2019 INSC 1268

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.1579 OF 2019

State of Uttar Pradesh & Anr. … Appellant(s)

Versus

M/s. Birla Corporation Limited … Respondent(s)

WITH

CIVIL APPEAL NO.1580 OF 2019

J U D G M E N T

A.M. Khanwilkar, J.

1. The seminal question involved in both these appeals is about the power of the State to rescind the notification providing for rebate in respect of tax payable under the Uttar Pradesh Trade Tax Act, 1948 (for short, "the 1948 Act") and thus withdrawing the facility even in respect of industrial units, which had commenced production and had complied with the conditions for grant of such rebate in terms of Notification dated 27th February, 1998.

2. Briefly stated, the appropriate authority, in exercise of power under Section 5 of the 1948 Act issued notification dated 18th June, 1997, to declare the goods having fly ash contents of 10% or more by weight to be notified goods for the purpose of Section 5, and to grant a rebate of 25% in respect of the goods having fly ash contents between 10 to 30% by weight and a rebate of 50% in respect of the goods having fly ash contents exceeding 30% by weight on the tax levied under the Act in the districts notified thereunder. In due course, the feedback received by the Government was that neither any new industrial unit was established within the State nor the consumption of the fly ash had increased by the existing units. Resultantly, there was no extra disposal/consumption of fly ash which was being produced by the thermal power stations situated within the State of Uttar Pradesh. In other words, the avowed objective for issuing the notification to extend rebate did not fructify. In light of such feedback, the appropriate authority issued fresh notification dated 27th February, 1998 bearing No.T.I.F-2-592/XI-9(226)94-U.P.Act-15-48-Order-98 to rescind the earlier notification and instead to grant a rebate of

25% in respect of the goods having fly ash contents between 10% to 30% by weight and a rebate of 50% in respect of the goods having fly ash contents exceeding 30% by weight on the tax levied under the Act in the districts mentioned thereunder, subject to certain conditions. The said notification reads thus:

"[S. No. 1289]

Notification No.T.I.F – 2-592/XI-9(226)94-U.P. Act-15-48-Order-98, dated 27.02.1998

Whereas, the State Government is satisfied that it is expedient in the public interest so to do:

Now, therefore, in exercise of the powers under Section 5 of the Uttar Pradesh Trade Tax Act, 1948 (U.P. Act No. XV of 1948), read with section 21 of the Uttar Pradesh General Clauses Act, 1904 (U.P. Act No.1 of 1904), the Governor, with effect from March 1, 1998 is pleased:

(a) to rescind the Notification No.TT-2-1885/XI-9(226)/94-UP-Act-15-48 Order-97, dated June 18, 1997;

(b) to grant a rebate of twenty five percent on goods having fly-ash contents between ten to thirty percent by weight and a rebate of fifty percent on the goods having fly-ash contents exceeding thirty percent by weight on the tax levied under the Act in the district mentioned in column-2 Annexure given below for the period mentioned in column-3 of the said Annexure subject to the following condition:-

CONDITIONS

(i) such goods shall be manufactured in a unit established in the area mentioned in coloumn-2 of the Annexure;

(ii) such goods shall be manufactured by using fly-ash purchased or received from the thermal power stations situated on Uttar Pradesh;
(iii) the dealer claiming rebate under this notification shall keep records in which following informations will be shown:

(a) date;
(b) name of thermal power stations from which fly-ash is purchased or received;
(c) weight of fly-ash;
(d) name of manufactured goods;
(e) weight of manufactured goods;
(f) weight of fly-ash used in manufacturing of such goods;
(g) weight of other goods used in manufacture of such goods;

(iv) the total weight of manufactured goods and percentage of fly-ash used, should be mentioned on goods of packing of such goods as far as possible.

ANNEXURE

Serial Number	Name of District	Period for which the rebate will be allowed
1	2	3
1	Banda, Hamirpur, Jalaun, Mahoba, Jhansi, Lalitpur and Shahuji Nagar.	Twelve Years
2	Almora, Chamoli, Bageshwar, Dehradun, Fatehpur, Jaunpur, Kanpur (Dehat), Nainital, Pauri Garhwal, Pithoragarh, Sultanpur, Champawat, Tehri Garhwal, Udham Singh Nagar, Uttar Kashi and Growth Centre.	Twelve years
3.	(i) The District of Azamgarh, Ambedkar-Nagar, Behraich, Ballia,	Ten Years

	Barabanki, Basti, Badaun, Bulandshahr, Deoria, Etah, Etawah, Faizabad, Farrukhabad, Ghazipur, Gonda, Hardoi, Mainpuri, Mathura, Mau, Moradabad, Padrauna, Pillibhit, Pratapgarh, Raibareilli, Rampur, Shahjahanpur, Sidharath Nagar, Sitapur, Unnao, Kaushambhi, Jyotiba-Phule Nagar, Mahamaya Nagar and Shravasti.	
	(ii) The area of Allahabad District in South of the river Jamuna and confluent Ganga (Excluding the area included under Municipal Corporation, Allahabad).	Ten Years
	(iii) The Taj Trapezium Area	Ten Years
	(iv) Greater Noida Industrial Development Area	Ten Years
	The Districts of Agra (excluding Taj Trapezium area), Aligarh (excluding Taj Trapezium area), Allahabad (excluding the area in south of rivers Jamuna and confluent Ganga but including the area included under Municipal Corporation Allahabad), Bareilly, Bhadohi, Bijnor, Firozabad (excluding Taj Trapezium area), Ghaziabad (excluding Greater Noida Industrial Development Area), Gorakhpur, Haridwar, Kanpur (Nagar), Lakhimpur Kheri, Lucknow, Maharajganj, Meerut, Muzaffarnagar, Saharanpur, Varanasi, Gautam Budh Nagar, Chandauli, Mirzapur and Sonbhadra	

Explanation:- The verification of percentage of fly-ash used by fly-ash based industries shall be made of the basis of Government orders issued in this behalf from time to time."

3. This notification came to be issued with intent to promote and encourage the industrial activities in the identified backward and underdeveloped areas. This notification, however, was assailed in two writ petitions filed before the High Court of Judicature at Allahabad (for short, 'the High Court'). The challenge was essentially on the ground that the conditions specified in the notification resulted in causing discriminatory treatment to the producers and suppliers of the sale product imported from neighbouring States as opposed to the goods manufactured and produced in the State of Uttar Pradesh. Such dispensation contravened the constitutional provisions of Articles 301 and 304(a) of the Constitution of India. The High Court vide order dated 29th January, 2004 upheld the said challenge. The State of Uttar Pradesh carried the matter in appeal against the said decision of the High Court, which eventually culminated with the judgment of this Court, affirming the challenge, in ***State of Uttar Pradesh & Ors.*** vs. ***Jaiprakash Associates Limited***[1]**.** This Court held that rebate of tax granted by the State Government only to the cement

1 (2014) 4 SCC 720

manufacturing units using fly ash as raw material in the units established in the districts of the State of Uttar Pradesh, is violative of the provisions contained in Articles 301 and 304(a) of the Constitution of India. The Court further declared that notification, therefore, would also apply to the cement manufacturing units of the neighbouring States who were using fly ash as raw material.

4. After the decision of the High Court dated 29th January, 2004, the appropriate authority was advised to rescind the Notification dated 27th February, 1998. The Principal Secretary of the Tax and Registration Department processed the proposal for rescinding the said notification and submitted for comments of Council of Ministers which read thus:

"CONFIDENTIAL

COMMENTS FOR THE HONORABLE COUNCIL OF MINISTERS.

SUB: Repealing the exemption (rebate) available to units based on fly ash

Industries established in certain districts have been granted exemption on tax levied under the Act for eight, ten, twelve years vide Govt. Notification No.vya.ka./592/gyarah-9(226)/94, dated 27 February 1997, under Section 5 of the Trade Tax Act on the following grounds:-

(a) Where the content of fly ash is 10% to 30% of the total weight of goods – 25% rebate on tax.

(b) Where the content of fly ash is more than 30% of the total weight of goods -50% rebate on the tax.

2. Accordingly under Section 8 (5) of the Central Sales Tax Act, by the Govt. Notification No.vya.ka/-2-593/gyaraha-9 (226)94, dated 27th February 1998, similar rebate has been allowed. A condition was prescribed in the above notifications that such goods shall be manufactured within the units established in the area mentioned in column No.2 of the annexure and such goods shall be manufactured from Fly Ash purchased from or received from the thermal power stations situated in Uttar Pradesh. Above notifications were challenged before the Hon'ble High Court by the writ petition.

3. Commissioner, Trade Tax has informed that in the writ petitions No.957/99M/sBela Cement Ltd. Vs. State and writ petition No.958/99 M/s Jai Prakash Industries Vs State, Bench of the Hon'ble High Court has by the order dated 29.1.2004 declared the above conditions mentioned in the notification as unconstitutional. It has also been mentioned that effect of the above judgment shall be that henceforth facility of rebate will not only be available to the above types of industrial units situated in Uttar Pradesh only, but above rebate shall also be available to the unit situated outside the Uttar Pradesh. **It is also apprised that in regard to above, Addl. Advocate General has given the legal opinion that considering the revenue loss being caused in future above notifications can be repealed. In case above notifications have to be repealed from retrospective effect then the same can be done by way of an ordinance. In accordance with the legal opinion tendered by the Hon'ble Add. Advocate General, a recommendation has made to proceed further expeditiously**.

> 4. It appears that the main objective of providing the rebate vide the above notifications was that the Industrial units of the Uttar Pradesh should utilize more and more fly ash available for disposal in the state, in view of the above rebates. In the light of above judgment of the Hon'ble High Court, now above rebate shall also be available to the unit situated outside the state. **Therefore it deems to be fit that above notifications should be repealed. In this regard the proposal of Commissioner Trade Tax seems to be proper.**
>
> 5. **Therefore it is proposed that notifications issued under section 5 of the Trade Tax Act and Section 8 (5) of Central Sales Tax Act, related to rebate applicable to industries based on the fly ash should be repealed.**
>
> 6. **Finance department has expressed the consent to the above proposal.**
>
> 7. **Law department has expressed the view that it had been advised by the Add. Advocate General that to prevent the revenue loss notification dated 22.7.1998 can be repealed. In view of the above the proceedings for repealing the impugned notifications is legally possible.**
>
> 8. Honorable Minister has examined these comments.
>
> 9. Order of the Hon'ble Cabinet is prayed for on the Para 5 above.
>
> Sd/-
> (Rita Sinha)
> Principal Secretary
>
> Tax & Registration Department
> File No.9 (63)/2001
> Lucknow dated 19 August, 2004"
>
> (emphasis supplied)

5. The appropriate authority of the State eventually took decision on the said proposal, as a result of which a notification dated

14th October, 2004 came to be issued rescinding the earlier notification dated 27th February, 1998. The said notification reads thus :-

"**NOTIFICATION**

No.KA.NI.-2-2996/XI-9(63)/2001-Act, 74-56 Order – (38) 2004

Dated Lucknow : : October 14, 2004

WHEREAS, the State Government is satisfied that it is expedient so to do in public interest.

Now, therefore, in exercise of the powers sub-section (5) of Section 8 of the Central Sales Tax Act, 1956 (Act No.74 of 1956) read with Section 21 of the General Clauses Act, 1897 (Act No.10 of 1897) **the Governor is pleased to rescind, with effect from October 14, 2004**, the government notification No.T.I.F – 2-593/X-9(226)/94-Act-74-56-Order-98, dated February 27, 1998."

(emphasis supplied)

6. This notification is the subject matter of challenge in the present proceedings.

7. The respondents in the respective appeals preferred separate writ petitions asserting that because of the representation made to the stake holders vide notification dated 27th February, 1998, they had commenced production of the specified goods and complied with the requisite conditions provided under the said notification entitling them to avail rebate of the Uttar Pradesh Tax facility. They

had commenced commercial production before coming into effect of the impugned notification on 14th October, 2004. However, due to coming into effect of stated notification they have been denied of the rebate which they could have earned for ten years.

8. In the case of respondent in Civil Appeal No. 1579/2019 - M/s. Birla Corporation Limited (for short, 'the BCL'), the factory was set up by the said respondent at Raibareli and it had commenced commercial production from 14th December, 1998. As the said respondent had complied with all the conditions specified in the notification dated 27th February, 1998, it availed the rebate facility from 14th December, 1998 until 13th October, 2004. It could have continued to avail of that facility for a period of ten years, i.e., upto 13th December, 2008, but that arrangement has been disrupted because of the issuance of the impugned notification dated 14th October, 2004. In other words, denial of rebate to respondent-BCL is for the period from 14th October, 2004 to 13th December, 2008.

9. In the case of respondent in Civil Appeal No. 1580/2019 - M/s. Jai Prakash Associates Limited (for short, 'the JPAL'), it was

operating its factory outside the State and because of the condition specified in the notification dated 27th February, 1998, had challenged the said notification which, as aforesaid, was upheld by the High Court and later by this Court. In terms of the said decision, this respondent could have continued with its business and also avail of the rebate but for the impugned notification issued on 14th October, 2004. However, despite the said respondent (JPAL) having succeeded before the High Court in Writ Petition No.958 (Tax) of 1999 vide judgment dated 29th January, 2004, out of abundant precaution, it decided to set up a factory of its own in the area specified in the notification dated 27th February, 1998, to avoid any further controversy or dispute regarding tax rebate facility. In furtherance of that decision, after seeking necessary approvals, the said respondent (JPAL) commenced commercial production in the factory set up in the notified area in the State of Uttar Pradesh w.e.f 18th September, 2004 and in terms of the notification dated 27th February, 1998, in vogue, became entitled to avail rebate facility for a period of ten years, i.e., up to 17th September, 2014. However, because of the intervening

notification dated 14th October, 2004, the said respondent (JPAL) has been denied of that facility even though it had invested almost over Rs. 100 crores to set up a new factory within the notified area in the State of Uttar Pradesh.

10. In this background, both the respondents filed separate writ petitions before the High Court asserting that the State could not have resiled from the promise or representation it had made in terms of notification dated 27th February, 1998, and the impugned notification dated 14th October, 2004, therefore, suffered from the vice of being violative of promissory estoppel. It was asserted that the State, in exercise of its executive power, cannot resile from the promise it had made by inviting setting up of industry within the designated areas in the State of Uttar Pradesh and in the process, withdraw the rebate facility with retrospective effect. That could be done only by the legislature by enacting a law in that behalf or by issuing ordinance as was suggested in the note submitted to the Council of Ministers referred to above. It was also asserted that, in fact, the notification, as issued on 14th October, 2004, specified that the same would come into effect from the date it is issued. There is

no indication whatsoever that the intention behind issuing the said notification was to withdraw the facility of stake holders who had already set up their industrial units and commenced commercial production prior to 14th October, 2004. The thrust of the challenge was that the decision to rescind the notification dated 27th February, 1998 was to discontinue the rebate to industry that would be set up on and from 14th October, 2004 and to other industrial units in the neighbouring States on account of the decision of the High Court. However, that decision cannot be implemented or enforced against the industries which had already commenced commercial production within the designated areas in the State of Uttar Pradesh after 27th February, 1998 but before 14th October, 2004. Taking any other view would result in giving retrospective or retroactive effect to the notification dated 14th October, 2004. That is impermissible in law.

11. The writ petitioners had also contended that in any case, the State Government had failed to make out a case of inevitable supervening circumstances warranting cancellation and withdrawal of the rebate facility with retrospective effect. The fact that the High

Court decided the issue against the State and extended the benefit to other industrial units in the neighbouring States, by itself cannot be the basis much less a supervening circumstance to justify the act of resiling from the commitment flowing from the notification dated 27th February, 1998.

12. The appellant-State had resisted the writ petitions by filing affidavit before the High Court. The stand taken by the State before the High Court essentially was that the State had power to rescind its notification dated 27th February, 1998 and withdraw rebate facility to all industrial units because of the supervening circumstances. The emphasis to invoke that power was essentially because of the judgment of the Allahabad High Court dated 29th January, 2004 and the inability of the State to verify the claims of the industrial units in the neighbouring States which was beyond the territorial jurisdiction of the State authorities.

13. The High Court vide impugned judgment, in the first place held that the State had given assurance about the rebate on the specified goods produced in the designated areas within the State on complying with other conditions specified in notification dated

27th February, 1998. It then proceeded to hold that the State Government in the Indian context and the Indian jurisprudence was amenable to the doctrine of promissory estoppel like any other private party or individual. On that finding, the High Court concluded that the notification issued on 14th October, 2004 cannot stand the test of judicial scrutiny qua the claim of the industrial units which were already established within the designated area in the State and had commenced commercial production of the stated goods before 14th October, 2004. It also rejected the stand taken by the State Government that it was justified in doing so because of supervening public interest and resultantly allowed the writ petitions preferred by the concerned respondents herein. The conclusion recorded by the High Court reads thus:-

"**SUMMARY**

121. Supervening public interest may not be established merely by pleading in the counter affidavit. It shall not be sufficient to meet out the requirement of law. The supervening public interest should be adjudged on the basis of material placed by the State Government during the course of judicial review. Nothing has been brought on record to establish as to what prompted the government to revoke earlier notification more so when the situation has not been changed and flyash remain an ecological hazard release by thermal power stations.

122. Since, before issuance of the impugned notification the petitioner had started production establishing the factory in Tanda, the principle of promissory estopple attracted in view of catena of judgement of Hon'ble Supreme Court particularly Kalyanpur Cement Ltd (supra) as well as world wide settled proposition of law, it shall be fitness of thing and to maintain the people's confidence in the administration, ordinarily government should be abide by its assurance or promise and person should not be deprived of the benefit available from such assurance, in case it acted on. Though the government has got right to change its policy but that too is subject to judicial review and the courts have got ample power to ensure that because of change of policy fundamental or statutory rights of the citizen is not infringed. Equitable relief under the principle of promissory estopple may be given by courts for the ends of justice.

123. The impugned notification should be given prospective effect with regard to tax rebate. Thus, industries which were established relying upon the assurance given in the notification dated 27.2.1998 and started production are entitled for tax rebate for the period which they were entitled at the time of production or before the issuance of impugned notification.

124. In view of above, writ petition deserves to be allowed partly and petitioner seems to be entitled for benefit of tax exemption in view of original notification dated 27.2.1998. However, keeping in view the law on the subject that government has got right to change the policy on one hand and on the other hand, petitioner's right may be protected by applying the impugned notification prospectively, the right available under the principle of promissory estoppel may be protected by applying the impugned notification prospectively. The prayer for quashing the impugned notification is refused and the relief is moulded accordingly.

O R D E R

125. The writ petition is allowed in part to the extent petitioner's entitlement for tax exemption for the

> period available under the original notification dated 27.2.1998. Accordingly, a writ in the nature of mandamus is issued directing the opposite parties to provide tax exemption to the petitioner industry from the date of production for the period of entitlement under original notification dated 27.2.1998.
>
> Writ petition is allowed in part. Cost easy."

14. The State of Uttar Pradesh has assailed the decision of the High Court. The argument canvassed on behalf of the State concedes the legal position that even if the State Government is bestowed with the executive power to withdraw the rebate facility, it is obliged to justify before the court of law that the circumstances were so overwhelming that it will be inequitable to hold the Government bound by the promise. In other words, the intent behind the impugned notification dated 14th October, 2004 was replete with supervening public interest. To buttress that, the State has relied upon following reasons, stated to be supervening public interest:

> "i). The judgment dated 29.01.2004 of Allahabad High Court in the earlier round of litigation by the same petitioners and others had quashed condition No.1 of notification dated 27.02.1998, by which Units situated outside the State of U.P. were also made entitled to the tax rebate. This judgment was subsequently affirmed by this Hon'ble Court vide its judgment dated 12.04.2004 reported in (2014) 4 SCC 720 titled as

> State of U.P. & Ors. Vs Jai Prakash Associated Ltd. etc. etc.
>
> ii). The effect of the judgment nullified the public interest in granting the tax rebate.
>
> iii). State had no territorial jurisdiction to ascertain fly ash consumption and source of Units operating outside the State of U.P.
>
> iv). Utilization of fly ash was promoted in terms of Government of India Notifications dated 14.09.1999 & 27.08.2003, as also directions given by Hon'ble Delhi High Court in a PIL from 2003 to 2005. State was taking all steps for disposal of fly ash by promoting its use.
>
> v). Future revenue loss."

15. It is then urged that the High Court has not carefully analysed each of these reasons, much less the impact of all the reasons taken together justifying the exercise of power to rescind the notification providing for rebate facility. It is also contended that the decisions pressed into service by the respondents would be applicable to ordinary situation where the principle of promissory estoppel has been invoked by the State Government but the same will have no application to the notification under consideration which was the outcome of supervening public interest. In other words, general principle of promissory estoppel and vested/accrued rights have no application to a case of supervening public interest.

16. Lastly, it is urged that even if the writ petitioners-respondents herein were to succeed, the entitlement of rebate would depend on the fact whether the respondents have themselves paid the amount claimed and have not passed on the burden to their consumers in full or in part, as the case may be. The claim for refund as a consequence of applicability of the notification dated 27th February, 1998 for the specified period would depend on establishing the foundational fact that the respondents had not passed on the commensurate tax burden to their consumers. To buttress the above submissions, reliance has been placed on the decisions of this Court in ***State of Jammu & Kashmir*** vs. ***Trikuta Roller Flour Mills Pvt. Ltd. & Anr.***[2]; ***Sales Tax Officer & Anr.*** vs. ***Shree Durga Oil Mills & Anr.***[3]; and ***Shree Digvijay Cement Co. Ltd. & Anr.*** vs. ***Union of India & Anr.*** [4].

17. Per contra, the respondents would adopt the reasons given by the High Court for sustaining their challenge to notification dated 14th October, 2004. It is urged that the notification dated

2 (2018) 11 SCC 260
3 (1998) 1 SCC 572
4 (2003) 2 SCC 614

14th October, 2004 cannot be construed as having retrospective or retroactive effect and apply to the units which had already been set up and commenced commercial production prior to 14th October, 2004. Section 5 of the 1948 Act does not confer any power on the executive to rescind the existing notification with retrospective or retroactive effect. In absence of express power invested in that behalf, it is not open to the executive to do so either in terms of Section 5 of the 1948 Act or Section 21 of the General Clauses Act, 1897 (for short, "the 1897 Act") or Section 21 of the Uttar Pradesh General Clauses Act, 1904 (for short, "the 1904 Act"). Section 5(2) of the 1948 Act reinforces the submission of the respondents that the legislature has not invested any authority in the State or executive to give retrospective or retroactive effect to its notification, rescinding the existing notification unlike sub-section (2), which expressly provides for allowing rebate with effect from a date prior to the notification. There is no express, much less, implicit or tacit authority in the executive to issue a notification having retrospective or retroactive effect. In support of this plea, reliance is placed on the decisions of this Court in ***Kazi Lhendup Dorji*** vs.

Central Bureau of Investigation & Ors.[5] and ***Industrial Infrastructure Development Corporation (Gwalior) Madhya Pradesh Limited*** vs. ***Commissioner of Income Tax, Gwalior, Madhya Pradesh***[6].

18. It is urged that in the present case, an enforceable right had accrued in favour of the respondent(s) under the notification dated 27th February, 1998 to avail the benefit of rebate for its full eligibility period up to 13th December, 2008 and 17th September, 2014 respectively. That right could not be interdicted and disrupted by virtue of the impugned notification dated 14th October, 2004. It is not a case where the legislature has intervened to interdict that right, but it is being done by a notification by an authority who is not empowered to issue notification having retrospective or retroactive effect. The respondents are relying on the decisions of this Court which has taken the view that the notifications cannot apply to units already set up prior to their issuance. (See ***MRF Limited, Kottayam*** vs. ***Assistant***

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5 1994 Suppl. (2) SCC 116
6 (2018) 4 SCC 494

Commissioner (Assessment) Sales Tax & Others[7]; ***Southern Petrochemical Industries Co. Ltd.*** vs. ***Electricity Inspector & ETIO & Others***[8]; and ***Pournami Oil Mills & Ors.*** vs. ***State of Kerala & Anr.***[9]*)*. In support of the argument that the subordinate legislation such as the notification dated 14th October, 2004 cannot have retrospective or retroactive effect, reliance is placed on the exposition in ***Director General of Foreign Trade & Anr.*** vs. ***Kanak Exports & Anr.***[10].

19. While dealing with the argument of the State regarding supervening or overwhelming public interest, it is urged that the High Court was right in observing that the State Government had failed to make out any case to justify the impugned notification dated 14th October, 2004 on that principle. To buttress that submission, our attention was invited to the relevant portion of the pleadings before the High Court in the form of writ petition and affidavits of both sides. Relying on the dictum in the cases of **M/s. *Motilal Padampat Sugar Mills Co. Ltd.*** vs. ***State of Uttar***

7 (2006) 8 SCC 702
8 (2007) 5 SCC 447
9 1986 Suppl. SCC 728
10 (2016) 2 SCC 226

Pradesh & Others[11] and ***Manuelsons Hotels Pvt. Ltd.*** vs. ***State of Kerala & Others***[12], it is urged that there is heavy burden on the State to show that the public interest is so supervening and so overwhelming that it would be inequitable to hold the Government bound by the promise. It is urged that facade has been created by the State Government for the first time before this Court about supervening public interest. In any case, the reasons stated in support thereof cannot stand the test of judicial scrutiny, inasmuch as, the notification dated 27th February, 1998 and the stand taken by the State Government on affidavits filed before the High Court in support of the said notification in the first round of litigation, clearly, were founded on the assertion that the object for grant of rebate was to promote use of fly ash generated from thermal power stations in Uttar Pradesh and utilization of the fly ash in manufacture of goods to be produced by the industry set up in the designated areas mentioned in the said notification. That was done to address the environmental issues confronting the State in the concerned areas and also to provide employment and job

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11 (1979) 2 SCC 409
12 (2016) 6 SCC 766

opportunities to the locals due to setting up of industries in the designated areas within the State of Uttar Pradesh. Admittedly, the generation of fly ash in thermal power stations in Uttar Pradesh has continued unabated causing serious health hazards in the neighbourhood, turning fertile lands into barren lands. Notably, the new industry set up in the designated areas after 27th February, 1998 and before 14th October, 2004 is using the fly ash generated in thermal power stations in Uttar Pradesh. Thus, the newly established industry would continue to achieve the object and intent behind the said notification, which has not ceased to exist and is still relevant. In such a situation, it is incomprehensible as to how the principle of supervening public interest could be invoked by the State much less of such magnitude that it would be impossible for the State to hold or be bound by the promise made by it in notification dated 27th February, 1998. The only reason recorded in the proposal for issuing the impugned notification dated 14th October, 2004, as can be discerned from the note submitted by the Principal Secretary of the concerned Department to the Council of Ministers, mentions only about the fall out of the judgment of the

High Court dated 29th January, 2004. The apprehension of the State that it would not be in a position to verify the factual basis to deal with the claims of the industries operating from the neighbouring States has already been considered and negated by this Court in the previous round, which finding will continue to operate against the State.

20. The respondents have distinguished the decisions pressed into service by the appellant in the ***Trikuta Roller Flour Mills P. Ltd.*** (supra) and ***Shree Durga Oil Mills*** (supra) being decisions on the facts of the concerned case. In the former case, the Court upheld the stand of the State of supervening public interest because of the unravelling of fraudulent transactions and bogus refund claims by non-existent traders who had neither filed the returns nor deposited any taxes. In the latter case, the Court opined that the writ petitioners had not given essential foundational facts nor had challenged the vires of the relevant notification for grant of any relief as claimed by them. The Court also noted that the concerned notification did not grant exemption but it merely promised that orders will be issued laying down the mode of administering the

concessions and incentives by the departments concerned and more importantly that, before the unit of the writ petitioner started production on 19th March, 1980, the earlier notification was already abrogated on 20th May, 1977. It is submitted that in the facts of that case, no relief could be granted to the writ petitioner nor it could be allowed to challenge the authority of the executive for having abrogated the earlier notification.

21. In addition, the respondents would rely on the exposition in ***State of Bihar & Others*** vs. ***Kalyanpur Cement Limited***[13] to urge that the doctrine of promissory estoppel applies to notifications such as the impugned notification dated 14th October, 2004. It is further urged that the notification dated 14th October, 2004 violates not only the principle of promissory estoppel but also is arbitrary and hit by Article 14 of the Constitution of India. Reliance has been placed on the decision in ***Lok Prahari Through Its General Secretary*** vs. ***State of Uttar Pradesh & Others***[14]. Lastly, it is contended that the argument of unjust enrichment has been raised for the first time before this Court and ought not to be

13 (2010) 3 SCC 274
14 (2018) 6 SCC 1

countenanced. That would be a matter for consideration in the refund proceedings which are still pending for decision before the concerned authority. The respondents submit that the appeals be dismissed being devoid of merits.

22. We have heard Ms. Aishwarya Bhati, learned senior counsel appearing for the State and Mr. S.K. Bagaria and Mr. S.B. Upadhyay, learned senior counsel appearing for the respondents.

23. After cogitating over the rival submissions, it becomes evident that the parties have proceeded on the premise that the State Government or the Executive is competent to rescind the earlier notification and the doctrine of promissory estoppel can be no impediment in that behalf. That, however, is hedged or laced with condition that the burden is upon the Government to show that it acted in furtherance to public interest in issuing such a notification otherwise than in accordance with the promise and that the public interest is so overwhelming that it would be inequitable to hold the Government bound by the promise. It is well established that the Court would not act on mere *ipse dixit* of the Government and must insist on a highly rigorous standard of proof in discharge of its

burden by the Government. Resultantly, it is not necessary for us to dilate on the precedents pressed into service by the respondents on the application of doctrine of promissory estoppel of the State Government like any other private party or individual.

24. Before we proceed further, it would be apposite to extract Section 5 of the 1948 Act. The same reads thus :-

> **"5. Rebate of tax on certain purchases or sale.—** (1) Where the State Government is satisfied that it is expedient in the public interest so to do, it may by notification, and subject to such conditions and restrictions as may be specified therein, allow a rebate up to the full amount of tax levied on any specified point on—
>
> (a) The sale or purchase of any goods, or
> (b) The sale or purchase of such goods, by such persons or class of persons as may be specified in the said notification.
>
> (2) The rebate under sub-section (1) may be allowed with effect from a date prior to the date of the notification."

25. On a bare reading of this provision, it is evident that there is no express authority given to the Executive to issue notification for "withdrawing or rescinding the rebate facility" from a date prior to the date of notification. Section 5(2) merely constrict that power only for "allowing" rebate with effect from a date prior to the date of

notification. That does not include, by necessary implication or otherwise, power to "withdraw" or "rescind" the rebate from a date prior to the date of the notification.

26. Section 21 of the 1897 Act also will be of no avail. The same reads thus :-

> "21. **Power to issue, to include power to add to, amend, vary or rescind notifications, orders, rules or bye-laws**—Where, by any Central Act or Regulations a power to issue notifications, orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued."

27. Section 21 of the 1904 Act, is pari materia to the above provision and will be of no avail for withdrawing the rebate from a date prior to the date of the notification. In the present case, it is not necessary to dilate further on this aspect as the plain language of the notification dated 14th October, 2004, reproduced above in paragraph 5, itself expressly rescinds notification dated 27th February, 1998 with effect from 14th October, 2004. There is no express or tacit intent manifested from this notification, so as to construe it as bestowing power to

withdraw the rebate facility with effect from a date prior to the date of notification as such. On this finding, nothing more is required to be said as the concomitant of this finding would necessarily be that all the industrial units set up after 27th February, 1998 and before 14th October, 2004 which had commenced commercial production, must continue to qualify for rebate for specified term mentioned in notification dated 27th February, 1998, subject to fulfilling all other conditions specified therein.

28. In the case of BCL, the rebate ought to continue up to 13th December, 2008 and in the case of JPAL, up to 17th September, 2014. Any other interpretation of the impugned notification dated 14th October, 2004, would entail in giving retrospective or retroactive effect thereto. That is not predicated by Section 5 of the 1948 Act or the impugned notification itself. Having said this, it would necessarily follow that the challenge to the notification on the ground of being hit by doctrine of promissory estoppel need not detain us any further. Similarly, the argument regarding the circumstances in which the Government could stave off from the

dispensation under notification dated 27th February, 1998 has become irrelevant.

29. Assuming that we need to examine the reasons offered by the State Government to justify the impugned notification dated 14th October, 2004 of supervening public interest, it is noticed from the pleadings exchanged by the parties before the High Court or for that matter before this Court that the dominant reason weighed with the State Government to rescind the earlier notification was the effect of the decision of the High Court dated 29th January, 2004 and the logistical issues confronting the State in implementation of that decision, including the financial implications for the future State Revenue. For proper analysis of the plea so taken by the State, we must go back to the intent behind notification dated 27th February, 1998. The dominant intent was to invite the investors to set up industrial unit in the designated areas within the State of Uttar Pradesh which were known to be underdeveloped or backward areas and more importantly to address the environmental issue because of the fly ash generated by the thermal power stations situated in Uttar Pradesh and incidentally to generate job

opportunities and employment to the locals. It is one thing to argue that because of the interpretation given to the notification dated 27th February, 1998 by the High Court and affirmed by this Court, the industrial units situated in the neighbouring States may not be able to fulfill the underlying intent behind the notification dated 27th February, 1998 in its letter and spirit. That is not the plea of the State. Furthermore, it is undeniable that the thermal power stations in the State of Uttar Pradesh are still operational and are generating fly ash in the same manner and quantity as was happening in February, 1998, if not more. It is also indisputable that the industrial units set up in furtherance of the promise or representation made in the notification dated 27th February, 1998 which had commenced commercial production in respect of specified goods before 14th October, 2004, would continue to achieve the same objective as is specified in the notification dated 27th February, 1998. In that, the concerned manufacturing units continue to manufacture specified goods by using fly ash purchased or produced from the thermal power stations situated within the State. As long as that activity is continued until the term specified

under the notification dated 27th February, 1998, namely ten years from the date of commencement of commercial production, there is no tangible reason nor it is open to contend that the dominant purpose underlying notification dated 27th February, 1998 had ceased to exist or had become irrelevant in any manner, much less there are supervening circumstances qua such units which are so overwhelming that it would be inequitable for the State Government to be bound by the promise given in notification dated 27th February, 1998.

30. Indeed, the judgment rendered by the High Court and affirmed by this Court in interpreting the notification dated 27th February, 1998, at best, may have given rise to some logistical issues for the State including financial implications regarding future revenue loss. That ground cannot be invoked as supervening public interest in reference to the activities of the industrial units who qualify the conditions specified in notification dated 27th February, 1998 in all other respects and had commenced commercial production of the specified product before 14th October, 2004. Indubitably, an enforceable right had accrued to and crystalised in favour of such

industrial units which could not be truncated or snapped unless the dominant purpose for which the notification dated 27th February, 1998 came to be issued had ceased to exist, namely generation of fly ash by the thermal power stations situated within the State and consumption of that fly ash by the industrial units established within the designated areas of the State as per the specified quantity to become entitled for rebate for the duration mentioned therein. The question of future revenue loss would not arise as the industrial units established in the neighbouring States would not be eligible to avail of the rebate because of rescinding the earlier notification. Suffice it to observe that the argument about future revenue loss cannot be invoked against the industrial units who had already established and commenced production after 27th February, 1998 and before 14th October, 2004. For, it can be safely presumed that the policy makers were fully conscious about the so-called loss of future revenue due to rebate to those units when they had issued notification dated 27th February, 1998. That ground cannot be set up against the industrial units who qualify in all other respect under the notification dated 27th

February, 1998 and have made substantial investment running into crores much less as being supervening public interest, as is being placated by the State in these proceedings. This is clearly an afterthought plea, which by no standards can stand the test of judicial scrutiny. It is well established that the Court is obliged to insist for a highly rigorous standard of proof in the discharge of the burden and onus upon the State to justify its action as supervening public interest.

31. Having said this, it must necessarily follow that the impugned notification dated 14th October, 2004 can have no application to the settled enforceable right accrued to industrial units who fulfill all other conditions specified in the notification dated 27th February, 1998, having commenced commercial production of the specified goods before 14th October, 2004. In other words, we reject the stand of the State Government about the supervening public interest qua the respondents herein and similarly placed persons. The notification dated 14th October, 2004 cannot be construed as having retrospective or retroactive effect to whittle down the accrued rights in favour of such industrial units.

32. In this view of the matter, it is unnecessary to dilate on the precedents pressed into service to buttress the argument that doctrine of promissory estoppel applies or not to the State Government or about the power of the State Government to rescind the earlier notification whereunder rebate under Section 5 of the 1948 Act had become due and payable to the eligible industrial units. We also dispose of the grievance of the appellant that the High Court has not elaborately dealt with the argument of supervening public interest justifying the issuance of notification dated 14th October, 2004. We say so because, we are convinced with the argument of the respondents that no material fact has been pleaded in the response filed before the High Court or in the present proceedings by the State Government in that regard.

33. Nevertheless, we had permitted the State Government to articulate the reasons which it did in the written submissions as referred to in paragraph 14 above. We have analysed the said reasons and are of the considered opinion that the same singularly or taken together would be of no avail to the State Government, to justify the application of the impugned notification dated 14th

October, 2004, to industrial units already set up which had commenced commercial production of the specified goods in the designated areas before 14th October, 2004.

34. A priori, the respondents and similarly placed persons would be entitled to rebate for the relevant period prescribed in the notification dated 27th February, 1998 which would continue to remain in vogue until the expiry of the specified period, namely, ten years. In the case of BCL up to 13th December, 2008 and in the case of JPAL up to 17th September, 2014 respectively. The amount of rebate, however, would depend on the verification of their refund claim pending before the concerned authorities and would be subject to just exceptions including the principle of unjust enrichment. The respondents should be able to substantiate that the amount claimed by them has not been passed on to their consumers. Only then, they would be entitled for refund. The competent authority may verify the claim for refund of each of the respondent(s) in accordance with law and pass appropriate orders, including about the interest for the relevant period.

35. We are in agreement with the respondents that the decisions in ***Trikuta Roller Flour Mills P. Ltd.*** (supra) and ***Shree Durga Oil Mills*** (supra) turn on the facts of the concerned cases. The dictum in those cases will have no application to the fact situation of the present case in light of our above analysis. Similarly, the observations made by this Court in the earlier round of proceedings cannot come in the way of the respondents to pursue their claim for refund of the rebate amount, for the relevant period. That be decided in accordance with law.

36. In view of the above, these appeals must fail. Hence, the same are dismissed with observations. There shall be no order as to costs. All pending applications are also disposed of.

.................................,.....**J.**
(A.M. Khanwilkar)

.................................,.....**J.**
(Dinesh Maheshwari)

New Delhi;
November 20, 2019.