M/s.GNEE which was engaged in the development, financing construction and ownership of wind power projects in Germany and in light of the promise and incentives held out by the State of Maharashtra expressed its inclination in developing the Wind Mill power generation project in the State of Maharashtra. The said Company was appraised about the Government policy on the wind power generation including the various incentives in form of tariff, banking of the energy, capital subsidy and the sales tax benefits, as were set out by the State Government in its Resolution. The minutes of the meeting dated 28 th October 1998 held between the Officers of MEDA and the German Company M/s.GNEE have been placed on record. The said Company was also appraised of the various sites which were selected on the basis of wind data and which were selected as the potential sites. On being appraised of the essential requirements to enter into a contract with the State of Maharashtra, the German Company expressed its willingness subject to the incentives that have been held out to it by the State Government. This resulted into issuance of a Letter of Tilak 36 WP-2329-03.doc Intent on 29th January 1999 by the Governor of Maharashtra, exercising the executive power of the State Government with the German Company who was interested in developing the Wind Power projects in the State of Maharashtra. The Letter of Intent expressed that both the parties wished to set forth their agreement consisting the feasibility reviewed by the Company of sites and possible development of commercial Wind Power projects on such sites by the Company with the support and assistance of the Government of Maharashtra. It was therefore, agreed that the Government would provide the Company with detail information concerning the sites as 'the' Company reasonably requires including the wind data which the Company would review and assess during the period commencing on the date of the LOI and ending on the date which was scheduled as six months after receipt by the Company of such information from the Government. This was stipulated to be the "assessment period". It was further stipulated in the LOI that such review shall be conducted for the purpose of determining whether it is economically feasible to develop a commercial wind project on one or more of the Tilak 37

WP-2329-03.doc sites. The agreement further stipulated that any time on or before the end of assessment period, the parties can negotiate in good faith the possible development by the Company of the projects on such terms and conditions of development. It also contained a stipulation that the LOI would come to an end at the end of the assessment period if either the Government of Maharashtra or the Company has not elected to pursue development of any project and upon such a expiration neither party shall have any further obligation to the performance of its obligation under the LOI.

The factum that the LOI was entered into between the Government of Maharashtra and M/s.GNEE is not in dispute. The bone of contention between the rival parties, however, is whether the LOI was subsisting at the time when the petitioner walked into the scene or it came to an end by efflux of time set out in it. The submission of the learned counsel for the respondent is to the effect that the LOI did not survive on expiry of period of six months and therefore, no right flows from the said LOI. We have noted the judgment of the Hon'ble Apex Court in case of Rajasthan Co-operative Tilak 38 WP-2329-03.doc Dairy Federation Limited Vs Maha Laxmi Mingrate Marketing Service Pvt.Ltd (supra). The proposition set out by the Hon'ble Apex Court to the effect that LOI merely expresses an intention to enter into a contract cannot be disputed. In the peculiar facts, the Hon'ble Apex Court has held that if the condition stipulated in the Letter of Intent were not fulfilled by a party and if the conduct was otherwise not such as would generate confidence, then, the other side was entitled to withdraw the LOI and then, there was no binding relationship between the two. Applying the said proposition if we look at the LOI dated 29th January 1999 which is in form of agreement entered into between the Government of Maharashtra and M/s.GNEE, the object of the said LOI was only to agree on the feasibility review and the assessment. The LOI afforded an opportunity to the Company to review and assess whether it is economically feasible to develop a commercial wind power project on the sites selected/suggested by the Government of Maharashtra. While assessing such feasibility, the Company was to be supplied with the reasonable information including the wind data and it was permissible also to visit the site if it Tilak 39 WP-2329-03.doc desired. It also stipulated that during the period of assessment, the parties would negotiate in good faith the possible development by the Company of one or more projects and also the terms and conditions of such a development. Thus, what the LOI aimed at was only a preliminary assessment of the possibility by the Company whether to enter into an agreement with the State of Maharashtra for development of wind power project and whether it was economically feasible for it to enter into such a project. Though it is stipulated in the said LOI that the assessment period would be of six months, it also clarified that it would come to an end if either the Government of Maharashtra or the Company has not elected to pursue the development of any such project and it is on such a stipulation, no obligation would flow on either side from the LOI. It is not that the LOI had set out a dead line in terms of the period but within the period stipulated by it, it was for the Company to work out the feasibility of the project in the backdrop of the data supplied to it by the Government of Maharashtra. From the chronology of events which have been placed before us by the learned counsel Shri Chagla, we could only notice that the Tilak 40 WP-2329-03.doc negotiations between the German Company and the State of Maharashtra proceeded in terms of the LOI and it had tacitly consented for commissioning the project in the State and as a step taken ahead, the German Company entered into a Memorandum of Understanding with an Indian Company M/s.King Prawns Ltd, who possessed the land at Palghar, District Jawhar and which was found to be suitable

for setting up of a wind energy farm. Further correspondence which has been placed on record thus reveals that M/s.GNEE took further steps in pursuance of the LOI, and therefore, there is no question of it coming to an end or expiring after a period of six months is over. The document or the LOI has to be read in its true spirit by ascertaining what was the intention of the parties and the intention is writ large that it was an attempt to afford an opportunity to the Company to work on the feasibility of the project by taking into consideration the pros and cons of the matter and if the said company has further proceeded and entered into a Memorandum of Understanding with an Indian Company, then, it cannot be said that M/s.GNEE did not take any steps in terms of the LOI to pursue the development of this Tilak 41 WP-2329-03.doc project. In the backdrop of the aforesaid circumstances, we are unable to accede to the submission of Shri Sakhare that the LOI itself has expired and therefore, there were no rights flowing from the said LOI.

15 As far as the submission of the learned counsel Shri Sakhare which he has advanced in the alternative to canvass before us that even if the LOI subsists, then also the petitioner has no locus to avail any benefit flowing from the said LOI. The facts reveal that the German Company M/s.GNEE in terms of the promise held out to it made its intention clear to proceed with the wind power project and it was in the backdrop of the incentives that were offered to it on behalf of the State of Maharashtra. The German Company entered into a deal with King Prawns Limited for setting up of a wind energy farm of 1000 mega watt. The further correspondence made by the State Government is with King Prawns Limited and the respondent no.1 State entertained the said correspondence and responded positively. The petitioner no.1 before us came to be incorporated as a subsidiary of King Prawns Ltd on 21 st May Tilak 42 WP-2329-03.doc 2001 pursuant to the Memorandum of Understanding entered into between King Prawns Ltd and M/s.GNEE. The incorporation of petitioner no.1 was with an objective of taking over the production, generation, accumulation, distribution, transmission and supply of electricity and electro motive force by wind power and to form collaboration with parties such as M/s.GNEE. The procedure for its incorporation by executing memorandum and articles of association was duly followed. The correspondence placed on record by the petitioner so also the respondent would clearly disclose that the petitioner no.1 was acknowledged and recognized as the entrepreneur entitled to take over the commercial venture on behalf of M/s.GNEE. We have taken note of the material subsequent development in the matter where the MEDA itself had forwarded a list of potential sites to the petitioner by its communication and there were negotiations that were effected with the petitioner no.1 in selection of the said site. Not only that the correspondence further reveals that it was the petitioner no.1 who made an application to the MSEB for grant of NOC under Section 44 of the Electricity Supply Act 1948 and requested for grant of a Tilak 43 WP-2329-03.doc partial NOC for 30 mega watt project. On 18 th September 2001, the MSEB has addressed a communication to the petitioner and granted its No Objection for installation of 30 Mega Watt wind farm complex at Bramanvel, District Dhule. The said communication clearly reveals that the NOC has been granted on a request made by M/s.K.P. Power Pvt.Ltd i.e. the petitioner. The said communication clearly sets out that M/s.GNEE has been issued the LOI by Government of Maharashtra for development of wind operated electricity generator (WEGs) in the State of Maharashtra and an agreement to that effect was also executed on 19 th January 1999. The said communication further proceeds to state that the petitioner Company was registered on 21 st May 2001 and a Memorandum of Understanding was signed by it with M/s.GNEE on 16th October 2000 for setting up WEG project at Chatale, Taluka Palghar, District

Thane in the 1200 acres of land to be provided by the petitioner. The letter further sets out that on 28th August 2001, the petitioner Company had applied for 30 mega watt project at Wadi, Taluka Palghar, District Thane and requested for NOC. It was the petitioner Tilak 44 WP-2329-03.doc who communicated that he will not pursue the NOC for 70 mega watt project under the LOI dated 4th September 2001. In the backdrop of the aforesaid facts, the MSEB conveyed its consent under Section 44 of the Electricity Supply Act 1948 for installation of 30 mega watt (10 x 600 kw + 32 x 750 kw) at Bramanwel, Taluka Sakri, District Dhule. It also stipulated certain conditions in the said letter and one of the essential clause was to the effect that the NOC was valid for a period of one year before which the wind operated electric generator should be commissioned and connected to MSEB grid. At the conclusion of the said NOC, it is clarified to the following effect :

"You and M/s.GNEE are requested to convey your acceptance of the above to the C.E. Nashik and S.E. Dhule under intimation of this office".

We do not think that in the light of the said correspondence and communication conveying its no objection for installation of 30 mega watt wind power complex in favour of M/s.K.P. Power Pvt.Ltd i.e. the petitioner, it is open for the respondents to question the locus of the petitioner. The respondent Tilak 45 WP-2329-03.doc authorities have thus accepted the petitioner as a subsidiary of M/s.King Prawns Ltd and who was held to be representing M/s.GNEE to commission the wind energy farm project in the State of Maharashtra in whose favour the LOI was issued. 16 The chronology of facts as placed before us further reveal that the State of Maharashtra modified its policy dated 12th March 1998 by issuing a Government Resolution on 1 st October 1999, specifically as against the sales tax benefits to be availed. By its earlier policy, sales tax benefits were made available, equivalent to the qualifying investment of wind energy generation projects. However, it was noted by the State that the Industrialist have expressed certain difficulties and a proposal was moved before the State Government for modifying the procedure for availing the sales tax benefits. The procedure came to be simplified by issuing a Government Resolution on 1st October 1999 and it came to be clarified that the sales tax benefit will be available on electricity generating units in relation to the achievement of plant load factor and these benefits were declared to be availed by the project which Tilak 46 WP-2329-03.doc are commissioned as well as connected to the transmission lines from two months after the date of publication of the Government Resolution. The sales tax benefits were permitted to be availed for continuous six years after obtaining the entitlement certificate from the sales tax department. It was further clarified that the sales tax benefits will be available for the promoters from the date of obtaining an entitlement certificate for a period of continuous six years and after every year, such benefits will be limited to 1/6th of the qualifying investment subject to the stipulation that if in any one year, plant load factor of 12% is not achieved, then, that year sales tax benefit will be cancelled and will result in losing the benefit for that year and that the sales tax benefits for two years will not be permitted to be clubbed in one year. It was also clarified that for availing the sales tax benefit, the period will be counted for total six years.

17 The grievance of the petitioner is that by the resolution of 1st October 1999, the State Government took into consideration the request of various wind power projects Tilak 47 WP-2329-03.doc including M/s.GNEE and it modified the procedure for availing the sales tax benefits and it stipulated that the sites approved by the Ministry of non-conventional energy sources, Government

of India, New Delhi would be eligible for sales tax benefits and NOC would be issued by respondent no.2 only after submission of an undertaking from the concerned manufacturer and promoter that the machinery used for the wind generation project was new. The petitioner's grievance is that the respondent no.1 adopted a procedure, without any public notice and without making it known to the petitioner that the NOC for commissioning wind power project would be considered and granted only during the period of 15 days i.e. 15th December 1999 and 31st December 1999. The procedure prescribed by the Government contemplated the developer to apply to the respondent no.2 for NOC for its project and the respondent no.2 in turn would recommend this application to respondent no.1 who would immediately grant an in-principle NOC and thereafter, MEDA would issue final NOC to the developer. However, according to the petitioner, this requirement was not communicated to M/s.GNEE prior to 31 st Tilak 48 WP-2329-03.doc December 1999, resultantly, it did not apply for the requisite NOC. The submission of Shri Chagla is that though it did not apply for NOC, it was already having an LOI issued in its favour and his specific allegation is to the effect that the respondent no.1 had selectively communicated this procedure to various parties so as to enable them to apply for NOC on or about 28 th December 1999 and obtain the sanction of respondent no.1 within the stipulated period. Not only this, respondent no.1 granted such in-principle sanction on 31 st December 1999 to certain parties. However, when King Prawns Limited approached the respondent no.1 on getting knowledge about the deadlines in January 2000, it was informed that respondent no.1 has stopped issuing principal NOCs after 31 st December 1999. This was done in spite of the fact that the respondent no.1 was already aware of the details of wind mill power generation project in which the petitioner and M/s.GNEE was participating since the LOI was issued by the respondent no.1 itself on 29th January 1999. The petitioner no.1 Company was incorporated on 21st May 2001. The respondent no.1 came up with a resolution on 25th July 2001 and the said resolution has Tilak 49 WP-2329-03.doc been placed on record as Exhibit-F to the petition. Perusal of the said Government Resolution would reveal that it has been issued in the backdrop of the inquiries made by the entrepreneur as to the eligibility of the benefits under the Common Incentive Plan and as to what would be the last date of completion of the final effective steps. The Government Resolution categorized three contingencies which are to the following effect :

(i) Where an application for setting up of a project prior to 31st December, 1999 such project would be considered to be in the pipeline if any one of the following criteria was complied with namely; (a) where a proposal was already made for purchase of land; (b) an application for raising funds for the project had been made to the institution, (c) the Company concerned had been registered; (d) a project report had been submitted for consideration;

and (e) when an application was made to the government for setting up of a project when a Letter of Intent was issued by the Government.

(ii) Those units that satisfied condition (e) would not be considered to be in the pipeline and would be entitled to the benefit of the common incentive plan provided they fulfilled the other conditions of eligibility for such incentives.

(iii) In case of those units that complied with any of the items (a), (b), (c) or (d) set out above, if documentary evidence was produced showing that on or before 31 st Tilak 50 WP-2329-03.doc December, 1999 steps were taken for any one of the aforesaid items such units would also be entitled to the benefit of the common incentive plan"

In the backdrop of the stipulations contained in Government Resolution dated 25th July 2001, it cannot be said that the petitioner's project was in pipeline since LOI was already issued and therefore, the project of the petitioner no.1 would fall within clause E of (i) and would thus be entitled to the benefit of Common Incentive Plan since the LOI was issued on 29th January 1999. The case of the petitioner would then fall within the following stipulation in the Government Resolution which reads thus :

"As regards aforesaid item E, those units which have been granted LOI before 31st December 1999 by the Government and have been given approval to consider for the incentive, for such unit all the incentives of the sales tax under the Common Incentives Plan will be admissible. Hence, such units will not be considered to be the unit in pipeline".

18 In such circumstances, we do not find substance in the argument of Shri Sakhare that nothing was done by the petitioner in terms of the Government Resolution like setting up of the entire project or process of connecting generated power Tilak 51 WP-2329-03.doc with the transmitters before 31st December 2001 which was obligatory on his part for availing the sales tax benefits. The said argument cannot be considered because the project of the petitioner cannot be said to be in pipeline in view of the LOI issued in its favour before 31st December 1999 and in such circumstances, he is entitled to all the incentives of sales tax under the Common Incentive Plan. However, in view of the specific allegation of the learned senior counsel Shri Chagla that the steps to be taken up for commissioning the project were to be concluded before 31st December 1999 and the procedure which was adopted to determine the said deadline was not communicated to the petitioner and it is the case of Shri Chagla that here the Sate Government has acted in an arbitrary manner and has deprived the petitioner unit of meeting the deadline since it was not communicated about the deadline being fixed as 31st December 1999. However, the State Government itself on 25th July 2001, through its resolution has clarified as to what would be the last date for completion of final effective phase under the Common Incentive Plan under the Wind Mill power generation project Tilak 52 WP-2329-03.doc and what projects would be in the pipeline. The petitioner's project surely cannot be considered to be in pipeline in light of the LOI that has been granted and in such circumstances, the limitations contained in the said Government Resolution cannot be made applicable to the petitioner and it would rather fall in Clause E of clause (i) where a requisition was made to the Government for setting up of the project and the Letter of Intent was already issued prior to 1 st December 1999. In these circumstances, the unit of the petitioner which was granted LOI would be entitled for availing the common incentives.

19 Shri Chagla has stressed upon the arbitrary approach of the respondent authority and we find substance in the said submission. The State Government who was desirous of relieving its dream of exploring the non-conventional energy resources by inviting participation from entrepreneurs and

when a foreign company express its desire which is duly acknowledged by the State of Maharashtra by issuing an LOI in its favour, we find the approach of the State Government a bit Tilak 53 WP-2329-03.doc strange in then conducting a procedure and fixing up deadline without communicating the same to the entrepreneurs who are desirous of its participation in the process. Mr.Chagla has clamped the said action of State Authorities being arbitrary and unreasonable. It is no doubt true that Article 14 applies to State action and no doubt, the respondent nos.1 and 2 are duty bound to act fairly and reasonably. There can be no qualm about the proposition that it falls within the province of the State to frame its policy and implement the same in exercise of its administrative function and no inference is normally warranted at the instance of the Court in its writ jurisdiction. By this time it is settled that the protection of Article-14 is no longer restricted to only executive action of the State or actions having public element. Article 14 will strike wherever there is arbitrariness in the State action, even if such action is in the contractual field. Any action which is capricious or uninformed by reason or not based on relevant principles applicable alike to all similarly situated, or guided by extraneous or irrelevant considerations or is discriminating would be arbitrary. The observations of the Hon'ble Apex Court in Kum Shrilekha Tilak 54 WP-2329-03.doc Vidyarthi Vs. State of U.P & ors 4 would be gainfully applied to the facts in hand.

"There is an obvious difference in the contracts between private parties and contracts to which the State is a party, Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition there- to. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non- arbitrariness at the hands of the State in any of its actions".

4 1991 AIR 537 Tilak 55 WP-2329-03.doc A State action which is expected to be fair cannot be sustained if it is arbitrary and lacks the precision of being fair. Article 14 strikes at arbitrariness and rule against an arbitrary action is equally applicable to an administrative authority and it binds the Government and all the agencies acting as instrumentality of the Government in the grant of any largesse, Government contracts etc. The Hon'ble Apex Court long back in case of Ramana Dayaram Shetty Vs. International Airport Authority of India, 5 has clearly observed thus :

"It is well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr. Justice Frankfurter in *Vieralli V. Saton* 359 US 535 where the learned Judge said :

"An executive agency must be rigorously held to the standards by which it professes its action to be judged Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword".

5 1979 3 SCC 489/ AIR 79-SC-1628 Tilak 56 WP-2329-03.doc This Court accepted the rule as valid and applicable in India in *A. S. Ahuwalia v. Punjab*(2) and in subsequent decision given in *Sukhdev v. Bhagatram*,(3) Mathew, J., quoted the above- referred observations of Mr. Justice Frankfurter with approval. It may be noted that this rule, though supportable also as emanation from Article 14, does not rest merely on that article. It has an independent existence apart from Article 14. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority. If we turn to the judgment of Mr. Justice Frankfurter and examine it, we find that he has not sought to draw support for the rule from the equality clause of the United States Constitution, but evolved it purely as a rule of administrative law. Even in England, the recent trend in administrative law is in that direction as is evident from what is stated at pages 540- 41 in Prof. Wade's *Administrative Law* 4th edition. There is no reason why we should hesitate to adopt this rule as a part of our continually expanding administrative law. To- day with tremendous expansion of welfare and social service functions, increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the State, the power of the executive Government to affect the lives of the people is steadily growing. The attainment of socio- economic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with State power-holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise. Whatever be the concept of the rule of law, whether it be the meaning given by Dicey in his "The Law of the Constitution" or the definition given by Hayek in his "Road to Serfdom" and "Constitution of liberty" or the exposition set-forth by Harry Jones in his "The Rule of Law and the Welfare State", there is, as pointed out by Mathew, J., in his article on "The Welfare State, Rule of Law and Natural Justice" in "democracy Equality and Freedom,"

"substantial agreement is in justice thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found". It is indeed unthinkable that in a democracy governed Tilak

58 WP-2329-03.doc by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive

Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affection of some right or denial of some privilege. 20 The Government as a welfare State is duty bound to follow the rule of law. The concept of equality which is a dynamic one and with many aspects and dimensions and as has been observed by Justice Bhagwati in case of E.P. Royappa Vs. State of Tamil Nadu,⁶ it cannot be "cribbed cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belong to the Rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is 6 (1974) 4 SCC 3 Tilak 59 WP-2329-03.doc arbitrary, it is implicit in it that it is violative of Article 14. The State action which is intended to ensure fairness and equality of treatment requires the State to apply relevant principles or its policies alike to all those who are similarly situated and not to be guided by any extraneous, irrelevant or malafide motive or considerations, which would result in denial of equality. Such an exercise of power by the State which is not based on fairness and equality but derived on extraneous considerations, then it would be nothing short of a malafide exercise of power and would be hit by Article 14 and as expressed by Justice Bhagwati, "Malafide exercise of power and arbitrariness are different lethal radiation emanating from the same vice; infact the latter comprehends the former. Both are inhibited by Article 14 and 16".

The action of the State in trying to oust the petitioner from the process in which M/s.GNEE had participated and rather encouraged to participate by the State, could not have been done in such a manner. A specific submission of the petitioner is to the effect that the cut-off date within which the NOC was to be obtained and the project to be Tilak 60 WP-2329-03.doc commissioned which came to be announced all of a sudden was not made known to the petitioner but it was selectively communicated to those developers who were entitled to be retained in the competitive process, gave an opportunity to allege that for a German Company, there was no ease of doing business in a democratic country like India. This painted a gloomy picture and in our considered opinion, the petitioner Company, a subsidiary of an Indian Company which entered into Memorandum of Understanding with M/s.GNEE could not have been shunted out by adopting such an arbitrary procedure which did not meet the principles of fairness and equality of treatment.

21 Shri Chagla had emphasized on the steps taken by the petitioner company on the promise that has been held out by the State Government as contained in form of various incentives to be offered and he has set on record the strenuous efforts taken by the petitioner no.1 for seeking a final NOC for atleast 30 Mega Watt Power Project. The MSEB had issued an NOC to the petitioner on 18th September 2001 which was to Tilak 61 WP-2329-03.doc remain valid for a period of one year and subject to the stipulation that the project should be commissioned and connected to the grid of MSEB within that time. The petitioner thereafter undertook all the necessary steps to arrange for the infrastructure under the NOC including providing 37 kms of transmission lines at the cost of Rs.5.7 crores and also paying the supervision charges in respect thereof. The petitioner also acquired 750 acres of land and done partial land development for which an amount to the tune of Rs.8.6 crore was spent. It is the specific case of the petitioner that these amounts were in addition to the expenditure incurred by purchasing 44 turbines for an approximate costs of 150 crores of the

development of 30 Mega Watt project. The State Government also continued to indulge the petitioner as the Government of Maharashtra included petitioner's project by including it in Annexure-D under the caption "the project that has been issued an LOI by the Government prior to 31st December 1999" in the list of Wind Mills Power generation project which was forwarded to MSEB on 27th September 2001. It is also clarified that the MSEB had issued the NOC for 30 Mega Watt but no proposal Tilak 62 WP-2329-03.doc for final approval was forwarded to the Government through MEDA. The MSEB had acknowledged the fact that it had granted the NOC of 30 Mega Watt project and MEDA had informed the petitioner no.1 that on the basis of the LOI, their case has been submitted to the State for necessary action and on receipt of such permission, necessary action would be initiated. Certain documents were also asked to be submitted and it was stated that once the documents are submitted, necessary steps would be initiated to issue NOC at the earliest. The petitioner had accordingly forwarded the said documents and also repeatedly corresponded with the Department of Energy requesting for a final NOC for atleast 30 Mega Watt out of 100 Mega Watts.

In the backdrop of the aforesaid facts, the learned senior counsel Shri Chagla would invoke the doctrine of promissory estoppel to canvass that the non-performance of the promised action by the Government is attracted in the present case and the petitioner was entitled to fall back on the definite promise held out to him by the Government. The learned counsel would submit that the State Government had in Tilak 63 WP-2329-03.doc unequivocal terms proceeded to confer the benefits of State largesse on the petitioner and held the petitioner entitled for the incentives as promised by it by the Government Resolution. This representation undisputedly was intended to create legal relations and in fact, the LOI is indicative of the said relationship being entered into. Based on the said promise and the legal relationship being created between the parties, the petitioner has altered its position relying on the promise and has made huge investment for the said project and now, according to Shri Chagla, it is impermissible for the State to resile from its promise. He would invite our attention to the positive pleadings contained in the petition invoking the doctrine of promissory estoppel and his contention is that he has placed sufficient material before this Court to assert that the petitioner no.1 has substantially altered its position in the backdrop of the definite representation made by the Government, resultantly causing serious prejudice when the Government is not honouring its commitment and he has therefore sought a writ of mandamus to pin down the Government and issue directions to issue a final approval/NOC Tilak 64 WP-2329-03.doc for its 30 Mega Watt Wind Mill Power Generation Project along with all the benefit/incentives available under the PSI as amended from time to time. We have perused the decision of the Hon'ble Apex Court in case of State of Bihar Vs. Kalyanpur Cement Limited 7 relied upon by Shri Chagla. 22 The State Government though is competent enough to frame its own policy and is not powerless to alter - modify its policies in its own wisdom as it deems fit in the larger interest of the public, exercise of such power is expected to be in a fair and a transparent manner. When the State gives an assurance without ascertaining the pros and cons of its policy and its capacity to extend the benefits, it will be unfair and improper on the part of the State not to act as per its promise. The doctrine of promissory estoppel comes into play in such background and for applicability of the said doctrine against the Government, it must be established that there was a definite representation by the Government and that persons to whom the representation or promise was made, in fact altered their 7 (2010) 3 SCC 274 Tilak 65 WP-2329-03.doc position by acting upon such representation or promise and that the party had suffered some prejudice sufficient to

constitute an estoppel. No doubt, for attracting the said doctrine, evidence of alleged representation must be spelt out in certain terms and mere vague assertion or assurance is not sufficient. The doctrine of promissory estoppel received its recognition in the Indian Scenario immediately after the Constitution was ushered and in case of Union of India Vs. Indo-Afghan Agencies 8 and the Hon'ble Apex Court made observations to the following effect :

19 It was somewhat faintly urged that if the Government is held bound by every representation made by it regarding its intention, when the exporters have acted in the manner they were invited to act, the Government would be held bound by a contractual obligation even though no formal contract in the manner required by Article 299 of the Constitution was executed, and the exporter would be entitled to claim damages contrary to that provision for breach of the contract even though no formal written contract had been executed in the manner provided by that Article. But the respondents are not seeking to enforce any contractual right:

they are seeking to enforce compliance with the obligation which is laid upon the Textile Commissioner by the terms of the Scheme, and we are of the view that even if the Scheme is executive in character, the respondents who were aggrieved because of the failure to carry out the terms of the Scheme were entitled to seek resort to the Court and claim that the obligation imposed upon the Textile Commissioner by the Scheme be ordered to be carried out.

8 AIR 1968 SC 718 Tilak

66 WP-2329-03.doc 20 We hold that the claim of the respondents is appropriately rounded upon the equity which arises in their favour as a result of the representation made on behalf of the Union of India in the Export Promotion Scheme, and the action taken by the respondents acting upon that representation under the belief that the Government would carry out the representation made by it. On the facts proved in this case, no ground has been suggested before the Court for exempting the Government from the equity arising out of the acts done by the exporters to their prejudice relying upon the representation. This principle has been recognised by the Courts in India and by the Judicial Committee of the Privy Council in several cases. In the Municipal Corporation of the City of Bombay Vs. The Secretary of State for India in Council(1), it was held by the Bombay High Court that even though there is no formal contract as required by the statute. the Government may be bound by a representation made by it.' In that case in answer to a requisition by the Government of Bombay addressed to the Municipal Commissioner to remove certain fish and vegetable markets to facilitate the construction of an arterial road, the Municipal Commissioner offered to remove the structures if the Government would agree to rent to the Municipality other land mentioned in his letter at a nominal rent. The Government accepted the suggestion and sanctioned the application of the Municipal Commissioner for a site for tabling and establishing the new markets. The Municipal Commissioner then took possession of the land so made available and constructed stables, workshops and chawls thereon. Twenty-four years thereafter the Government of Bombay served notices on the Municipal Commissioner determining the tenancy and requesting the Commissioner to deliver possession of the land occupied by the markets, and to pay in the meantime rent at the

rate of Rs. 12,000/- per annum. The Municipality declined to pay the rent, and the Secretary of State for India filed a suit against the Municipal Commissioner for a declaration that the tenancy of the Municipality created by Government Resolution of December 9, 1865, stood determined and for an order to pay rent at the rate of Rs. 12,000/- per annum. It was urged before the High Court of Bombay that the events which had transpired had created an equity in favour of the Municipality which afforded an answer to the claim of the Government to eject the Municipality. Jenkins, C.J., delivering the judgment of the Court observed:

"The doctrine, involved in this phase of the case is often treated as one of estoppel, but I doubt whether this is a correct, though it may be a convenient name to apply. It Tilak 67 WP-2329-03.doc differs essentially from the doctrine embodied in Section 115 of the Evidence Act, which is not a rule of equity, but is a rule of evidence that was formulated and applied in Courts of law; while the doctrine, with which I am now dealing, takes its origin from the jurisdiction assumed by Courts of Equity to intervene in the case of, or to prevent fraud."

After referring to Ramsden v. Dyson⁽¹⁾, the learned Chief Justice observed that the Crown comes within the range of equity and proceeded to examine whether the facts of the case invited the application of that principle. ²¹ This case is, in our judgment a clear authority that even though the case, does not fall within the terms of s. 115 of the Evidence Act, it is still open to, a party who has acted on a representation made by the Government to claim that the Government shall be bound to, carry out the promise made by it, even though the promise is not recorded in the form of a formal contract as required by the Constitution. ²⁴ Under our jurisprudence the Government is not exempt from liability to, carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise, solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an ex parte appraisal of the circumstances in which the obligation has arisen. We agree with the High Court that the impugned order passed by the Textile Commissioner and confirmed by the Central Government imposing cut in the import entitlement by the respondents should be set aside and quashed and that the Textile Commissioner and the Joint Chief Controller of Imports and Exports be directed to issue to the respondents import certificates for the total amount equal to 100% of the f.o.b. value of the goods exported by them, unless there is some decision which fails within cl. 10 of the Scheme in question.

Tilak 68 WP-2329-03.doc The doctrine was further propounded in Motilal Padampat Sugar Mills Co.Ltd Vs. State of Uttar Pradesh⁹, where the Hon'ble Apex Court held that the public bodies are as much bound as private individuals to carry out representation of facts and promises made by them, by relying on which other persons have altered their position to their prejudice. The obligation arising against an individual out of his representation amounting to a promise was held to be enforced by a person who acts upon the promise, when the law requires that a contract enforceable at law against a public body shall be in certain form or to be executed in the manner prescribed by statute, the obligation may be if the contract be not in that form be enforced against it in appropriate cases in equity. The Hon'ble Apex Court held as under :

8 It was pressed upon the Court that according to the well settled law as laid down in Jorden y.

Money(1), no estoppel could be raised against plaintiffs since the doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence and not to promises de futuro which, if binding at all, must be binding only as contracts and here there was no representation of an existing state of facts by the plaintiffs but it was merely a promise or representation 9 AIR 1979 SC 621 Tilak 69 WP-2329-03.doc of intention to act in a particular manner in the future. Mr. Justice Denning, however, pointed out:

"The law has not been standing still since Jorden v. Money. There has been a series of decisions over the last fifty years which, although they are said to be cases of estoppel are not really such. They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on. In such cases the courts have said that the promise must be honoured."

The principle formulated by Mr. Justice Denning was, to quote his own words, "that a promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply". Now Hughes v. Metropolitan Railway Co. (supra) and Birmingham and District Land Co. v. London & North Western Rail Co. (supra), the two decisions from which Mr. Justice Denning drew inspiration for evolving this new equitable principle, were clearly cases where the principle was applied as between parties who were already bound contractually one to the other. In Hughes v. Metropolitan Railway Co. (supra) the plaintiff and the defendant were already bound in contract and the general principle stated by Lord Cairns, L.C. was:

"If parties who have entered into definite and distinct terms involving certain legal results afterwards-enter upon a course of negotiations".

Ten years later Bowen, L. J. also used the same terminology in Birmingham and District Land Co. v. London and North Western Rail Co. (supra) that:

"If persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe-----".

Tilak 70 WP-2329-03.doc These two decisions might, therefore, seem to suggest that the doctrine of promissory estoppel is limited in its operation to cases where the parties are already contractually bound and one of the parties induces the other to believe that the strict rights under the contract would not be enforced. But we do not think any such limitation can justifiably be introduced to curtail the width and amplitude of this doctrine. We fail to see why it should be necessary to the applicability of this doctrine that there should be some contractual relationship between the parties.

19 When we turn to the Indian law on the subject it is heartening to find that in India not only has the doctrine of promissory estoppel been adopted in its fullness but it has been recognized as affording a cause of action to the person to whom the promise is made. The requirement of consideration has not been allowed to stand in the way of enforcement of such promise. The doctrine of promissory estoppel has also been applied against the Government and the defence based on executive necessity has been categorically negated. It is remarkable that as far back as 1880, long before the doctrine of promissory estoppel was formulated by Denning, J., in England, A Division Bench of two English Judges in the Calcutta High Court applied the doctrine of promissory estoppel and recognised a cause of action founded upon it in the Ganges Manufacturing Co. v. Surajmulji and others⁽¹⁾. The doctrine of promissory estoppel was also applied against the Government in a case subsequently decided by the Bombay High Court in Municipal Corporation of Bombay Vs. The Secretary of State.

25 The doctrine of promissory estoppel was also held applicable against a public authority like a Municipal Council in Century Spinning & Manufacturing Co. Ltd & Anr Vs. The Ulhasnagar Municipal Council & Anr. The question which arose in Tilak 71 WP-2329-03.doc this case was whether the Ulhas Nagar Municipal Council could be compelled to carry out a promise made by its predecessor municipality that the factories in the industrial area within its jurisdiction would be exempt from payment of octroi for seven years from the date of the levy. The appellant company, in the belief induced by the assurance and undertaking given by the predecessor municipality that its factory would be exempt from octroi for a period of seven years, expanded its activities, but when the municipal council came into being and took over the administration of the former municipality, it sought to levy octroi duty on appellant- company. The appellant company thereupon filed a writ petition under Article 226 of the Constitution in the High Court of Bombay to restrain the municipal council from enforcing the levy of octroi duty in breach of the promise made by the predecessor municipality. The High Court dismissed the petition in limine but, on appeal, this Court took the view that this was a case which required consideration and should have been admitted by the High Court. Shah, J., speaking on behalf of the Court, pointed out "Public bodies are as much bound as private individuals to carry out representations of facts and promises made by them, relying on which other persons have altered their position to their prejudice. The obligation arising against an individual out of his representation amounting to a promise may be enforced ex contractu by a person who acts upon the promise: when the law requires that a contract enforceable at law against a public body shall be in certain form or be executed in the manner prescribed by statute, the obligation may be if the contract be not in that form be enforced against it in appropriate cases in equity."

The learned Judge then referred to the decision in the Indo Afghan Agencies case and observed that in that case it was laid down by this Court that "the Government is not exempt from the equity arising out of the acts done by citizens to their prejudice relying upon Tilak 72 WP-2329-03.doc the representations as to its future conduct made by the Government". It was also pointed out by the learned Judge that in the Indo-Afghan Agencies case this Court approved of the observations made by Denning, J. in Robertson v. Minister of Pensions (supra) rejecting the doctrine of executive necessity and held them to be applicable in India. The learned Judge concluded by saying in words pregnant in the hope and meaning for democracy:

"If our nascent democracy is to thrive different standards of conduct for the people and the public bodies cannot ordinarily be permitted. A public body is, in our judgment, not exempt from liability to carry out its obligation arising out of representations made by it relying upon which a citizen has altered his position to his prejudice."

This Court refused to make a distinction between a private individual and a public body so far as the doctrine of promissory estoppel is concerned. 23 In *Kasinka Trading Vs. Union of India* 10 the Hon'ble Apex Court underlined the doctrine in the following words :

"11. The doctrine of promissory estoppel or equitable estoppel is well established in the administrative law of the country. To put it simple, the doctrine represents a principle evolved by equity to avoid injustice. The basis of the doctrine is that where any party has by his word or conduct made to the other party an unequivocal promise or representation by word or conduct, which is intended to create legal relations or effect a legal relationship to arise in the future, knowing as well as intending 10 (1995) 1 SCC 274 Tilak 73 WP-2329-03.doc that the representation, assurance or the promise would be acted upon by the other party to whom it has been made and has in fact been so acted upon by the other party, the promise, assurance or representation should be binding on the party making it and that party should not be permitted to go back upon, if it would be inequitable to allow him to do so, having regard to the dealings, which have taken place or are intended to take place between the parties.

Further, in case of *DCM Limited Vs. Union of India*,¹¹ the Apex Court reiterated the doctrine to the following effect :

"6. It is well settled that the doctrine of promissory estoppel represents a principle evolved by equity to avoid injustice and, though commonly named promissory estoppel, it is neither in the realm of contract nor in the realm of estoppel. The basis of this doctrine is the interposition of equity which has always proved to its form, stepped in to mitigate the rigor of strict law. It is equally true that the doctrine of promissory estoppel is not limited in its application only to defence but it can also find a cause of action. This doctrine is applicable against the Government in the exercise of its governmental public or executive functions and the doctrine of executive necessity or freedom of future executive action, cannot be invoked to defeat the applicability of this doctrine. It is further well established that the doctrine of promissory estoppel must yield when the equity so requires. If it can be shown by the Government or public authority that having regard to the facts as they have transpired, it 11 (1996) 5 SCC 468 Tilak 74 WP-2329-03.doc would be inequitable to hold the Government or public authority to the promise or representation made by it, the Court would not raise an equity in favour of the person to whom the promise or representation is made and enforce the promise or representation against the Government or public authority. The doctrine of promissory estoppel would be displaced in such a case because on the facts, equity would not require that the

Government or public authority should be held bound by the promise or representation made by it"

Further, Shrijee Sales Corporation Vs. Union of India¹² the Apex Court observed thus :

"3. It is not necessary for us to go into a historical analysis of the case law relating to promissory estoppel against the Government. Suffice it to say that the principle of promissory estoppel is applicable against the Government but in case there is a supervening public equity, the Government would be allowed to change its stand' it would then be able 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. However, the Court must satisfy itself that such a public interest exists".

Earlier, Union of India vs. Godfrey Philips India Ltd,¹³ the Hon'ble Apex Court observed thus :

9 Now the doctrine of promissory estoppel is well- established in the administrative law of India. It represents a principle evolved by equity to avoid injustice and, though commonly named¹² (1997) 3 SCC 398¹³ (1985) 4 SCC 369 Tilak 75 WP-2329-03.doc promissory estoppel, it is neither in the realm of contract nor in the realm of estoppel. The basis of this doctrine is the inter position of equity which has always, true to its form, stepped in to mitigate the rigour of strict law. This doctrine, though of ancient vintage, was rescued from obscurity by the decision of Mr. Justice Denning as he then was, in his celebrated judgment in Central London property Trust Limited v. High Trees House Limited, (1956) 1 All E. R. 256-. The true principle of promissory estoppel is that where one party has by his word or conduct made to the other a clear and unequivocal promise or representation which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise or representation is made and it is in fact so acted upon by the other party, the promise or representation would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so, having regard to the dealings which have taken place between the parties. It has often been said in England that the doctrine of promissory estoppel cannot itself be the basis of an action: it can only be a shield and not a sword: but the law in India has gone far ahead of the narrow position adopted in England and as a result of the decision of this Court in Motilal Sugar Mills Vs. State of Uttar Pradesh, [1979] 2 S.C.R. 641, it is now well-settled that the doctrine of promissory estoppel is not limited in its application only to defence but it can also found a cause of action. The decision of this Court in Motilal Sugar Mills case (supra) contains an exhaustive discussion of the doctrine of promissory estoppel and we find ourselves wholly in agreement with the various parameters of this doctrine outlined in that decision.

Tilak 76 WP-2329-03.doc 12 There can therefore be no doubt that the doctrine of promissory estoppel is applicable against the Government in the exercise of its governmental, public or executive functions and the doctrine of executive necessity or freedom of future executive action cannot be invoked to defeat the applicability of the doctrine of promissory estoppel.

24 In light of the principle of promissory estoppel as illustrated by the Hon'ble Apex Court in the judgments which we have referred to above, if we examine the facts placed before us, it is an admitted position that the petitioner has been entertained by the State Government and was encouraged to take various steps in furtherance of the LOI granted in favour of M/s.GNEE so that the project could have been commissioned. The projection of the entire chronology of events reveal that but for the final in-principle approval, the petitioner was taken along the path leading towards commissioning of the project and all of a sudden, the Government failed to respond to the petitioner's claim for commissioning the project by conferring a final NOC. By filing the affidavits before the Court, the State Government has taken a stand which amounts to resiling from Tilak 77 WP-2329-03.doc the said promise and with vehement opposition, the matter has been argued before us opposing the claim of the petitioner. The State Government had rather encouraged the petitioner to change its position and take steps towards the commissioning of the wind energy project. The opinion of the Law and Judiciary Department which has been placed on record has rightly understood the purport of the policy of the State Government as contained in its resolution dated 25th July 2001. On being queried as to whether the LOI has expired, the Department had replied that the LOI is open ended and the termination of which is subject to either parties will to terminate the same. Since the petitioner had already placed on record the order for Green Turbine Generator and it had acquired land to implement the project, the department had opined that the Company had taken steps in positive direction for installment of project and therefore, it cannot be said that the LOI dated 29th July 1999 has expired.

If this was the view of the State Government and it had clearly opined that the project being already approved falls in category E of Government Resolution of 25 th July 2001 and it Tilak 78 WP-2329-03.doc was held eligible for availing all incentives under the Government policy then there is no reason why the petitioner No.1 is deprived of the same. This Court had admitted the writ petition and while admitting it though it had refused the interim relief, it permitted the petitioner to commission the project. However, in light of the uncertainty looming as to whether the sales tax incentives would be available to the petitioner now, the petitioner sought an assurance from the Government for commissioning the project. However, the Government did not respond positively and therefore, the petitioner had placed on record a further affidavit in the pending petition on 19th October 2004 placing on record the facts occurring after the passing of interim order and stated that they are unable to commission the project unless they were granted the benefits/incentives under the Packet Scheme of Incentives 1993. During the course of arguments, learned senior counsel Shri Chagla made a categorical statement that he is ready to offer the electricity of 2.25 paise per unit to the distribution Company i.e. respondent no.3. Tilak 79 WP-2329-03.doc 25 The State Government was desirous of promoting the generation of energy through non-conventional sources so as to meet the demand of electricity in the State floated a scheme and invited bidders for operating the Windmills at sites selected by it. Once this participation was invited, the German Company M/s.GNEE who had an experience in wind power generation expressed its desire to participate and

evinced its intention to enter into an agreement with the State Government in terms of the policy laid by it. The said Company was called for meeting and the terms and conditions were made known to it and an offer was given in form of various incentives. Letter of Intent was issued in favour of M/s.GNEE. A promise was given that the energy produced by it would be purchased by the Electricity Board and several benefits including the benefits of sales tax was made integral part of the said offer which encouraged the Company to take necessary steps for installing a wind power generation plant at the site offered by the State. The promise which was held out by the State Government impliedly contained a responsibility to arrange for all the desirable No Objection Certificates and in pursuance of the said Tilak 80 WP-2329-03.doc promise, the MSEB granted the No Objection Certificate. However, on a hyper-technical stipulation that the No Objection from the State Government should be obtained before a stipulated date, the German Company and its subsidiary including the petitioner was kept out of the project by prescribing a cut-off date. We have noted that the said action of the State Government is an arbitrary exercise, inasmuch as it was only intended to keep the petitioner out of the entire process despite the State Government issuing the Letter of Intent in its favour and also considering the said Company as one of the developer who has been selected for conferment for final approval by the State of Maharashtra. However, the State of Maharashtra kept the proposal of the final approval pending for a considerable time inspite of the Electricity Board granting a No Objection in its favour and sat over the said proposal. In the mean time, the petitioner incurred expenditure, since he purchased the machinery required for installation of the said plant and also made arrangements for infrastructure including making a provision for transmission lines and acquiring land for the said project. In this backdrop, we find that the State Tilak 81 WP-2329-03.doc Government who has held out a promise to the petitioner is estopped from going back on its promise specially when the petitioner has acted on the said promise and has altered its position by making huge investment which is now detrimental to the petitioner. The action of the State Government is arbitrary and is also hit by the principle of promissory estoppel. In view of the said situation, when the petitioner has been driven at a stage where but for a final approval/NOC from the State Government, he has arranged for all the infrastructure for commissioning the wind power project, we have no hesitation in issuing the mandamus to the State Government. 26 In the backdrop of the said statement, we are of the clear opinion that there is no embargo in the petitioner commissioning the project now, but the only hindrance is that NOC which is not granted by the State Government. In light of the discussion above when we have reached the conclusion that the State Government has resiled from its promise at one step preceding the final approval for the project, the act of keeping the petitioner No.1 away from commissioning the project by Tilak 82 WP-2329-03.doc withholding the final NOC is arbitrary. The petitioner has challenged its action by relying on the said promise and had rather suffered a setback since the promise is not honoured. In such circumstances, we find the action of the State Government hit by the doctrine of promissory estoppel. We, therefore, are of the clear view that the petitioner has made out a case for issuance of a writ in the nature of mandamus for issuing directions to the State Government to accord final approval/NOC for its 30 mw Wind Mill Power Generation Project and permit the petitioner to commission the said project by availing all the benefits/incentives under the Packet Scheme of Incentives 1993 as amended from time to time. In any contingency, the benefits that could be availed by the petitioner in respect of sales tax would be governed by the resolution of 25th July 2001 and they could be availed to the extent quantified limit as set out in the said resolution. The respondent State is directed to ensure that the 'No Objection Certificate' is issued to the

petitioner company within a period of four weeks and then the petitioner would be entitled to commission its project and needless to say that it can avail the Tilak 83 WP-2329-03.doc consequential incidental benefits as flowing from the policy of the State Government as contained in the Government Resolution dated 12th March 1998 for promoting the Wind Energy Generation in the State.

26 With the aforesaid directions, Writ Petition is disposed of.

Rule is made absolute in the aforesaid reasons. (SMT. BHARATI H. DANGRE, J.) (S.C. DHARMADHIKARI, J.) Tilak