

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment Reserved on : 14.08.2019

Judgment Delivered on : 04.10.2019

Writ Petition (C) No. 1782 of 2012

1. Jindal Steel & Power Limited, a Company incorporated under the Companies Act, having its Registered Office at O.P. Jindal Marg, Hissar, (Haryana) & Works at Post Box No. 16, Kharsia Road, Raigarh 496 001 (Chhattisgarh)
2. Arvind Dave, S/o Shri Jagdish Lal, aged about 44 years, Share Holder & A.G.M. (F&A) of Jindal Steel & Power Limited, Post Box No.16, Kharsia Road, Raigarh 496 001 (Chhattisgarh)

---- Petitioners

Versus

- State of Chhattisgarh, Commerce and Industry Department, Dau Kalyan Singh Bhawan, Raipur (C.G.) through its Secretary

---- Respondent

For Petitioners	:	Shri Vivek Tankha, Senior Advocate with Shri Manish Kharbanda, Shri Prashant Sivarankan and Ms. Priya Singh, Advocates
For Respondents	:	Shri S.C. Verma, Advocate General and Shri Vikram Sharma, Deputy Government Advocate

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice

Hon'ble Shri Parth Prateem Sahu, Judge

CAV JUDGMENT

Per P. R. Ramachandra Menon, Chief Justice

1. Following are the important questions to be considered and answered in these writ petitions :
 - (a) Can the State turn its back on entrepreneurs (who set up the industries based on the promise as to the concessions to be extended in terms the Industrial Policy for the year 2004-2009), withdrawing the benefits after the expiry of the policy period and after giving shape to and commencement of a new Industrial Policy for the period 2009-2014;

unilaterally re-writing the terms of the expired Policy and the relevant rules to deny/curtail the benefits under the former Policy and retract from the promise already made ?

(b) Can the exercise pursued by the State be accepted as 'rectification of mistake', as sought to be projected by them ?

(c) Can such a deviation / correction as to the change in Policy be upheld in respect of the past transactions ?

(d) Is it not hit by the principles of 'Legitimate Expectation' and 'Promissory Estoppel' ?

2. Apart from the question of law, it may be necessary to advert to the sequence of events as well, at least to a limited extent, so as to make a proper analysis and appreciation on the issues involved. This is more so, since the Petitioners have raised the plea of 'legitimate expectation' and 'promissory estoppel' in these cases; thus, necessitating scrutiny as to whether the requirements to attract the said principles stand established ?
3. The State of Chhattisgarh was formed in the year 2000, in terms of the Madhya Pradesh Re-Organization Act, 2000. Being one among the rich States in the country in terms of mineral and forest resources, with a large extent of untapped potential for industrialisation, the Government felt the immediate necessity to initiate the process of rapid economic and social growth. It was accordingly, that an Industrial Policy '2001-2006' was formulated for 'five years' period with intent :

- *To attract large investments in core sector and downstream industries;*
- *To become the power hub in India - by promoting low cost pithead thermal power plants; and*
- *To build on locational advantages to develop the State into a regional logistics and transshipment hub.*

4. Four broad strategies were identified by the State for its industrial development as :

- (i) Cluster based industrial development;
- (ii) Good governance and excellent infrastructure;
- (iii) Improving the competitiveness of small scale industries;
- (iv) Directed incentives.

Under strategy No.(i) 'Cluster based industrial development', with reference to the competitive advantages of the State, the Government identified 'five' such areas that would be focussed, welcoming investments in any other areas as well, by entrepreneurs. Though the said Industrial Policy was for a period of 'five years', the State, for some reasons, terminated it prematurely and brought out a new Industrial Policy for the period '2004-2009', to be effective from 01.11.2004.

5. The main objective of the Industrial Policy '2004-2009', as provided under the Head 'Preface', in Clause 1.3 is as follows :

"..... 1.3. The main objective of the new Industrial Policy is to add maximum value to State's abundant natural resources within the state itself, and create maximum employment opportunities by setting up industries in all its districts across the state. To attract industrial investment in the state, the Policy attempts at providing necessary infrastructure for investment, reducing the cost of production for the investor and

ensuring an investor friendly administration. Towards this end, special importance has been given to private sector participation"

6. This is further highlighted under 'Clause 2' as given below :

"2. Objectives :

2.1 To create additional employment opportunities by accelerating the process of industrialisation in the state.

2.2 To create enabling environment for ensuring maximum value addition to the abundant, locally available mineral and forest based resources.

2.3 To ensure balanced regional development by attracting industries in the economically backward areas of the state.

2.4 To ensure participation of scheduled castes, scheduled tribes and other weaker sections in the development process.

2.5 To make industrial investments in the state competitive vis-a-vis other states in the country.

2.6 To promote private sector participation for creation of industrial infrastructure in the state.

2.7 To create an enabling environment for increasing industrial production, productivity and quality upgradation to face the challenge of competition emerging from economic liberalisation."

On the basis of the extent of investment, the industries were also classified into 'four' different categories, as provided under Clause 4.4.4 in the following manner.

- (i) **Small scale industries** - As defined by the Government of India from time to time;
- (ii) **Medium-Large industries** - Industries with total capital investment up to Rs. 100 crore except the small scale industries;
- (iii) **Mega projects** - Large industries with total capital investment between Rs. 100 crore and Rs. 1000 crore; and

*(iv) **Very large industries** with total capital investment of over Rs. 1000 crores."*

7. The genesis of the litigation, as revealed from the materials on record, is that the Petitioner-Company, pursuant to the declaration of the 'Industrial Policy 2004-2009' (Annexure-P/3), followed by the Investment Subsidy Rules (Annexure-P/5) brought about with retrospective effect from 01.11.2004 with intent to attract major industrial investment and to promote the overall economic growth in the State, came to be attracted to the various incentives declared and accordingly, decided to set an Industry with a capital base of Rs.2595 crores. By virtue of the classification of industries, with reference to the size of investment, it was to be a 'Very Large Industry' (having capital investment of more than 1000 crores) and the extent of eligible concession as provided under Clause 2 of Annexure-4, was to be 45% of the total capital cost, with a maximum amount of equivalent Commercial Tax / Central Sales Tax paid in the State in 'nine years' period, in respect of such projects set up in the backward Scheduled Tribe area. There were various other benefits as well, as proclaimed and notified by the State Government in the Industrial Policy 2004-2009 and the relevant Rules. The Petitioner-Company decided to make use of the favourable conditions/situation and accordingly, entered into a Memorandum Of Understanding (Annexure-P/4) with the State Government on 07.01.2005, to set up a new Industrial Unit (Unit III) in the village Patrapali, District Raigarh, with the proposed investment amount of Rs.2595 crores.
8. The Industrial Unit as above was set up by the 1st Petitioner, pumping in

sufficient money / investment and commercial production was started on 27.01.2006. After commencement of commercial production as above, the Petitioner submitted Annexure-P/6 application for registration under the 'Investment Subsidy Rules'; simultaneously applying for issuance of 'Production Certificate' as per Annexure-P/7 in October, 2006. On completing the procedural formalities, Annexure-P/8 'Certificate of Registration' was given to the Petitioner under the Investment Subsidy Rules, on 23.04.2008, followed by Annexure-P/9 'Certificate for commencement of production' issued by the Directorate of Industries on 08.05.2008, noting the total investment from July, 2004 to 31.07.2006 as Rs.673.83 crores.

9. On 27.11.2008, the 1st Petitioner submitted Annexure-P/10 application before the competent authority for approval of the reimbursement of subsidy in terms of Rule 4 of the Investment Subsidy Rules. After carrying out a site inspection by the District Trade and Industries Centre (DTIC), Annexure-P/11 report was submitted on 30.05.2009 to the effect that the Petitioner was eligible to receive the subsidy of Rs.1207.419 crores; being 45% of the Gross Capital Investment. On submitting Annexure-P/12 request to the Directorate for issuance of adjustment certificate of 'Capital Cost Infrastructure Subsidy', the 1st Petitioner was let known, that it was under consideration. Later, some minor discrepancies were pointed out with regard to the facts and figures, which were clarified and submitted all the requisite documents in response to the communication issued in this regard. The delay in submitting the application for approval of the investment subsidy was also explained

with reference to the late issuance of the 'Production Certificate' as well as the 'Registration Certificate' by the competent authorities.

10. On 17.12.2009, Annexure-P/18 additional certificate for commencement of production was issued to the Petitioner by the Directorate of Industries, taking note of the total investment made from July, 2004 till 31.07.2008 as Rs.1694.68 crores. The 1st Petitioner also submitted Annexure-P/20 explanation before the Commissioner of Industries on 10.03.2010, pointing out that the application was submitted within five months from the date of approval and that the 'Production Certificate' was issued on 08.05.2008, whereas the 'Registration Certificate' was issued only on 30.05.2008. It was also pointed out that the 'Hindi version' of the Notification provided for 18 months' time to submit the application (in the English version, it was 5 months) and hence there was no delay. On taking further steps, the details of subsidy were collected and caused to be placed before the State Level Committee, but the matter was not finalised, despite the many a representation / reminder.
11. Now comes Annexure-P/1 Notification dated 10.08.2011 issued by the Department of Commerce and Industries, as a bolt from blue, whereby sub-clauses B and C of Clause 2 in Appendix-4 of Annexure-P/3 Policy were amended by inserting an '**additional cap / ceiling**' with regard to quantum of subsidy available under the Policy, to various categories of industries. In the case of 'Very Large Industries' (to which the Petitioner belongs), the subsidy was capped as Rs. 3.5 crores. This was objected to by the 1st Petitioner, by submitting Annexure-P/29 representation, pointing that the Petitioner's accrued right / benefit cannot be taken away.

This did not yield any positive result and the 'Investment Subsidy Rules (Annexure-P/5) were amended on 20.03.2012 (much after expiry of the tenure of the Policy 2004-2009) retrospectively, imposing the additional cap / maximum subsidy at Rs. 3.5 crores, in the pretext of 'rectification of some mistake'.

12. Incidentally, it is to be noted that the State Level Committee, consisting of 'five' members, in the meeting held on 11.06.2012 made some adverse observations with regard to the eligibility of the 1st Petitioner. The finding of the said Committee was subjected to challenge before the Appellate Authority, who observed that the relevant facts and figures were not properly appraised and realized by the State Level Committee and accordingly, the said finding was set aside and the matter was remanded. The State Level Committee reconsidered the matter and the eligibility of the Petitioner-Company was cleared; but the extent of benefit was confined to 'Rs.300 lakhs', in terms of the Annexure-P/1 amendment of the Policy dated 10.08.2011 and a Certificate was issued to the Petitioner by the DTIC on 08.03.2019 ('Annexure-B' Certificate produced along with I.A. No.1 of 2019 dated 01.04.2019).
13. This made the Petitioners to approach this Court with the following prayers :

“10.1. issue appropriate writ/writs, order or direction setting aside the Impugned Notifications being the Notification dated 10.08.2011 (Which was published in the Official Gazette on 23.09.2011)(ANNEXURE P/1) and the subsequent Notification dated 20.03.2012 (Which was published in the Official Gazette on 06.04.2012) (ANNEXURE P/2);

10.2 issue a writ of mandamus or such other appropriate writ, order or direction, directing the Respondent to refund the amount of Rs. 287.87 Crores along with interest, paid by petitioner No.1 towards the VAT/CST till 31.03.2012 and refund such other amounts paid which the petitioner is entitled to claim as per Industrial policy of 2004-09 of the State Government along with interest;

10.3. pass such further orders and/ or directions as this Hon'ble Court may deem fit, appropriate and proper in the facts and circumstances of the present case.”

The relief sought for is opposed from the part of the State, who has filed return, seeking to sustain the amendment to the Policy, brought about as per Annexure-P/1 Notification of 2011, stating that non-inclusion of the maximum benefit in Annexure-P/3 Policy and Annexure-P/5 Rules notified earlier was only an inadvertent omission / mistake. It is stated that the State had never intended to offer the Investment Subsidy to the extent as notified earlier, without capping the maximum limit, adding that the impugned Administrative Notifications are well within the power and competence of the State and that they do not run against the Policy 2004-2009.

14. The version of the Respondents is sought to be rebutted in the rejoinder filed by the Petitioners, highlighting that the course of action pursued by the Respondents is nothing short of arbitrary and illegal. The State has filed I.A. No.03 of 2019 dated 13.08.2019 to accept some additional documents produced as Annexures-R/3 to R/7, which is vehemently opposed from the part of the Petitioners pointing out that the matter was heard elaborately on 30.07.2019 and on 08.08.2019 and it was adjourned to 14.08.2019 only for 'reply'; by virtue of which, no additional materials

could have been brought in or can be relied on. It is also pointed out that the Respondents-State is not justified in contending that the decision of the State Level Committee [after the remand] in its 47th meeting held on 02.02.2019, certifying the eligibility of the Petitioner-Company is not correct or proper; contending that the said order was not a 'reasoned order' and it came to be passed merely by virtue of the remand ordered by the Appellate Authority. It is further pointed out that, based on the decision of State Level Committee, 'Eligibility Certificate', was issued to the 1st Petitioner on 04.06.2019, fixing the extent of benefit as Rs.3 crores.

15. The learned Advocate General submits that the extent of benefit payable as per the 'Eligibility Certificate' of 04.06.2019, fixing the same at 'Rs.3 cores', is not subjected to challenge by amending the writ petition. In response to this, the learned Senior Counsel for the Petitioners submits that there is no necessity to have it challenged, as the Petitioners have challenged the very 'root cause' i.e. Annexure-P/1 Notification dated 10.08.2011, which tilted the balance. The learned Advocate General submits that, as per the observations made by the State Level Committee in its earlier meeting held on 11.06.2012, the Petitioners had played some 'fraud' insofar as it was not a new unit but was only an instance of expansion of the existing Unit and that the said Committee had discussed on the various aspects as per the Rules of Capital Investment Subsidy Rules; for example (a) Separate Factory Premises; (b) Land; (c) Water Tax; (d) Electricity Duty; (e) No Dues Certificate; (f) Application for registration under Capital Investment Scheme and (g) Delay in filing the

application etc.; which are not discussed by the Committee in the subsequent meeting, after remand.

16. The learned Senior Counsel for the Petitioners submits that there is absolutely no basis for the submission made by the learned Advocate General, insofar as the very same authority of the State Government (State Level Committee) in its meeting held on 02.02.2019 has discussed all the relevant aspects relating to the eligibility criteria and certified the eligibility in favour of the 1st Petitioner. The State Level Committee having found the Petitioner-Company eligible, based on the actual facts and figures (after remand), the submission made by the learned Advocate General against its own authority / machinery (State Level Committee) constituted by the State, is a matter of paradox. The learned Senior Counsel submits that the eligibility of the Petitioner-Company having been admitted and certified as per Annexures – 'A' and 'B' dated 05.03.2019 and 08.03.2019 respectively (produced along with I.A. No.1 of 2019), it is no more open for the Respondents to contend anything to the contrary and that the remaining question is only with regard to the quantum i.e. actual extent of benefit payable. The learned Senior Counsel also points out that absolutely no pleading has been raised with regard to the any instance of fraud in the 'return' filed by the State and hence no argument can be advanced without any pleading in this regard. The burden of proof is very heavy upon the party who alleges fraud, to plead and substantiate the same. This is more so, on the part of the Government, when the benefit conferred already by fixing a cap as to Investment Subsidy, as per Annexure-P/3 Policy and Annexure-P/5

Rules, is sought to be curtailed and taken away by fixing an 'additional cap', years after expiry of the tenure of 'Policy 2004-2009' by simply issuing a Notification in this regard.

17. In support of the submission made by the learned Advocate General, that the principles of 'Legitimate Expectation' or 'Promissory Estoppel' are not attracted to the case in hand and that the Government is at liberty to change the Policy in 'public interest', specific reference is made to the following judgments :

Indian Oil Corporation Limited and Another vs. Kerala State Road Trading Corporation and Others, (2018) 12 SCC 518 (name of the Respondents have been wrongly shown in the heading / cause title as “Kerala State Road Trading Corporation” in place of “Kerala State Road Transport Corporation” - 'KSRTC' in short) was a case involving withdrawal of subsidy to 'bulk consumers' on purchase of diesel, taken as a 'policy decision' by the Government of India, Ministry of Petroleum. This forced the 'KSRTC' to pay a higher rate for diesel, being a 'bulk consumer' in respect of the direct supply, to the Oil Company than the rate payable by any customer on purchase from the retail petroleum outlets. This was challenged as arbitrary and unconstitutional before the High Court of Kerala; seeking for a direction to cause to withdraw the 'dual policy' on diesel. An interim order was passed by the High Court of Kerala, based on the undertaking given by the State of Kerala to reimburse the deficit amount to the Oil Companies, in the event of the writ petition being dismissed ultimately. Several writ petitions came to be filed in different States, under similar circumstances and the Apex Court

transferred all the writ petitions after granting 'leave to appeal' filed by the Indian Oil Corporation against the order passed by the High Court of Kerala, in turn, leading to the judgment as aforesaid. It was with reference to the said factual context, that the Apex Court made an observation in 'paragraph 15' of the judgment, that the Policy framed by the Government of India in granting subsidy was a matter of privilege to be extended by the Government and hence cannot be claimed as a matter of right. It was held that, such policy decisions are not amenable to judicial review and accordingly, the writ petitions were dismissed and the appeals were disposed of, making it clear that it will be upon for the parties / State to work out 'equities' as may be considered appropriate by them. (It will not be out of context to mention here that, as we are given to understand, the KSRTC later took a 'policy decision' to purchase diesel from retail petroleum outlets in the State, identifying retail dealers in this regard, at the rate it was being sold to the general public, instead of going for bulk purchase directly from the Oil Marketing Companies suffering a higher rate and incurring huge loss. Met with the situation, there was some re-thinking for the Oil Marketing Companies and the Government and we have been told that the position has been restored as it existed earlier). The above decision is not attracted to the case in hand, as the subsidy extended in the instant case was the 'consideration' for accepting the offer and to set up the industry within the State, targeting economic growth of the State, which was acted upon, leading to a concluded contract / Memorandum of Understanding.

18. The decision rendered by the Apex Court in ***Col. A.S. Sangwan vs. Union of India and Others, 1980 (Supp) SCC 559*** was a 'service matter' involving seniority among the officers concerned, in connection with promotion as Brigadiers in the Directorate of Military Farms. Referring to the factual aspects discussed therein, the Apex Court held that in the absence of any statutory rules, 'Policy decisions' can be changed by the Government at any time and a new 'Policy' can be laid, provided it is not arbitrary or capricious. Though the above decision is not applicable to the case in hand, it is adequate enough to hold that interference is possible even in policy matters, if it is arbitrary or capricious.

19. With regard to judgment of the Apex Court cited from the part of the State in ***P.T.R. Exports (Madras) Pvt. Ltd. and Others vs. Union of India and Others (1996) 5 SCC 268***, the dispute was with regard to the change in the 'Export Policy' brought about by the Government, which was questioned by the Ready-made Garment Exporters, who sought for the benefit as per the previous policy; raising the plea of 'Legitimate Expectation'. The Apex Court held that the Court cannot bind the Government to stick to the previous Policy by invoking the doctrine of 'Legitimate Expectation', unless the change in Policy is vitiated by *mala fides* or abuse of power, which was to be specifically pleaded and proved to the satisfaction of the Court. It was also held that the doctrine of 'Promissory Estoppel' would not apply in the given set of facts and circumstances. The said decision also stands on a different footing and is not applicable to the case in hand.

20. The doctrine of 'Promissory Estoppel' was formulated and explained by the Apex Court in ***Union of India vs. M/s. Indo-Afghan Agencies Ltd., AIR 1968 SC 718***. Applicability of the above doctrine was considered by the Supreme Court in ***P.T.R. Exports (Madras) Pvt. Ltd.*** (supra) and it was held in 'paragraph 3' of the judgment that the point to be considered with reference to the subsequent change would be, whether the earlier Policy was revised by the Policy in 'public interest' or if the decision is based on any abuse of power. In this context, the Apex Court held that the power to lay, by executive decision or legislation, included the power to withdraw the same; unless in the given case, it was by *mala fide* exercise of power or the decision action taken was in abuse of the power.

21. The doctrine of promissory estoppel was explained further by the Apex Court in ***Kasinka Trading and Another vs. Union of India and Another, (1995) 1 SCC 274***. It was a case where the Appellants, who were manufacturers of certain products (requiring 'PVC resin' as one of the raw materials) were importing PVC resin from abroad, enjoying the benefit of exemption from import duty under a Notification issued by the Government on 15.03.1979, which was to be in force till 31.03.1981. But before expiry of the said period, the Government issued another Notification on 16.10.1980 under the same provision i.e. under Section 25 of the Customs Act, withdrawing the exemption in 'public interest', which was under challenge referring to the doctrine of 'Promissory Estoppel'. It was explained from the part of the Government that the exemption notification was issued with a view to equalise the sale prices of the indigenous and the imported materials and to make the commodity

available to the consumer at a uniform price, keeping in view the trends in supply of the material. Later, when it was found that the international price of the product had fallen down, resulting in the import prices to be lower than the ex-factory prices of the indigenous material, the matter was re-examined by the Government and it was decided to withdraw the Exemption Notification in 'public interest'. It was in the said context, that the element of public interest was held as weighed more, in turn, upholding the action of the Government by the Apex Court. No such situation is brought to our notice in the instant case, in respect of the Notification under challenge, issued (in the year 2011) after expiry of the 'Policy 2004-2009'; virtually re-writing the terms of benefits offered under the earlier Policy, which had served its purpose and come to an end.

22. In ***D.C.M. Ltd. And Another vs. Union of India and Another, (1996) 5 SCC 468***, the appellants were owners of Sugar Factories. The Central Government had promulgated the Sugar (Control) Order on 10.06.1966, by which the sale of sugar by producers was controlled. In order to mitigate the hardship caused to the sugar industry in establishing new sugar factories and for effecting substantial expansions of the existing units, certain incentives were declared by the Government. But later, there was a major change in the Sugar Policy, by virtue of which the Control was lifted w.e.f. 16.08.1978. However, a modified Sugar Policy was brought about w.e.f. 17.12.1979, providing for partial Control, by virtue of which, the extent / quota of 'levy-free sugar' allocable as part of the concession under the 'modified Policy' happened to be lesser than the earlier Policy. Hence the revised Policy was challenged placing

reliance on the principles of 'Promissory Estoppel' and sought to continue to grant the concession as it was being granted earlier. The discussion made by the Apex Court in paragraph '6' of the above verdict is relevant and hence it is reproduced below :

“6. We have considered the rival submissions. 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 rigour 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 found 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 require. If it can be shown by the Government or public authority that having regard to the facts as they have transpired, it would be unequitable 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 (vide *Union of India v. Godfrey Philips India Ltd.*, 1985 4 SCC 369).

By virtue of the distinct difference in the factual scenario, the above decision does not support the case of the Respondents-State in any manner.

23. Coming to the judicial precedents sought to be relied by the Petitioner as to the principles of 'Promissory Estoppel' and 'Legitimate Expectation', they are as given below :

(a) ***Motilal Padampat Sugar Mills Co. Ltd. Vs. State of U.P., (1979)***

2 SCC 490 [paragraph 24]

"24.

The doctrine of promissory estoppel is a significant judicial contribution in that direction. But it is necessary to point out that since the doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires. If it can be shown by the Government that having regard to the facts as they have transpired, it would be inequitable to hold the Government to the promise made by it, the Court would not raise any equity in favour of the promisee and enforce the promise against the Government. The doctrine of promissory estoppel would be displaced in such a case because, on the facts, equity would not require that the Government should be held bound by the promise made by it. When the Government is able to show that in view of the facts as have transpired since the making of the promise, public interest would be prejudiced if the Government were required to carry out the promise, the Court would have to balance the public interest in the Government carrying out a promise made to a citizen which has induced the citizen to act upon it and after his position and the public interest likely to suffer if the promise were required to be carried out by the Government and determine which way the equity lies. It would not be enough for the Government just to say that public interest requires that the Government should not be compelled to carry out the promise or that the public interest would suffer if the Government were required to honour it. The Government cannot, as Shah, J., pointed out in the Indo-Afghan Agencies case, claim to be exempt from the liability to carry out the promise "on some indefinite and undisclosed ground of necessity or expediency", nor can the Government claim to be the sole Judge of its liability and repudiate it "on an ex parte appraisalment of the circumstances". If the Government wants to resist

the liability, it will have to disclose to the Court what are the facts and circumstances on account of which the Government claims to be exempt from the liability and it would be for the Court to decide whether those facts and circumstances are such as to render it inequitable to enforce the liability against the Government. Mere claim of change of policy would not be sufficient to exonerate the Government from the liability : the Government would have to show that precisely is the changed policy and also its reason and justification so that the Court can judge itself which way the public interest lies and what the equity of the case demands. It is only if the Court is satisfied, on proper and adequate material placed by the Government, that overriding public interest requires that the Government should not be held bound by the promise but should be free to act unfettered by it, that the Court would refuse to enforce the promise against the Government. The Court would not act on the mere ipse dixit of the Government, for it is the Court which has to decide and not the Government whether the Government should be held exempt from liability. This is the essence of the rule of law. The burden would be upon the Government to show that the public interest in the Government acting otherwise than in accordance with the promise is so overwhelming that it would be inequitable to hold the Government bound by the promise and the Court would insist on a highly rigorous standard of proof in the discharge of this burden. But even where there is no such overriding public interest, it may still be competent to the Government to resile from the promise "on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position" provided of course it is possible for the promisee to restore status quo ante. If, however, the promisee cannot resume his position, the promise would become final and irrevocable. Vide Emmanuel Avodeji Ajaye v. Briscoe [(1964) 3 All ER 556 : (1964) 1 WLR 1326]."

- (b) ***Gujarat State Financial Corporation vs. M/s. Lotus Hotels Pvt. Ltd., (1983) 3 SCC 379*** [paragraph 13]

"13. Now if appellant entered into a solemn contract in discharge and performance of its statutory duty and the respondent acted upon it, the statutory corporation can not be allowed to act

arbitrarily so as to cause harm and injury, flowing from its un-reasonable conduct, to the respondent. In such a situation, the Court is not powerless from holding the appellant to its promise and it can be enforced by a writ of mandamus directing it to perform its statutory duty. A petition under Article 226 of the Constitution would certainly lie to direct performance of statutory duty by 'other authority' as envisaged by Article 12."

(c) ***Pawan Alloys & Casting Pvt. Ltd. vs. U.P.S.Ee.B. (1997) 7 SCC***

251 [paragraphs 34 to 36]

"34. Consequently it must be held that relying upon the representations held out by the Board in these earlier notifications assuring grant of incentive rebate of 10% on the total bill of electricity consumption charges these new industries being assured that for three years this concession will be available had burnt their boats and spent large amounts and had established their industries in the area falling in the operative jurisdiction of the Board in State of U.P.

35. Under these circumstances when no public interest was sought to be pressed in service by the Board for withdrawal of this incentive rebate, as seen earlier, the equity which had arisen in favour of the appellants remained untouched and undisturbed by any overwhelming and superior equity in favour of the Board entitling it to withdraw this development rebate in a premature manner leaving these promisees high and dry before the requisite period of three years earlier guaranteed to them by way of development rebate had got exhausted. This takes us to the consideration of the second aspect of the matter.

36. As observed by this Court in *Shrije Sales Corporation vs. Union of India*, (1997) 3 SCC 398 even where there is no such overriding public interest it might still be open to the promisor-State or its delegate to resile from the promise on giving reasonable notice which need not be a formal notice giving the promisee a reasonable opportunity of resuming his position, provided it is possible for the promisee to restore the status quo ante. Even on this aspect the respondent-Board has no case. It has not given any reasonable opportunity to the appellants to resume their earlier position. Nor is it

shown by the Board that it is possible for the appellant-promisees to restore the status quo ante. The reason is obvious. Once the new industries were lured into establishing their factories in the region catered to by the Board on being assured three years guaranteed incentive of development rebate of 10% on their total bills of electricity charges and acting on the same once they had established their industries and spent large amounts for constructing the infrastructure and for employing necessary labour and for purchasing raw materials etc., it would be almost impossible for them to restore the status quo ante and to walk out midstream if the development rebate incentive was withdrawn for the unexpired period out of the three years' guaranteed period of currency of development rebate incentive. In fairness even it was not suggested by learned senior counsel for the respondents that on such withdrawal of development rebate the appellants would be able to restore the status quo ante and walk out. He simply relied upon the ratio of the decision of this Court in the case of *Shrijee Sales Corporation* (supra) for contending that it is the power of the Board to grant the rebate and it is equally the power of the Board to withdraw the same in its own discretion."

(d) ***State of Punjab vs. Nestle India Ltd. & Ors. (2004) 6 SCC 465***

[paragraph 47]

"47. The appellant has been unable to establish any overriding public interest which would make it inequitable to enforce the estoppel against the State Government. The representation was made by the highest authorities including the Finance Minister in his Budget Speech after considering the financial implications of the grant of the exemption to milk. It was found that the overall benefit to the state's economy and the public would be greater if the exemption were allowed. The respondents have passed on the benefit of that exemption by providing various facilities and concessions for the upliftment of the milk producers. This has not been denied. It would, in the circumstances, be inequitable to allow the State Government now to resile from its decision to exempt milk and demand the purchase tax with retrospective effect from 1-4-1996 so that the respondents cannot in any event re-adjust the expenditure already made. The High Court was also

right when it held that the operation of the estoppel would come to an end with the 1997 decision of the Cabinet.”

24. In response to the submission made by the learned Advocate General that the benefit of the Investment Subsidy was sought for, pursued and Eligibility Certificate was obtained by 'fraud' played by the Petitioner, serious objection is raised by the learned Senior Counsel for the Petitioner as mentioned already, pointing out that there is absolutely no pith of substance in the said submission and that it is not based on any pleading in the return filed by the State. The learned Senior Counsel submits that, it was very much obligatory for the Respondent-State to have specifically pleaded the particulars of fraud alleged and it should have proved by cogent evidence. The burden is more on the part of the Government specially when the benefit already accrued based on Annexure-P/3 Policy and Annexure-P/5 Rules is sought to be taken away, after expiry of tenure of the said Policy 2004-2009, simply by issuing a Notification in the year 2011. Reliance is sought to be placed on the verdict passed by the Apex Court in ***Lynette Fernandes vs. Gertie Mathias, (2018) 1 SCC 271***, paragraph 13 of which is reproduced below :

“13. Coming to the second ground for just cause, re-allegation that the grant of probate was obtained by the appellant in fraudulent manner, as mentioned supra, the appellant has not come forward to adduce any evidence to prove the so-called allegation of fraud. The signature of Mr. Richard P. Mathias on the will has not been challenged. The trial court as well as the High Court have recorded the finding that the genuineness of the will was not challenged by the appellant. Moreover, the particulars of fraud are neither pleaded nor proved by the party alleging fraud before the District Court. The party alleging fraud must set forth full particulars of fraud

and the case can be decided only on the particulars laid out. There can be no departure from them. General allegations are insufficient. Merely because the appellant has made bald allegations in the revocation application that the will executed by the deceased is void because the same has been brought out by Mrs Mathias and the same is constituted by fraud and undue influence, it will not absolve her from providing specifically the particulars of fraud and undue influence. Mere bald pleading will not help her in the absence of proof."

25. The casual way in which the accrued benefit has been sought to be taken away by issuing Annexure-P/1 Notification in the year 2011, so as to have governed the field in respect of the Annexure-P/3 Investment Policy issued for the year 2004-2009, giving retrospective effect is sought to be deprecated, placing reliance on the verdict passed by the Apex Court in ***Director General of Foreign Trade and Another vs. Kanak Exports and Another***, (2016) 2 SCC 226. Paragraph 135 of the said judgment is reproduced below :

"135. We have already discussed these aspects in detail. To recapitulate, it is held by us that Section 5 of the Act does not empower the Government to make amendments with retrospective effect, thereby taking away the rights which have already accrued in favour of the exporters under the Scheme. No doubt, the Government has, otherwise, power to amend, modify or withdraw a particular scheme which gives benefits to a particular category of persons under the said scheme. At the same time, if some vested right has accrued in favour of the beneficiaries who achieved the target stipulated in the scheme and thereby became eligible for grant of duty credit entitlement, that cannot be snatched from such persons/exporters by making the amendment retrospectively. In the present case, we find that Section 5 of the Act does not give any specific power to the Central Government to make the rules with retrospective effect. The Central Government is authorised to make rules/schemes under the said provision as a delegatee, which means that the EXIM Policy/Scheme framed under the said provision is by way of delegated legislation. There has to be specific power to make the

amendments with retrospective effect, which are lacking in the instant case. Moreover, even if there is such a power, it cannot take away vested rights which have accrued in favour of particular persons/exporters. We have already enlisted number of judgments of this Court taking such a view. A few such cases laying down the aforesaid principle are :

(i) *Regl. Transport Officer v. Associated Transport Madras (P) Ltd.*, (1980) 4 SCC 597;

(ii) *Accountant General v. S. Doraiswamy*, (1981) 4 SCC 93;

(iii) *A.A. Calton v. Director of Education*, (1983) 3 SCC 33;

(iv) *Railway Board v. C.R. Rangadhamaiah*, (197) 6 SCC 623."

26. Gist of the legal position emerging from the precedents as referred to above is that, though the Government is at liberty to retract from its earlier promises owing to utmost public interest, it would not be enough for the Government just to say that the 'public interest' requires to change the course, but has to specifically plead and establish the same and Court would insist on a 'highly rigorous standard of proof' in the discharge of this burden as made clear by the Apex Court in ***M.P. Sugar Mills vs. State of Uttar Pradesh*, (1979) 4 SCC 409**. No such effort has been made by the Government in the instant case; but for simply stating that it was an 'inadvertent omission' to have the 'additional cap' inserted in Annexure-P/3 Policy and Annexure-P/5 Rules (for the Policy period 2004-2009) necessitating correction in public interest. It is also relevant to note that nothing is mentioned by the State with regard to the first Industrial Policy brought into force from 2001-2006 i.e. immediately after formation of the State. The said Policy, however, was prematurely terminated and a fresh Policy was introduced for the period 2004-2009

(Annexure-P/3) and thereafter, a further fresh Policy was introduced for the year 2009-2014. It was after expiry of two years of the 2004-2009 Policy and commencement of the subsequent Policy of 2009-2014, that wisdom came to the Government to re-write the terms of the expired Policy 2004-2009 and to fix an 'additional cap' as now sought to be incorporated by Annexure-P/1 Notification. No such stipulation was in existence in the prior / first Policy of 2001-2006 and as such, there is no basis for the contention that, there was an 'inadvertent omission' in this regard. The 'Policy' was discussed in the Cabinet and it was after approval, that Annexure-P/3 Policy was notified for 2004-2009; which was acted upon by the Petitioner, fulfilling the requirements and had accrued a vested right to have the benefit flowing from the said Policy, as incorporated in Annexure-P/5 Rules. As it stands so, this Court cannot but hold that the course pursued by the Respondent-State restricting the Investment Subsidy to the Petitioner-Company as contained in Annexure-P/1 Notification dated 10.08.2011, followed by Annexures- 'A' and 'B' proceedings dated 05.03.2019 and 08.03.2019 respectively (produced along with I.A. No.1 of 2019) is not correct or sustainable. We hold that the Petitioner-Company is entitled to have the benefit flowing from Annexure-P/3 Policy and Annexure-P/5 Rules and further that the 1st Petitioner is not governed by Annexure-P/1 amendment brought about to deny such benefits.

27. Yet another important aspect to be noted is that the extent of benefit available to the Petitioners were clearly laid down and it was with reference to the said extent of benefit in mind, that the investment was

made by the Petitioners. By virtue of the said investment, the benefit obtainable to them (in terms of money /subsidy) was quite certain and this would have naturally weighed much with the Petitioners in having fixed the 'market price' of their products. In other words, the cost of raw materials, cost of labour, quantum of statutory payments, cost of transportation, cost of electricity and such other heads etc. matter much in the fixation of 'sale price', also providing a reasonable extent of profit. The commodity thus manufactured fixing the 'sale price' (based on the above factors, also reckoning the element of 'investment subsidy' surely to get as offered / assured as per the notified Industrial Policy / Rules) has already been marketed and as such, if the amount payable towards the Investment Subsidy as per the original terms of the Policy / Rules is sought to be denied after expiry of the Policy period, it will simply result in rupturing the financial base of the Petitioners, as the unconscionable financial burden cannot be recovered by them 'by resetting the sale price' of the commodity which they had already sold out. To put it more clear, the clock cannot be reset to have a level playing field. The belated wisdom or the eagerness to have more profit for the State by fixing an "additional cap" in respect of the quantum of Investment Subsidy is not liable to be considered as 'mistake' to be rectified in public interest, but for re-writing the terms of contract. The State, in its attempt to generate revenue, can tap any source, but care has to be taken, to see that the source itself is not let to be dried up.

28. We are of the view that the Petitioners have made out a case that they were having 'Legitimate Expectation' to have had the benefits flowing

from the Industrial Policy for year 2004-2009 and incorporated as part of the Rules notified and existed throughout the Policy period. This is more so since, similar terms of benefit were offered in the Industrial Policy originally notified for the period 2001-2006, in respect of which, no plea is raised from the part of the State as to any mistake having occurred therein. Admittedly, the said Policy was prematurely terminated and a new Policy was introduced for the period 2004-2009; when also the need to fix any "additional capping of benefit" was never felt by the Government. As such, the explanation now offered from the part of the Government, that it was only a 'mistake', which required to be rectified in 'public interest' does not hold any water at all.

29. In the above circumstances, the Respondents, having accepted the eligibility and issued the 'Eligibility Certificate', are directed to re-work the extent of benefits payable to the Petitioner-Company in terms of Annexure-P/3 Policy and Annexure-P/5 Rules as expeditiously as possible; at any rate within 'two months' from today. Considering the particular facts and circumstances, we permit the Respondents-State to set off / adjust the Investment Subsidy worked out as above in respect of the arrears, if any, as well as the tax liability to be cleared by the Petitioners for the subsequent / current / future assessment years.

30. The writ petition is allowed. No cost.

Sd/-
(P.R. Ramachandra Menon)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge