

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CWP No.8338 of 2009

V.K.Indrayan

... Petitioner

Versus

State of Punjab & another

... Respondents

Date of Decision: 23.12.2015

**CORAM : HON'BLE MR.JUSTICE AJAY KUMAR MITTAL
HON'BLE MR.JUSTICE G.S. SANDHAWALIA**

Present : Mr. Ashwani Kumar Chopra, Sr. Advocate
with Ms. Rupa Pathania, Advocate for the petitioner
(in CWP No. 24416 of 2011).

Mr.Sanjeev Sharma, Sr.Advocate
with Mr.Shekhar Verma, Advocate
and Ms.Bhavna Joshi, Advocate, for the petitioner
(in CWP No. 1500 of 2012).

Mr.Chetan Mittal, Sr.Advocate
with Mr.Puneet Gupta, Advocate
and Mr.Rahul Sharma-I, Advocate, for the petitioner
(in CWP No.8338 of 2009).

Mr. Suvineet Sharma, Advocate,
Mr.Gaurav Goel, Advocate and
Ms.Salina Chalana, Advocate, for the petitioner
(in CWP Nos. 11692/2009, 24363/2011 & 9037/2012).

Mr. Krishan M.Vohra, Advocate for
Mr. Sumeet Goel, Advocate for the petitioner
(in CWP No. 16383 of 2012).

Mr. Sanjiv Singh Thakur, Advocate for
Mr. Sanjiv Bansal, Advocate for the petitioner (s)
(in CWP No. 13217 of 2010 & 1485 of 2011).

Mr. Ashwani Talwar, Addl. AG, Punjab and
Mr. Sunil Kumar Vashisht, AAG, Punjab.

Ms. Madhu Dayal, Advocate for the PSIDC
(in CWP Nos. 12084 of 2010 & 8151 of 2011).

Mr. V.M. Gupta, Advocate for the PSIDC.
(in CWP Nos. 8603, 13217 & 17804 of 2010 and
CWP No. 1485 of 2011).

Mr.Sarvesh Malik, Advocate, for the PSIDC
(in CWP No.24363 of 2011).

Mr.Samarth Sagar, Advocate, for the PSIDC
(in CWP No.11541 of 2009).

Mr.Arun Nehra, Advocate, for the PSIDC
(in CWP No.11541 of 2009).

Mr. Parveen Gupta, Advocate
and Mr. Sanjeev Trikha, Advocate, for respondent No.1
(in CWP Nos. 13175 of 2009 & 15038 of 2011
and for respondent No.2 (in CWP No. 16383 of 2012).

Mr. Ishtbir Singh Sidhu, Advocate, for respondent No.2
(in CWP Nos.8338, 11692 of 2009 & 9037 of 2012)
and for respondent-PSIDC (in CWP No. 252 of 2012).

Mr. G.S.Hooda, Advocate, for respondent No.1
(in CWP No. 13217 of 2010).

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. Whether to be referred to the Reporters or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

G.S. Sandhawalia , J.

This judgment shall dispose of bunch of cases, bearing
CWP Nos. 8338 of 2009, 13217 of 2010, 8771, 11541, 11692 of
2009, 8603, 9685, 12084, 13175, 17804, 18156, 21031 of 2010,
1485, 2169, 8151, 14852, 15038, 24363, 24416 of 2011, 252,
1500, 9037, 16383 of 2012 with LPA No.1635 of 2010, involving

common questions of law and facts. However, facts are being extracted from CWP No.8338 of 2009 titled *V.K.Indrayan Vs. State of Punjab & another*.

2. Challenge in these petitions has been raised to the notification dated 06.02.2009 (Annexure P30) whereby the One Time Settlement Scheme (for short, the 'OTS') for equity disinvestment in joint sectors/assisted sector companies, promoted by the respondent-Punjab State Industrial Development Corporation Ltd. (in short, the 'Corporation') and Punjab Agro Industries Corporation, has been amended. Clause 9.3.4 of the Punjab Government's Industrial Policy, 2003, has been amended by deleting the words "irrespective of the status of the unit" and which was to be read as "to collaborators/promoters of companies, other than profit making companies". Resultantly, the State Government withdrew the OTS, earlier given to the collaborators/promoters/profit making companies. Challenge has also been raised to the subsequent letter dated 28.04.2009 (Annexure P32), whereby the respondent/Corporation adjusted a sum of Rs.9,63,42,275/- paid by the petitioner against the OTS towards the dues owed by him in terms of the Financial Collaboration Agreement (hereinafter referred to as 'FCA') dated 24.05.1995 (Annexure P1). The petitioner was, accordingly, held entitled for transfer of 1841185 shares on account of the adjustment of the dues and asked to pay the balance amount of

Rs.993.97 lacs (subject to audit as on 30.04.2009) with further interest, as per the FCA till the date of payment or the amount based on the market value of the shares of the company held by the respondent-Corporation, as per the FCA, at the earliest but not later than one month from the date of the issuance of the letter.

3. Challenge has, thus, been raised on the ground that the respondent-Corporation had decided to unilaterally withdraw the OTS agreement dated 04.08.2004 (Annexure P8) under which the petitioner had already paid the entire amount due on 18.06.2007. A further prayer of a writ in the nature of mandamus, directing the respondent-Corporation to transfer its equity shares holding in M/s Indian Yarn to the petitioner and its nominees was prayed for.

4. The following three questions emerge for consideration of this Court:

(i) Whether the State was permitted to alter the terms of the OTS on the ground that it being a public policy, could be modified?

(ii) If question no. (i) is answered in favour of the State, whether the said decision could be with retrospective effect in the absence of any statutory provision?

(iii) Whether the State and the Corporation are bound by the principle of promissory estoppel and

*can go back on the terms of the OTS agreement
which had been duly acted upon by the petitioner
by materially altering its position?*

5. For deciding the above legal issues, reference to the pleaded facts of the case will be necessary.

6. The plague of terrorism which had struck the State of Punjab in the 1990's had occasioned the State to pursue with the policy of generating employment and to promote rapid industrialization of the State. It, accordingly, encouraged respondent No.2-Corporation to establish new ventures in joint/assisted sectors. In the said background, FCA was entered into by the petitioner with the respondent-Corporation on 24.05.1995, to set up a polyester/Viscose Grey Blended Yarn Project under the name and style of M/s Indian Yarn Ltd. The petitioner was the collaborator of the agreement which was set up for setting up the project which had initial capacity of 12,480 spindles, in pursuance of a Memorandum Of Understanding which had earlier been executed on 10.12.1993, for setting up the abovesaid project. The Corporation was to invest a sum of Rs.3.54 crores in the equity capital in M/s Indian Yarn Ltd. out of the total equity of Rs.13.26 crores. The petitioner was to contribute Rs.3.32 crores out of the balance equity of Rs.9.81 crores and the remaining Rs.6.49 crores was to be raised from the public through a public issue. The said public issue did not

materialize which led to a shortfall in the funds due to which only 6480 spindles were installed on 31.03.1996. The capacity was found unviable and the financial structure was changed and the promoters contributed additional amount of Rs.90 lacs (petitioner:60 lacs and respondent-Corporation:30 lacs), for which a supplementary agreement was entered into. The capacity was reduced to 9720 spindles and the petitioner sought to raise more funds from his own resources through the Punjab National Bank. The FCA contained the buy-back clause of the equity after 5 years from the date of the commencement of the commercial production, as per Clause 22. In view of the financial constraints faced, the petitioner was not able to comply with the buy-back arrangement. On account of the heavy tax exemption in the State of Himachal Pradesh in the years 1999 to 2003, all the industries started migrating to the said State. The funds remained locked and in an effort to recover the amount from various collaborators, a meeting of the Disinvestment Committee regarding the status of the buy-back agreements and the realizations of the Corporation's investment was held on 27.06.2001 wherein various options were deliberated upon as to how to recover the amount.

7. Accordingly, a decision was taken in the year 2003 to enter into the OTS with the collaborators by reducing the penal interest provided in the FCA. Resultantly, the Industrial Policy of 2003 was notified on 26.03.2003 (Annexure P3) wherein the OTS

policy to facilitate the disinvestment in promoted companies was initiated. As per Clause 9.3.3, the OTS was to come into play for facilitating the equity disinvestment even in those cases where arbitration proceedings had already started. Interest was to be charged @ 10% simple rate of interest irrespective of the status of the unit, subject to various conditions. The policy reads as under:

“The Governor of Punjab is pleased to formulate 'Industrial Policy-2003' to facilitate the development of industry in the State of Punjab, as contained in Chapters 1 to 12 herein under:

CHAPTER-9

REDEFINING ROLE OF PSIDC, PFC AND PSIEC

9. Following steps will be taken:-

9.1 Re-capitalisation of PSIDC and PFC for their future role.

9.2 Amalgamation of the following roles under one roof:-

- **infrastructure Development**
- **One stop banking including appraisals, insurance, merchant banking**
- **Seed/venture capital funds in specific in sunrise areas.**
- **One window facilitation to industry for all clearances.**
- **Closing down or redefining of divisions which are irrelevant**

9.3 Dis-investment in the Joint/Assisted Sector and Direct Subscription companies promoted by various Corporations of Punjab Government.

9.3.1 Punjab State Industrial Development

Corporation and Punjab Agro Industries Corporation have been engaged in promoting joint sector/assisted sector companies by participating towards equity of funds entities based on an understanding with the promoter that after a specified number of years when the company was on stream, the promoter would buy back the equity stake of the investing Corporations at principal investment plus pre-agreed rate of interest.

9.3.2 In most cases, the promoters/collaborators have not been able to buy back shares which have become overdue.

9.3.3 A liberal One Time Policy for facilitating equity dis-investment in the promoted companies as also in those cases where arbitration proceedings have already started would be implemented to enable the units to settle obligations with PSIDC and PAIC.

9.3.4. The Policy will offer Single Tier carrying 10% simple rate of interest irrespective of the status of the unit. This OTS shall apply only to all the balance shares being held by the respective corporations in Joint Sector/Assisted Sector/Direct Subscription which have yet not been transferred back to the collaborator.

9.3.5 The above concessions would be subject to the following:

a) The buy back amount under the OTS Policy as per above shall be calculated as on 31st March 2003 and the operating date shall be 1.04-2003.

b) The promoters shall have to deposit an amount

equivalent to 10% of the consideration amount i.e. principal + up to date simple interest as calculated above from the date of disbursement till the offer date alongwith his application asking for OTS.

c) There will be following options for the payment of balance amount:

i) In case, the complete amount is paid within 60 days, then 10% rebate on the interest due up to the actual date of buy back will be given.

ii) In case, the complete amount is paid within 120 days, then 5% rebate on the interest due up to the actual date of buy back will be given.

iii) In case, the payment is made beyond 120 days and in less than one year, then no rebate is offered. However, further simple interest @ 12.5% p.a. shall be charged on reducing amount till the date of full payment or one year whichever is earlier.

iv) In case, the payment is made after one year then the compound interest @ 12.5% p.a. shall be charged on reducing amount. However, even in this option, the entire payment has to be completed within 2 years of accepting the offer.

d) The entire buy back is to be completed within two (02) years from the date of acceptance. In case the collaborator fails to complete the buy back during the said period, then the buy back shall be governed by the provisions of the FCA and the amount already received shall be adjusted against the interest.

e) The shares shall be transferred only after the entire amount is received and buy back concluded

thereof.

f) The above scheme shall be in operation till 31st May 2003 for the purpose of exercising an option.

g) The rate of interest under One Time Settlement Policy for facilitating equity disinvestments in the companies promoted by Punjab Government Undertakings located in the Border districts will be 8% instead of 10%. The period for availing OTS for equity buy-out for the Border districts units will be 3 years.”

9. It is not disputed that the said policy was further approved by the Council of Ministers in its meeting dated 27.05.2004. The petitioner having run into financial difficulty, was already facing arbitration proceedings in pursuance of the arbitration clause provided under the FCA. The petitioner, accordingly, entered into the OTS as per the agreement dated 04.08.2004 (Annexure P8) with the respondent-Corporation and started to make payment and paid a sum of Rs.77,74,096/- on 29.06.2004. It is the case of the petitioner that he had got the amount from the third parties on the assurance that the equity share holdings to be transferred by the respondent-Corporation, would be further transferred to them. As per the terms of the agreement, the petitioner, accordingly, wrote another letter dated 09.08.2004 (Annexure P10) to the Corporation asking for the transfer of the shares on proportionate basis. Thereafter, another sum of Rs.1,20,000/- was deposited on 17.09.2004 and request

was made to transfer the equity shares in various names. The petitioner was informed to give postdated cheques with the balance amount payable within the overall limit of 3 years in equal quarterly instalments for the balance of the OTS payable. On account of the non release of the shares on *pro rata* basis, a communication dated 13.04.2005 (Annexure P13) was addressed and a protest was raised against the demand of the respondent-Corporation to submit postdated cheques and the supplementary agreement which was asked to be entered into vide decision dated 24.03.2005.

10. The Corporation vide letter dated 06.05.2005 (Annexure P14) declined to issue the shares on pro-rata basis until the collaborators entered into a supplementary agreement. In spite of the request made by the petitioner on 18.10.2005 the same was declined by the Corporation vide letter dated 08.11.2005 (Annexure P16). Thereafter, the petitioner was intimated vide letter dated 04.04.2006 (Annexure P17) that a sum of Rs.345 lacs by way of equity had been invested by the Corporation and the petitioner was required to buy-back the same as per the FCA. Only a sum of Rs.72.32 lacs was deposited by him in pursuance of the OTS of 2003 and a tentative demand of Rs.781.79 lacs (subject to audit) with further compound interest of 12.5% per annum till the date of payment, was made. The petitioner wrote on 29.11.2006 (Annexure P18) for conveying the amount due so that

he could make arrangement for paying the entire dues. Thereafter, he paid by way of cheque, a sum of Rs.25 lacs vide letter dated 06.04.2007 (Annexure P20) and asked for the transfer of additional one lac shares against the said payment in the name of one M/s Priyamanu Finance & Investment Pvt. Ltd. on the ground that total payment had been made to the tune of Rs.96,94,096/-. Thereafter, on 18.06.2007 (Annexure P21), a sum of Rs.21.10 lacs was paid through cheque, bringing the total payment to the tune of Rs.9,63,42,000/- and the whole payment as per the OTS was paid, as per the calculations of the petitioner. Still the shares were not transferred to the petitioner inspite of the request made on 19.06.2007 (Annexure P22).

11. It is also a matter of judicial record that on 22.05.2006, CWP No.8592 of 2006 titled *Sarabjit Singh Vs. State of Punjab & others*, was filed, as a Public Interest Litigation. The plea taken was that the Corporation had entered into OTS where even profit making companies were being granted the said benefit and the amount of Rs.26.56 crores should be recovered with punitive interest from respondents no. 3 and 4 therein. Accordingly, the petitioner received a letter dated 22/23.06.2007 (Annexure P-23) wherein the pendency of the abovesaid case was referred to. The petitioner was asked to submit an undertaking as per the attached performa that 90% of the amount alongwith interest payable by him would be accepted conditionally, in view of the pendency of the

public interest litigation. The shares would not be transferred till the decision of the case and the encashing of the cheques would not bind the Corporation. Accordingly, a demand was made to make the balance payment of the dues so as to enable the Corporation to process the matter. Subsequently, vide letter dated 29.06.2007 (Annexure P24), the balance payment was demanded as per the OTS policy, subject to the draft undertaking upto 30.06.2007 and the amount was quantified on 30.06.2007 at Rs.9,04,57,238/-. The petitioner, on 04.07.2007 (Annexure P26), wrote back to the Corporation that he had already made the entire payment and the conditions of the letters dated 22/29/30/06.2007 were not applicable to him and that the non-delivering of the shares was putting him in a very difficult financial situation.

12. The petitioner, thereafter, filed CWP No.10322 of 2007, seeking a writ of mandamus for directing the respondents to transfer his equity share-holdings of M/s Indian Yarn Ltd. to him and his nominees and for quashing of the demands raised. The said writ petition was opposed by the respondents on account of the pendency of the public interest litigation. It was concluded by a Division Bench of this Court that once the payment had been received, the buy-back clause had to be enforced. A direction was given that the shares be transferred by obtaining an appropriate undertaking from the petitioner, who would remain bound by the directions passed in the public interest litigation and that the

collaborators would not create third party rights on the transfer of the shares. Relevant portion of the order dated 18.12.2007 reads as under:

“In view of the above, we find that on the one hand, cheques issued by the collaborators have been encashed and on the other hand in pursuance to the buy back clause, the shares are not being transferred to them. These two things cannot go side by side. Therefore, we deem it just and appropriate to direct the respondent-corporation to transfer the shares by obtaining appropriate undertaking from the petitioner. In case, any order is passed by this Court in Public Interest Litigation initiated in C.W.P. No.8592 of 2006, the petitioner shall remain bound by all the directions and that the collaborators will not create any third party right on transfer of the shares. List again on 18-2-2008.”

13. The interim order was passed on 03.03.2008, directing the Corporation to transfer the equity shares immediately held by the respondent-Corporation of M/s Indian Yarn Ltd. to the petitioner subject to the decision of the writ petition. The said order was challenged by filing Special Leave to Appeal (Civil) No.8630 of 2008 and interim injunction was passed regarding re-transfer of the shares till further orders on 15.04.2008 but liberty was granted to the High Court to dispose of the writ petition. Thereafter, the impugned notification came in force on 06.02.2009 wherein the

benefit of the OTS was withdrawn to the profit making companies and the OTS offer given earlier to the petitioner, was withdrawn, which is now the subject matter of challenge. The same reads as under:

“The Governor of Punjab is pleased to amend the One Time Settlement Scheme (OTS) for Equity Disinvestment in the Joint Sector/Assisted Sector Companies promoted by Punjab State Industrial Development Corporation Ltd. and Punjab Agro Industries Corporation, in Clause 9.3 Industrial Policy 2003, notified vide No. 5/58/2002/1 IB/968 dated 26-3-2003, further amended and approved by the Council of Ministers in its meeting held on 27-5-2004.

2. Accordingly, in clause 9.3.4 the words “irrespective of the status of the unit” would be read as “to collaborators/promoters of companies other than profit making companies.”

3. In view of the above, the Governor of Punjab is further pleased to withdraw the OTS offer earlier given to the collaborators/promoters of profit making companies.”

14. CWP No.10322 of 2007, filed by the petitioner, was disposed of on 10.02.2009 by the Division Bench (Annexure P31) by directing that the Corporation would take a fresh decision in the light of the changed circumstances within 6 weeks from the receipt of the copy of the order. The petitioner was given liberty to seek appropriate redressal in case the Corporation takes a decision

adverse to it. Thereafter, on 28.04.2009 (Annexure P32), the Corporation took the stand that since the OTS stood withdrawn on the ground of change of policy it was not to extend the OTS to profit making companies. Since M/s Indian Yarn Ltd. was a profit making company as on 31.03.2004, as per the audited balance sheet, therefore the amount of Rs.9,63,42,275/-, paid by the petitioner as a collaborator, stood adjusted against the dues owed in terms of the FCA dated 24.05.1995. A balance amount of Rs.993.97 lacs (subject to audit) was payable on 30.04.2009 with further interest till the date of payment etc., which is now the subject matter of challenge on the ground of promissory estoppel. The ground being that the petitioner had made the payment of entire amount along with interest @ 10% per annum upto 30.03.2003 and 12.5% thereafter and had already forgone the punitive interest of 24%. Resultantly, the present writ petition was filed.

15. In the written statement filed by respondent No.1, the action taken has been justified as there was an overriding public interest required for making the amendment in the OTS of 2003 so that the benefit may not be granted to the profit making companies run by collaborators/promoters. Reference was made to the objections raised by the Comptroller & Auditor General of India that the scheme lacked financial prudence. There was no criteria laid down regarding the performance/working results of the units to

judge the genuineness of the default and ignoring the distinction between genuine and wilful defaulters. A financial loss was being caused to the Corporation and a tendency to encourage the promoters/collaborators to resort to wilful default for availing the benefit of OTS would come into play. The object of the OTS was not being achieved. Reference was also made to the public interest litigation which had been filed in *Sarabjit Singh's case* (supra) and the decision being a financial policy, could not be subject matter of challenge under Article 227 of the Constitution of India. The petitioner had executed an FCA and had to buy-back the shares after the expiry of 5 years which was intentionally not bought back. There was a wilful default and blocking of public money which was to be circulated for the industrial development of the State. The floating of the OTS was admitted but it lacked financial prudence and therefore, the State was justified to amend the same and not offer it to profit making companies. The petitioner had the resources to buy-back the equity but he did not do so intentionally and kept on postponing the payment. The petitioner, being a defaulter, had intentionally withheld the public money. Plea taken was that individual interest must yield to public interest and the notification had been issued keeping in mind the overriding public interest. There was no estoppel against the State Government regarding the framing of the policies. The rectification had been done by way of amendment after due deliberation and

considering all the financial aspects. Reference was made to the report of the Comptroller & Auditor General of India and its observations wherein loss of Rs.26.58 crores was made by settling the OTS scheme by the respondent-Corporation with two industrial establishments namely, M/s Rana Polycot and M/s Malwa Industries Ltd. That even an application had been filed for permission to allow the respondent-Corporation to withdraw the OTS to the profit making companies but no order had been passed in the public interest litigation. Thereafter, the Council of Ministers, on 02.12.2008, had decided to withdraw the OTS granted to the collaborators.

16. In the written statement filed by respondent No.2-Corporation, the factual matrix was not disputed including the fact of the deliberations by the Disinvestment Committee. That the Corporation was left with no option but to effect speedy recovery of the dues owed to it on account of the illegal withholding of the same by the collaborators. The power of the Government to issue directions regarding the matter of policy and annul any directive, was defended under Article 135 of the Articles of the Association of the Corporation. The company was in profit on 31.03.2004 when it had exercised the option for the OTS on 29.06.2004. Therefore, being a profit making concern, as per the audited balance sheet/annual report for 2003-04, it was under an obligation to discharge the liability in terms of the mutually agreed terms and

conditions, as reduced in writing. The petitioner having pumped all its resources and not being in a position to purchase the equity shares was not a justifiable ground for avoiding the commercial liability. Reliance was placed upon the letter dated 24.06.2004 (Annexure R2/1) wherein the petitioner was asked to vacate the office of the Managing Director on account of his failure to act upon the buy-back agreement. The Corporation had no option but to initiate arbitration proceedings on the failure of the petitioner to honour its obligation under the FCA. Only when the petitioner was asked to vacate the office of the Managing Director, he availed the OTS. The factum of raising funds from third parties was denied and it was admitted that the OTS was signed on 04.08.2004, though the cut-off date was 30.06.2004. The Board had taken a decision on 24.03.2005, requiring the collaborators to enter into a supplementary agreement as per the OTS policy and the said action had not been challenged. The payments had not been made on account of the dilatory tactics to avoid discharging the legal obligation. Reference was made to the report of the Comptroller & Auditor General of India and the PIL filed before this Court and the decision of the Council of Ministers dated 02.12.2008 to withdraw the OTS. The said PIL had been disposed of in view of the notification dated 06.02.2009 and the collaborators had paid less than half of the amount which they were supposed to pay to the Corporation, as per the terms of the

agreements entered into. Accordingly, the action was justified and the earlier agreement was alleged to be void under Section 23 of the Indian Contract Act, 1872. The payment of the amount of Rs.963.42 lacs was admitted with a caveat that the petitioner was bound to pay much more than what was being paid. He had failed to make payments under the FCA and enjoyed unjust enrichment at the expense of the people of the State of Punjab. The petitioner was a deliberate defaulter who had the resources and funds to buy-back the equity but did not do so. The funds of the Corporation were lying blocked because of such wilful default and profit making companies were under legal obligation to pay back under the FCA. Accordingly, prayer was made that the writ petition be dismissed.

17. Having noticed the factual matrix, which is very clear, this brings us to decide the three legal issues, which arise for consideration, as noticed above.

Issue No.1:

Whether the State was permitted to alter the terms of the OTS on the ground that it being a public policy, could be modified?

18. In our opinion, this issue needs to be necessarily answered in favour of the State, regarding the right of the State to frame a policy and revise or rescind or modify the same on the ground of public interest. There is no denying the fact that the benefit of the OTS was being granted to one and all under initial OTS dated 26.03.2003 (Annexure P3) irrespective of the status of

the unit and whether it was earning profit or not. There is no denying the fact that a report from the Comptroller & Auditor General of India was received regarding the financial prudence of the State's decision to give the benefit of the OTS to one and all. Even profit making companies had benefitted from the said OTS, leading to loss of revenue to the State. The said policy, in effect, was, thus, benefitting the persons who were holding back the payments in spite of the fact that they were profit making companies. Therefore, the State Government was well within its right to alter the terms and conditions of the policy once it was opposed to public policy. The issue of companies squandering public funds funded by public shares and delaying the buy-back and even taking the benefit of their financial indiscipline, is something which cannot be condoned. The modification was, accordingly, done to restrict the said benefit to only those companies who were not profit making. Limiting the applicability of the concession to the promoters/collaborators of the companies who were not making profit was apparently well intentioned. Counsel for the State and the Corporation were, thus, well justified in projecting that a wrong decision could always be corrected and on account of the economic harm being caused to the State on the wrong drafting of the policy which came under judicial scrutiny also.

19. Under Article 135 of the Articles of Association of the

respondent-Corporation, the Government has the power to issue directions which it may consider necessary in the matter of broad policy and could vary any directive which was to be given immediate effect. Article 135 reads thus:-

“Article 135 of the Articles of Association of Punjab State Industrial Development Corporation Limited “Notwithstanding anything contained in any of the Articles, the Government may, from time to time, issue such directives as they may consider necessary in matters of broad policy and in like manner may vary and annul any such directive. The company shall give immediate effect to directives so issued.”

20. As noticed, it is not disputed that the earlier decision of the grant of OTS was by the cabinet decision dated 27.05.2004 and the same was accordingly withdrawn by the cabinet also on 02.12.2008. The decision was taken on the ground that the profit making companies, who are defaulters were beneficiaries of the OTS scheme and thus, the amendment impugned was made. The said change in policy could always have been made as it was in public interest and against the public policy as it was a decision of the Government which could change its policies and was well within its jurisdiction.

21. For the said legal proposition, one can go back for

support upon the judgment of the Apex Court in **Amrit Banaspati Company Ltd. & another Vs. State of Punjab & another 1992 (2) SCC 411.** The issue in the said case was whether the company was entitled to the refund of the sales tax and the inter-state sales tax on the assurance held out by the Government without the competent authority taking a decision on the same. A single Bench of the High Court had granted the said benefit which was reversed on appeal by the Division Bench. The order of the Division Bench was upheld by the Apex Court on the ground that the appellant therein was never intimated that the Government had changed its policy regarding the refund of the sales tax and the said promise being contrary to law and against public policy, could not be enforced in the Court of law. It was, accordingly, held that taxation was the sovereign power and a promise to refund the tax which was due under the Act, would be a fraud under the Constitution of India and a breach of faith of the people and could not be enforced in law. Relevant portion of the judgment reads as under:

“12. But refund of tax is made in consequence of excess payment of it or its realisation illegally or contrary to the provisions of law. A provision or agreement to refund tax due or realised in accordance with law cannot be comprehended. No law can be made to refund tax to a manufacturer realised under a statute. It would be invalid and ultra vires. The Punjab Sales Tax Act provided for refund

of sales tax and grant of exemption in circumstances specified in Sections 12 and 30 respectively. Neither empowered the Government to refund sales tax realised by a manufacturer on sales of its finished product. Refund could be allowed if tax paid was in excess of amount due. An agreement or even a notification or order permitting refund of sales tax which was due shall be contrary to the statute. To illustrate it the appellant claimed refund of sales tax paid by it to the State Government of sale made by it of its finished products. But the tax paid is not an amount spent by the appellant but realised on sale by it. What is deposited under this head is tax which is otherwise due under provisions of the Act. Return of refund of its or its equivalent, irrespective of from is repayment or refund of sales tax. This would be contrary to Constitution. Any agreement for such refund being contrary to public policy was void under Section 23 of Contract Act. The constitutional requirements of levy of tax being for the welfare of the society and not for a specific individual the agreement or promise made by the government was in contravention of public purpose thus violative of public policy. No legal relationship could have arisen by operation of promissory estoppel as it was contrary both to the Constitution and the law. Realisation of tax through State mechanism for sake of paying it to private person directly or indirectly is impermissible under Constitutional scheme. The law does not permit it nor equity can countenance it. The scheme of refund of sales tax was thus incapable of being enforced in a court of law.

12. Fallacy of such constitutionally inhibited policy, sacrificing public interest resulting in illegal private

enrichment is exposed by claim of refund for nearly Rs. 2 crores, for a period of three years, only, when total investment in establishing the unit was Rs. 1.5 crores, Levy of tax to raise revenue for promoting economic growth of the State reduced itself in enhancing the profit margin of the manufacturer and the sales tax stood converted into income of the appellant. Such contrivance of law even though bona fide is legally unenforceable.”

22. In **Kaniska Trading & Industry Vs. Union of India (1995) 1 SCC 274**, the issue arose as to the withdrawal of the time-bound exemption notification issued under the Customs Act, 1962. The said notification was sought to be withdrawn before the prescribed period and was challenged on the ground that the appellants had placed order for the import of PVC resin on the understanding that it was exempt from Customs duty. The plea was rejected by the High Court, which was the subject matter of challenge before the Apex Court. It was held that the modification and alteration was in supersession of an earlier policy, in the larger interest and cannot be reviewed by the Courts except where it could be shown that the subsequent act of the Government was not in public interest. It was, accordingly, held that the Government could not be made the slave of its policy for all times to come and it was concluded that individual interest must yield in societal interest and accordingly, the appeals filed were dismissed. Relevant observation reads as under:

“19. The power to grant exemption from payment of duty, additional duty etc. under the Act, as already noticed, flows from the provisions of Section 25(1) of the Act. The power to exempt includes the power to modify or withdraw the same. The liability to pay customs duty or additional duty under the Act arises when the taxable event occurs. They are then subject to the payment of duty as prevalent on the date of the entry of the goods. An exemption notification issued under Section 25 of the Act had the effect of suspending the collection of customs duty. It does not make items which are subject to levy of customs duty etc. as items not leviable to such duty. It only suspends the levy and collection of customs duty, etc., wholly or partially and subject to such conditions as may be laid down in the notification by the Government in "public interest". Such an exemption by its very nature is susceptible of being revoked or modified or subjected to other conditions. The supersession or revocation of an exemption notification in the "public interest" is an exercise of the statutory power of the State under the law itself as is obvious from the language of Section 25 of the Act. Under the General Clauses Act an authority which has the power to issue a notification has the undoubted power to rescind or modify the notification in a like manner. From the very nature of power of exemption granted to the Government under Section 25 of the Act, it follows that the same is with a view to enabling the Government to regulate, control and promote the industries and industrial production in the country. Notification No. 66 of 1979 in our opinion, was not designed or issued to induce the appellants to import PVC resin. Admittedly, the said notification was not even intended as an incentive for import. The

notification on the plain language of it was conceived and issued on the Central Government "being satisfied that it is necessary in the public interest so to do". Strictly speaking, therefore, the notification cannot be said to have extended any 'representation' much less a 'promise' to a party getting the benefit of it to enable it to invoke the doctrine of promissory estoppel against the State. It would bear repetition that in order to invoke the doctrine of promissory estoppel, it is necessary that the promise which is sought to be enforced must be shown to be an unequivocal promise to the other party intended to create a legal relationship and that it was acted upon as such by the party to whom the same was made. A notification issued under Section 25 of the Act cannot be said to be holding out of any such unequivocal promise by the Government which was intended to create any legal relationship between the Government and the party drawing benefit flowing from of the said notification. It is, therefore, futile to contend that even if the public interest so demanded and the Central Government was satisfied that the exemption did not require to be extended any further, it could still not withdraw the exemption."

23. In **State of Punjab Vs. Ram Lubhaya Bagga 1998 (4) SCC 117**, the right of the State to change its policy, from time to time, under changing circumstances, was held not to be illegal. Financial constraints were held to be relevant consideration, which could weigh with the Government. The dispute was regarding the entitlement towards medical expenses of the Punjab Government employees and the pensioners which was admissible to them at

the same scale in non-governmental hospitals. The earlier benefit for treatment of the heart ailment at the ESCORTS hospital was being declined on account of the withdrawal by following the new policy. It was held that the policy which had been changed was neither challenged nor can it be and the principle of fixation of rates and scale was justified and could not be held to be violative of the Constitution of India. In spite of the fact that it pertained to the health of the employees, once the decision was based on relevant facts and circumstances, on expert advise, including financial constraints, the Court would not enter into this arena of public policy. Relevant observations read as under:

“20. Now we revert to the last submission, whether the new State policy is justified in not reimbursing an employee, his full medical expenses incurred on such treatment, if incurred in any hospital in India not being a Government hospital in Punjab. Question is whether the new policy which is restricted by the financial constraints of the State to the rates in AIIMS would be in violation of Article 21 of the Constitution of India. So far as questioning the validity of governmental policy is concerned in our view it is not normally within the domain of any court, to weigh the pros and cons of the policy or to scrutinize it and test the degree of its beneficial or equitable disposition for the purpose of varying modifying or annulling it, based on however sound and good reasoning, except where it is arbitrary or violative of any constitutional, statutory or any other provision of law. When Government forms its policy, it is based on number of

circumstances on facts, law including constraints based on its resources. It is also based on expert opinion. it would be dangerous if court is asked to test the utility, beneficial effect of the policy or its appraisal based on facts set out on affidavits. The Court would dissuade itself from entering into this realm which belongs to the executive. It is within this matrix that it is to be seen whether the new policy violates Article 21 When it restricts reimbursement on account of its financial constraints.”

24. A Three Judges Bench of the Apex Court in **BALCO Employees' Union (Regd.) Vs. Union of India (2002) 2 SCC 333**, held that the Court would refrain from interfering with the decisions pertaining to Government policies. No prior notice or hearing of persons was to be given to the persons affected by the Government policy decisions and principles of natural justice would not come into play. The wisdom of advisability of the economic policies could not be held to be amenable to judicial review, except on the ground that they were constitutionally invalid. The issue in question, in the above-said case, was regarding the disinvestment and the transfer of the 51% shares of M/s Bharat Aluminum Company Ltd., which was a Government of India undertaking. The disinvestment being made in the company was challenged by the employees union which was rejected by the High Court. On the valuation done, the bid of M/s Sterlite Industries was considered which led to the initiation of further legal proceedings. The question which arose was whether the decision was amenable to

judicial review and as to what were its parameters and extent. The defence of the State was accepted that the same was not amenable to judicial review. It was held that the process of disinvestment involves complex economic factors and merely because the workman had the protection of Articles 14 & 16, it would not mean that the Government had to give the workers a prior notice of hearing before deciding to disinvest. The Government had the liberty to run the industry departmentally or in any other form, subject to the economic climate. Relevant observations read as under:

“51. The aforesaid observations, in our opinion, enunciates the legal position correctly. The policies of the Government ought not to remain static. With the change in economic climate, the wisdom and the manner for the Government to run commercial ventures may require reconsideration. What may have been in the public interest at a point of time may no longer be so. The Government has taken a policy decision that it is in public interest to disinvest in BALCO. An elaborate process has been undergone and majority shares sold. It cannot be said that public funds have been frittered away. In this process, the change in the character of the company cannot be validly impugned. While it was a policy decision to start BALCO as a company owned by the Government, it is as a change of policy that disinvestment has now taken place. If the initial decision could not be validly challenged on the same parity of reasoning, the decision to disinvest also cannot be impugned without showing that it is against

any law or mala fide."

25. In **Howrah Municipal Corporation & others Vs. Ganges Rope Co. Ltd. & others 2004 (1) SCC 663**, the grant of sanction for construction of three additional floors to a multi-storey complex was set aside and the decision of the Single Bench was restored on the ground that there was no vested right in favour of the company to seek sanction once there was a restriction of the high rise building on the GT road. In the absence of any vested right or settled expectations, the same could not be constructed against the public interest and public inconvenience and there was no error in declining the grant of sanction.

26. In **Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer & others 2005 (1) SCC 625**, the question before the Apex Court was regarding the discontinuance of the purchase tax exemption pertaining to the mills which exceeded the ceiling of Rs.300 lacs during the period of 5 years and the applicability of the Government's letter which made it operative retrospectively. The High Court of Madras had accepted the plea of the State Government on the ground that subsidy was a concession and the Government had got reasons for modifying the scheme in public interest, while taking into account the principle of legitimate expectations. It was held that policy could be changed where the person's legitimate expectations had not been fulfilled by taking a decision. It was also held that the decision maker has the choice

in balancing the pros and cons relevant to the change in policy. The legitimate expectations only permitted the Court to find out whether the policy was irrational or perverse and would depend upon the facts and recognized principles of administrative law. The public interest being a superior equity could override the individual equity and the Government was free to take a call provided it was necessary to do so, in public interest. Relevant observation reads as under:

“17. Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interest of the general public and not from the standpoint of the interests of persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time enter into judicial verdict, the reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country.”

27. Similarly, in **Indian Financial Assn. of Seventh Day**

Adventists Vs. M.A. Unneerikutty (2006) 6 SCC 351, the Apex Court held that the public policy does not remain static and if the agreement is opposed to a public policy, the same could not be enforced.

28. In **Villianur Iyarkkai Padukappa Maiyam Vs. Union of India & others 2009 (7) SCC 561**, again a Three Judges Bench of the Apex Court held that the scope of interference in public policies is very limited. The Court's interference with the economic decisions and power to examine the relative merits of the different economic policies was beyond its domain. The issue pertained to the development of the port of Pondicherry and the decision of handing over the movable and immovable assets to the private-responder, in pursuance of the concession agreement entered into by the Government of Pondicherry. It was, accordingly, held that the said decision was a matter of public policy and even a change in Government could result in shifting focus on change of economic policy which would adversely affect some vested interest. In the absence of any illegality, it was held that the Court could not strike the same down and it was for the State to see its advantage. Relevant observation reads as under:

“In a democracy, it is the prerogative of each elected Government to follow its own policy. Often a change in Government may result in the shift in focus or change in economic policies. Any such change may result in adversely affecting some vested interests.

Unless any illegality is committed in the execution of the policy or the same is contrary to law or malafide, a decision bringing about change cannot per se be interfered with by the court. It is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. Wisdom and advisability of economic policy are ordinarily not amenable to judicial review. In matters relating to economic issues the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within the limits of the authority. For testing the correctness of a policy, the appropriate forum is Parliament and not the courts. Normally, there is always a presumption that the Governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not informed with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the court by proper and adequate material. The court cannot lightly assume that the action taken by the Government is unreasonable or against public interest because there are large number of considerations, which necessarily weigh with the Government in taking an action. In a case like this where the State is allocating resources such as water, power, raw materials, etc. for the purpose of encouraging development of the port, this Court does

not think that the State is bound to advertise and tell the people that it wants development of the Port in a particular manner and invite those interested to come up with proposals for the purpose. The State may choose to do so if it thinks fit and in a given situation it may turn out to be advantageous for the State to do so, but if any private party comes before the State and offers to develop the port, the State would not be committing breach of any constitutional obligation if it negotiates with such a party and agrees to provide resources and other facilities for the purpose of development of the port. The State is not obliged to tell the respondent No. 11 "please wait I will first advertise, see whether any other offers are forthcoming and then after considering all offers, decide whether I should get the port developed through you". It would be most unrealistic to insist on such a procedure, particularly, in an area like Pondicherry, which on account of historical, political and other reasons, is not yet industrially developed and where entrepreneurs have to be offered attractive terms in order to persuade them to set up industries. The State must be free in such a case to negotiate with a private entrepreneur with a view to inducing him to develop the port and if the State enters into a contract with such an entrepreneur for providing resources and other facilities for developing the port, the contract cannot be assailed as invalid because the State has acted bona fide, reasonably and in public interest. The terms and conditions of the contract entered into with the respondent No. 11 as well as the surrounding circumstances show that the State has acted bona fide and not out of improper or corrupt motive or in order to promote the private

interest of the respondent No. 11 at the cost of the State. Therefore, it is difficult to interfere and strike down the State action as arbitrary, unreasonable or contrary to public interest. It is true that one of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. But as noted earlier, this is not a case of sale of property by the State. Though public auction or inviting of tenders is the ordinary rule in case where the State Government proposes to dispose of a property, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule, the reasons indicated in this case for the departure are shown to be rational and are not suggestive of discrimination. The Government is entitled to make pragmatic decisions and policy decisions which may be necessary or called for under the prevalent peculiar circumstances.”

29. Resultantly, question no. 1 is answered in favour of the State that it has power to alter or modify the scheme once it comes to a conclusion that it was against the financial interest of the State and no fault can be found as such or any challenge can be raised to the withdrawal of the OTS to a certain category of industries who are profit making.

Issue No. 2:

If question no. (i) is decided in favour of the State, whether the said decision could be with retrospective effect in the absence of any statutory provision?

30. Examining the second issue, as noticed above, the amendment was made in the OTS scheme. As per the Black's Law Dictionary-10th Edition- Page no. 98, the word "amendment" means a change by addition or deletion or correction. It is apparent that the State Government was amending the clause as such but not substituting it from the date it came into effect and thus, was not wiping out the earlier concessions granted. Even otherwise, an amendment order cannot be retrospective in operation so as to create a disability to the person who, in response to the same, has already completed the transaction. In **Sri Vijayalakshmi Rice Mills, New Contractors Co. etc. vs. State of Andhra Pradesh, 1976 (3) SCR 775** a three-Judge Bench of the Apex Court held that a notification takes effect from the date it is issued and not from any prior date. The issue in question was the price of supplies of rice made under the Andhra Pradesh Rice Price Control (Third Amendment) Order, 1964. The millers were asking for the price in view of the amendment made in the schedule which was allowed by the Civil Courts. The benefit of the difference between the control price specified in the Control Order, 1963 and the Control Order, 1964 was granted. The High Court allowed the appeals which led to the matter being taken to the Apex Court and the view taken by the High Court was upheld and it was held as under:-

“5. Mr. Nariman appearing on behalf of the appellants has laid great emphasis on the word "substituted" occurring in clause 2 of the Rice (Andhra Pradesh) Price Control (Third Amendment) order, 1964 and has urged that the claim of the appellants cannot be validity ignored. Elaborating his submission, counsel has contended that as the prices fixed by the Government are meant for the entire season, the appellants have to be paid at the controlled price as fixed vide the Rice (Andhra Pradesh) Price Control (Third Amendment) order, 1964, regardless of the dates on which the supplies were made. We cannot accede to this contention. It is no doubt true that the literal meaning of the word "substitute" is "to replace" but the question before us is from which date the substitution or replacement of the new Schedule took effect. There is no deeming clause or some such provision in the Rice (Andhra Pradesh) Price Control (Third Amendment) order, 1964 to indicate that it was intended to have a retrospective effect. It is a well recognized rule of interpretation that in the absence of express words or appropriate language from which retrospectivity,

may be inferred, a notification takes effect from the date it is issued and not from any prior date. The principle is also well settled that statutes should not be construed so as to create new disability or obligations or impose new duties in respect of transactions which were complete at the time the [Amending Act](#) came into force. (See [Mani Gopal Mitra v. The State of Bihar](#), (1969) 2 SCR 411.”

31. The Apex Court in **I.T.C. Bhadrachalam Paperboards and another vs. Mandal Revenue Officer, A.P. and others, 1996 (Sup5) SCR 643**, negated the contention wherein, challenge had been raised to the demand of assessment on non-agricultural lands. The claim was based on the ground that there was an exemption notification. It was accordingly held that publication in the gazette is the final confirmation for making such an order or Rule and the version printed in the gazette is final. The relevant portion reads thus:-

“13.....The object of publication in the Gazette is not merely to give information to public. Official Gazette, as the very name indicates, is an official document. It is published under the authority of the government. Publication of an order or rule in the Gazette is the official

confirmation of making of such an order or rule.

*The version as printed in the Gazette is final. The same order or rule may also be published in the newspaper or may be broadcast by radio or television. If a question arises when was a particular order or rule was made, it is the date of Gazette publication that is relevant and not the date of publication in a newspaper or in the media (See **Pankaj Jain Agencies v. Union of India [1994 (5) S.C.C.198**). In other words, the publication of an order or rule is the official irrefutable affirmation that a particular order or rule is made, is made on a particular day (where the order or rule takes effect from the date of its publication) and is made by a particular authority; it is also the official version of the order or rule. It is a common practice in courts to refer to the Gazette whenever there is a doubt about the language of, or punctuation in, an Act, Rule or Order. Section 83 of the Evidence Act says that the court shall presume the genuineness of the Gazette. Court will take judicial notice of what is published therein, unlike the publication in a newspaper, which has to be proved as a fact as provided in the Evidence*

Act. If a dispute arises with respect to the precise language or contents of a rule or order, and if such rule or order is not published in the Official Gazette, it would become necessary to refer to the original itself, involving a good amount of inconvenience, delay and unnecessary controversies. It is for this reason that very often enactments provide that Rules and/or Regulations and certain type of orders made thereunder shall be published in the Official Gazette. To call such a requirement as a dispensable one - directory requirement - is, in our opinion, unacceptable. Section 21 of the Andhra Pradesh General Clauses Act says that even where an Act or rule provides merely for publication but does not say expressly that it shall be published in the official Gazette, it would be deemed to have been duly made if it is published in the official Gazette.”

32. Similarly, in **Union of India and others vs. M/s. Ganesh Das Bhojraj, 2000 (1) SCR 1081**, the three-Judge Bench of the Apex Court held that the publication in the official gazette would be the date when the notification came into force and there was no reason to depart from the same. The issue in question was the exemption notification of 02.08.1976 being withdrawn on

04.02.1987 on account of which duty was levied on the goods imported by the respondent in the said case in which the bill of entry was made on 05.02.1987. The Bombay High Court had allowed the writ petition on the ground that the notification was not duly published and was not made available. It was accordingly held that the method and mode provided is by notification bringing the same into operation and no further publication is contemplated. The discordant note in **Collector of Central Excise vs. New Tobacco Company, 1998 (8) SCC 250** followed in **Garware Nylons Ltd. vs. Collector of Customs and Central Excise, Pune, (1998) 8 SCC 282** was held not laying down correct law. The view taken in **M/s. Pankaj Jain Agencies vs. Union of India, (1994) 5 SCC 198**, was held to be correct exposition of law. The relevant observations read thus:-

“12. In our view, as noted above, in Pankaj Jain Agencies case, the Court directly dealt with a similar contention and after relying upon the decision in the case of Mayer Hans George (Supra) rejected the same. That decision is followed in I.T.C. Ltd. (Supra) and other matters. Hence, it is difficult to agree that the decision in Pankaj Jain Agencies case was not helpful in deciding the question dealt with by the Court. Section 25 of the Customs Act empowers the

Central Government to exempt either absolutely or subject to such conditions, from the whole or any part of the duty of customs leviable thereon by a notification in Official Gazette. The said notification can be modified or cancelled. The method and mode provided for grant of exemption or withdrawal of exemption is issuance of notification in the Official Gazette. For bringing Notification into operation, the only requirement of the section is its publication in the Official Gazette and no further publication is contemplated. Additional requirement is that under Section 159 such notification is required to be laid before each House of Parliament for a period of thirty days as prescribed therein. Hence, in our view Mayer Hans George (supra) which is followed in the Pankaj Jain Agencies case represents the correct exposition of law and the Notification under Section 25 of the Customs Act would come into operation as soon as it is published in the Gazette of India i.e. the date of publication of the Gazette. Apart from prescribed requirement under Section 25, usual mode of bringing into operation such notification followed since years in this country is its

publication in the Official Gazette and there is no reason to depart from the same by laying down additional requirement.”

33. The matter was also examined in **Virender Singh Hooda & others Vs. State of Haryana & others 2004 (12) SCC 588**, wherein the power of the legislature to set aside the decision of the Court of law was under consideration and the basis which led the Court to decide, could be changed, with retrospective effect but the vested right could not be taken away. Relevant observation reads as under:

“48. The legislative power to make law with retrospective effect is well recognised. It is also well settled that though the legislature has no power to sit over Court's judgment or usurp judicial power, but, it has, subject to the competence to make law, power to remove the basis which led to the Court's decision. The legislature has power to enact laws with retrospective effect but has no power to change a judgment of court of law either retrospectively or prospectively. The Constitution clearly defines the limits of legislative power and judicial power. None can encroach upon the field covered by the other. The laws made by the legislature have to conform to the constitutional provisions. Submissions have also been made on behalf of the petitioners that by enacting law with

retrospective effect, the legislature has no power to take away vested rights. The contention urged is that the rights created as a result of issue of writ of mandamus cannot be taken away by enacting laws with retrospective effect. On the other hand, it was contended on behalf of the respondent-State that the power of the legislature to enact law with retrospective effect includes the power to take away vested rights including those which may be created by issue of writs.”

34. The Apex Court in **Mahabir Vegetable Oils (P) Ltd. & another Vs.State of Haryana & others (2006) 3 SCC 620**, examined the issue of the exemption from payment of sales tax and held that a retrospective operation has to be seen from the terms which arise by necessary and distinct implications.

35. In **Kusumam Hotels (P) Ltd. Vs. Kerala State Electricity Board (2008) 13 SCC 213**, the Apex Court was seized with the issue whether the decision of the Electricity Board and the Government to limit the concession of electricity tariff only to 5 years, was sustainable. Initially, tourism had been declared as an industry and no time limit had been fixed on the applicability of the policy decision. Accordingly, it was held that policy decision could be revived from time to time and could be withdrawn in public interest. The Board having acted in pursuance to the decision of the State Government, was bound on the question of policy and

that the administrative orders were to be ordinarily prospective in nature. A policy decision could not be given prospective or retroactive operation since the accrued right of the appellants would be affected. It was held that for giving retrospective effect, the source of power is to be on the basis of a statutory provision which is to be enacted expressly or by necessary implication. The State had issued directions to the Board and the Board was bound by the same until there were clear intentions of withdrawal, by retrospective effect. In the absence of any clear intentions, the Government order was held to have prospective operation and not retrospective operation. Relevant observations read as under:

“18. Tourism was declared to be an industry. The wide range of concessions as noticed hereinbefore, inter alia, covered electricity and water charges. It is not a case where some exemptions or concessions were to be given for a specific period or as a one time measure. No time limit was fixed for applicability in respect of the policy decisions. Pursuant thereto long term investments might have been made. It is not based on a principle of giving benefit with a view to facilitate the initial growth of the industry. It was not based on any formula or criteria to evaluate the realization of the object of grant of such concession over a period. It was an open ended offer. It must, therefore, be held that the Government was satisfied that the need was to grant concession if not permanently, at least for a long time.

19. There cannot be any doubt whatsoever that a policy decision can be reviewed from time to time. It is

also beyond any doubt that the concessions granted can be withdrawn in public interest.

20. Indisputably, the State is also entitled to change or alter the economic policies. Appellants do not have any vested right to enjoy the concessions granted to them forever, particularly when the Board is constituted and incorporated under the provisions of Electricity (Supply) Act, 1948. Any policy decision adopted by the State would not be binding on the Board, save and except provided for in the Act. The Board being an independent entity, the duties and functions of the Board vis-a-vis the State are enumerated in the Act. The Board, however, would be bound by any direction issued by the State Government on questions of policy. A dispute which may arise as to whether a question is or not a question of policy involving public interest, Central Government is the final arbiter. The policy decision adopted by the State on the basis whereof the Board felt obligated to grant electrical connection in favour of the appellants on the basis of industrial tariff must, therefore, be understood in the context of Section 78A of the 1948 Act. What is binding on the Board is the policy of the State. The direction of the State was to apply a particular category of tariff to the appellants. Such directions could have been withdrawn while making another tariff. The State indisputably has the power to grant subsidy from its own coffer instead of directing the Board to grant concession.

21. It is now a well settled principle of law that the doctrine of promissory estoppel applies to the State. It is also not in dispute that all administrative orders ordinarily are to be considered prospective in nature. When a policy decision is required to be given a retrospective operation, it must be stated so expressly

or by necessary implication. The authority issuing such direction must have power to do so. The Board, having acted pursuant to the decision of the State, could not have taken a decision which would be violative of such statutory directions.

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36. The law which emerges from the above discussion is that the doctrine of promissory estoppel would not be applicable as no foundational fact therefor has been laid down in a case of this nature. The State, however, would be entitled to alter, amend or rescind its policy decision. Such a policy decision, if taken in public interest, should be given effect to. In certain situations, it may have an impact from a retrospective effect but the same by itself would not be sufficient to be struck down on the ground of unreasonableness if the source of power is referable to a statute or statutory provisions. In our constitutional scheme, however, the statute and/or any direction issued thereunder must be presumed to be prospective unless the retrospectivity is indicated either expressly or by necessary implication. It is a principle of rule of law. A presumption can be raised that a statute or statutory rules has prospective operation only.

37. The State of Kerala in this case did not grant any concession by itself. The Central Government took a larger policy of treating the tourism as an industry. A wide range of concessions were to be granted by way of one time measure; some of them, however, had a recurring effect. So far as grant of benefits which were to be recurring in nature, the State exercises its statutory power in the case of grant of exemption from payment of building tax wherefor it amended the statute. It issued directions which were binding upon

the Board having regard to the provisions contained in Section 78A of the 1948 Act. The Board was bound thereby. The Board, having regard to its financial constraints, could have brought its financial stringency to the notice of the State. It did so. But the State could not have taken a unilateral decision to take away the accrued or vested right. The Board's order dated 11.10.1999 in law could not have been given effect to. The Board itself kept the said notification in abeyance by reason of order dated 8.11.1999.

38. The appellants, indisputably, continued to derive the benefits in terms of the original order. They obtained certificates of classification. It is on the aforementioned context, the question as regards construction of the impugned notification dated 26.9.2000 arises. Ex facie, the said policy decision could not be given a retrospective effect or retroactive operation. The State was not exercising the power under any statute to grant or withdraw the concession. It was exercising its statutory power of issuing direction. It is, therefore, a statutory authority. The 1948 Act does not authorize the State to issue a direction with retrospective effect. The Board, therefore, could only give prospective effect to such directions in absence of any clear indication contained therein. By reason of withdrawal of concession with retrospective effect, the accrued right of the appellants had been affected.

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40. We, therefore, are of the opinion that the impugned G.O. dated 26.9.2000 must be held to have a prospective operation and not a retrospective operation. That view would save it from being vulnerable to the challenge of being hit by Article 14 of

the Constitution of India.”

36. In **Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector & E.T.I.O. & others 2007 (5) SCC 447**, the issue arose as to the modification of the notification and it was held that when the State intended to depart from the conditions laid down earlier wherein incentives had been granted to various firms, it was held that the State could not be permitted to alter its stance on furtherance of the representations made by it.

37. In **Bharat Sanchar Nigam Ltd. & another Vs. BPL Mobile Cellular Ltd. & others (2008) 13 SCC 597**, contracts had been entered into by the parties regarding interconnection links provided. It was held that the parties will be bound by the concluded contract and the alteration or modification could not be done by express agreement or by necessary implication and therefore, there could not be any change of tariff in terms of Section 8 of the Indian Contract Act.

38. Adverting to the factual matrix herein, as noticed, the petitioner, in pursuance to the OTS floated by the respondent-Corporation, had entered into an agreement with the Corporation on 04.08.2004 (Annexure P8) wherein he had taken the benefit of the low rate of interest and offered to pay within the time frame of the policy. In pursuance of the said agreement, the arbitration proceedings pertaining to the buy-back agreement were also terminated by placing the agreement on record and therefore, the

Corporation also gave up its claim regarding the amounts due under the FCA, vide order dated 18.08.2004 (Annexure P9) passed by the Arbitrator. In pursuance of the agreement, further payments were made by the petitioner and it is not disputed that a sum of Rs.96,94,094/- has been paid but was not acted upon. The Corporation cannot be allowed to blow hot and cold at the same time and could not withdraw from the concluded contract. The petitioner had also chosen to litigate and approached this Court seeking direction for transfer of shares on pro-rata basis, as per the agreement which provided that on the receipt of minimum payment of Rs.20 lacs transfer would be made as per the OTS value of the shares, as calculated upto the date of transfer of shares. The Corporation had also agreed that in case the amounts were not paid as per the OTS, the Corporation would be entitled to claim the payments, as per the FCA. The resultant amendment, subsequently, would not and could not have been done, with retrospective effect. The withdrawal of the OTS offer earlier given would not apply with retrospective or retroactive effect. The amendment by way of notification could only be from the date of the decision so notified and the date could not have been preponed to a earlier point of time, to the prejudice of the petitioner who had acted upon the offer given.

39. Thus, from the above discussion, it can be safely concluded that under the strength of public policy, the State is well

within its vested right to review its earlier decision and restrict the benefit of the OTS which was a mere concession to a limited set of eligible persons on a valid criteria as to whether it was a profit making industry or not but not with retrospective effect.

Issue No. (iii):

Whether the State and the Corporation are bound by the principle of promissory estoppel and can go back on the terms of the OTS agreement which had been duly acted upon by the petitioner by materially altering its position.

40. Admittedly, vide a decision dated 06.02.2009, the benefit is only being granted to the companies who are not profit making by the substitution of Clause 9.3.4. It is not disputed that the said decision making has been approved by the Council of Ministers who had, firstly, by virtue of its decision dated 27.05.2004, given the option of the OTS. By a subsequent Cabinet decision dated 02.12.2008, the withdrawal was being done and therefore, the same would necessarily amount to an approval, with retrospective effect. The said substitution would necessarily have to be read from the date of the notification and could not be given retrospective effect from 26.03.2003.

41. The principle of promissory estoppel upon which the petitioner relies, is based upon the backing out by the Corporation when the petitioner has altered his position materially, especially to the promise which had been held out by the State. The facts have

already been noted regarding the petitioner having opted for the OTS and even the Corporation having floated the same agreeing to the terms of the OTS by entering into an agreement and modifying the claim under the FCA. It is the pleaded case of the petitioner that being a Collaborator, he was an independent person against whom the buy-back agreement could have been enforced and which was being done by way of arbitration proceedings. He chose to accept the offer held out by the State and pay-back at the lower terms since the money was to be paid in a shorter period of time and he had made the payments after taking the amounts from a finance company who had asked for the transfer of shares in their name and which he has, accordingly, requested the Corporation to do. It is, thus, his categorical case that he has materially altered his position to pay-back to the Corporation.

42. The Apex Court in **Union of India Vs. Indo-Afgan Agencies Ltd. (1968) 2 SCR 366**, laid down the foundation of the principle. It was held that once the person had acted upon the representations made in the Sports Promotion Scheme on the ground that the value of the goods exported would be given the benefit of import licences which had maximum value permissible. The principle of equity was, thus, read in and once the party had acted upon the policy of the Government, it was bound to carry out its promise.

43. In **Motilal Padampat Sugar Mills Co. Ltd. Vs. State**

of Uttar Pradesh 1979 (2) SCC 409, the said principle was further expounded. In the said case, the petitioner's factory had been exempted from payment of sales tax for a period of 3 years from commencement of production and accordingly, it was held that the principle of promissory estoppel would be in all the three fields, whether contractual, administrative or statutory.

44. In **State of Punjab Vs. Nestle India Ltd. & another (2004) 6 SCC 465**, the plea of the State that there was no formal notification of the exemption from tax, was rejected. It was noticed that the Chief Minister and the Council of Ministers and the Finance Minister had decided to abolish the same w.e.f. 01.12.1996 and various advertisements had also been issued. This Court had held that the State Government was bound by its promise and even in the absence of formal notification, bound down the Government. The said decision was upheld by the Apex Court by noting that the disagreement note in **Jit Ram & others Vs. State of Haryana & another 1981 (1) SCC 11**, had been disapproved by a Three Judges Bench of the Apex Court in **Union of India & others Vs. Godfrey Philips India Ltd. & others (1985) 4 SCC 369**. It was noted that the essential pre-requisites for the operation of the promissory estoppel had been established and it had, accordingly, directed the issuance of the notification. The Government, unable to show any benefit having been passed to the purchasers, it was held that it was inequitable to allow the

State Government to resile.

45. In **Godfrey Philips** (supra), the Three Judges Bench of the Apex Court was considering the issue of Excise duty leviable on cigarettes. It was held that Central Government was bound by the promissory estoppel to exclude the cost of the corrugated fibre board containers from the value of the goods for the purpose of assessment of the excise duty for the specified period as it was in their competence and the respondents had acted upon the said representation. Relevant paragraphs read as under:

“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. We must concede that the subsequent decision of this Court in Jeet Ran v. State of Haryana [1980] 3 S.C.R. 689, takes a slightly different view and holds that the doctrine of promissory estoppel is not available against the exercise of executive functions of the State and the State cannot be prevented from exercising its functions under the law. This decision also expresses its disagreement with the observation made in Motilal Sugar Mills case that the doctrine of promissory estoppel cannot be defeated by invoking the defence of executive necessity, suggesting by necessary implication that the doctrine of executive necessity is available to the Government to escape its obligation under the doctrine of promissory estoppel. We find it difficult to understand how a Bench of two Judges in Jeet Ram's

case could possibly overturn or disagree with what was said by another Bench of two Judges in Motilal Sugar Mills Case. If the Bench of two Judges in Jeet Ram's case found themselves unable to agree with the law laid down in Motilal Sugar Mills case, they could have referred Jeet Ram's case to a larger Bench, but we do not think it was right on their part to express their disagreement with the enunciation of the law by a coordinate Bench of the same Court in Motilal sugar Mills case. We have carefully considered both the decision in Motilal Sugar Mills and Jeet Ram's case and we are clearly of the view that what has been laid down in Motilal sugar Mills case represents the correct law in regard to the doctrine of promissory estoppel and we express our disagreement with the observations in Jeet Ram's case to the extent that they conflict with the statement of the law in Motilal Sugar Mills case and introduce reservations cutting down the full width and amplitude of the propositions of law laid down in that case.

Of course we must make it clear and that is also laid down in Motilal Sugar Mills case (supra), that there can be no promissory estoppel against the legislature in the exercise of its legislative functions nor can the Government or public authority be debarred by promissory estoppel from enforcing a statutory prohibition. It is equally true that promissory estoppel cannot be used to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make. We may also point out that the doctrine of promissory estoppel being an equitable doctrine it 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 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. This aspect has been dealt with fully in Motilal Sugar Mills case (supra) and we find ourselves wholly in agreement with what has been said in that decision on this point."

46. In **U.P. Power Corporation Ltd. Vs. Sant Steels & Alloys (P) Ltd. (2008) 2 SCC 777**, the issue of concession of hill development rebate granted was the subject matter of consideration. It was, accordingly, held that once a person had acted upon the representation, the State Government could not resile from the benefits and it was an act of unfairness and arbitrariness. It was further held that the benefits could only be withdrawn after the U.P. Electricity Reforms could come into force and the entrepreneurs would be adversely affected by involving the principle of promissory estoppel. Relevant paragraph reads as under:

"27. In this background, in view of various decisions noticed above, it will appear that the Court's approach

in the matter of invoking the principle of promissory estoppel depends on the facts of each case. But the general principle that emerges is that once a representation has been made by one party and the other party acts on that representation and makes investment and thereafter the other party resiles, such act cannot be stated to be fair and reasonable.

When the State Government makes a representation and invites the entrepreneurs by showing various benefits for encouraging to make investment by way of industrial development of the backward areas or the hill areas, and thereafter the entrepreneurs on the 13 representations so made bona fide make investment and thereafter if the State Government resiles from such benefits, then it certainly is an act of unfairness and arbitrariness. Consideration of public interest and the fact that there cannot be any estoppel against a statute are exceptions."

47. In similar circumstances, in **State of Bihar & others Vs. Kalyanpur Cement Ltd. (2010) 3 SCC 274**, the respondents had set up a cement plant which had gone under losses and sales tax exemption had been granted under the Industrial Policy and the claim of the petitioner had been rejected. The High Court had allowed the writ petition and directed the State Government to take a decision. The defence of the State was that Clause 22.3 barred exemptions to sick and closed industrial units which had availed such facilities in the past. Various meetings had been held and there were repeated assurances given by the State Government but the notification was not forthcoming. The Industrial Policy

provided that an apex body had to be constituted to revive the sick small scale medium industries and the company had made the application for exemption and the package was still pending consideration. Accordingly, the directions given by the High Court were upheld.

48. The Apex Court, recently, in **Devi Multiplex & another Vs. State of Gujarat & others (2015) 9 SCC 132**, allowed the appeal of the entrepreneur on the ground that the concession granted to tourism industries could be extended. It was held that though the appellants had not commenced commercial operations but the unit could approach the State Government for extension which was part of the scheme. The appellant had altered his position and the State Government would be bound by the principle of promissory estoppel and therefore, the matter was directed to be reconsidered by the State Level Committee as to whether entitlement was there to the incentives and benefits. Relevant portion of the judgment reads as under:

“21. Coming to the facts of the present case, we find that the Scheme definitely promised incentives in the form of Tax holiday of 5-10 years in respect of exemptions from Sales Tax, Turnover Tax, Electricity Duty, Luxury Tax and Entertainment Tax upto 100 per cent of capital investment if a new unit was registered after 1.8.1995 and appropriate investment in fixed capital assets was made. It also promised an initial period of two years for going operational in the first instance, extendable by further period of two years

subject to satisfactory progress to be found by the State Level Committee. Even thereafter, the Unit could still approach the State Government for further extension. This was part of the core of the Scheme, which invited investment in tourism units promising tax holiday as stated above. Based on such representation, various units including that of the appellants having come forward and altered their position, the State Government would certainly be bound by the principles of Promissory Estoppel. The State Government was thus estopped from going back on the promise so made in the Scheme and could not have curtailed the period and the opportunity specifically made available within which the project could be completed so as to avail the benefits under the Scheme.”

49. Resultantly, issue no. (iii) is answered in favour of the petitioners that the State and the Corporation were bound by the principle of Promissory Estoppel and could not go back on the terms of the OTS which had already been offered and accepted by the collaborators/petitioners. The said persons had made payments in pursuance of the OTS and entered into agreements and acted on the promise held out by the State and the Corporation and the State was, thus, bound by the OTS agreement entered into. Having acted upon the said agreement, the petitioners had paid the amounts and were thus, entitled for the benefits of the lesser interest rate as per the OTS scheme. The said petitioners might not have taken offer of making the payment

and the Corporation would have been left with litigation in hand by way of arbitration and for enforcement of the buy back agreements. However, after having given the offer and the petitioners having accepted the same and the Corporation having received the payments in satisfaction of the contract entered into, could not turn around and submit that they were not bound by the terms of the OTS. The pendency of the public interest litigation and the decision therein would not be of any assistance to the State since the writ petition was disposed of that the Corporation would take appropriate decisions in view of the modified policy. The petitioners were also left free to seek appropriate redressal in case adverse decision was taken and the petitioners were also given liberty to challenge the notification. Thus, the Division Bench has not opined on the said issue and it was a policy decision of the State as such. Consequently, issue no. (iii) is answered against the State and the Corporation.

50. Accordingly, keeping in view the cumulative discussions made above, in our opinion, the State could alter the terms and conditions of the OTS on the ground of public interest. A valid criteria has been made to restrict the OTS to the profit making companies. However, in the absence of any statutory power, the said decision making could not be done with retrospective effect and could only have been limited from the date of notification of the decision. The persons who had altered their position by making

payment in pursuance of the OTS, could not be denied the final fruits of the concluded contract of the agreement entered into after they had made payments, as per the OTS. The said decision could not have been taken with retroactive effect and the State and the Corporation are bound by the principle of promissory estoppel.

51. As a necessary corollary, the present writ petitions and LPA No.1635 of 2010, are disposed of, with a direction to the Corporation to give the necessary effect to the OTS, in the cases where the petitioner had made the payments, in pursuance of the OTS and the OTS had been duly acted upon. The amounts paid under the said OTS would, accordingly, be accepted by the Corporation, which would further be acted upon by the State Government. However, where the complete amounts have not been paid, it would be open to the Corporation to proceed as per the terms of the OTS and fall back on the FCA.

(G.S. SANDHAWALIA)
JUDGE

(AJAY KUMAR MITTAL)
JUDGE

DECEMBER 23, 2015
sailesh