REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5181 OF 2002

STATE OF BIHAR & ORS. ....APPELLANT(S)

VERSUS

KALYANPUR CEMENTS LTD. .....RESPONDENT(S)

J U D G M E N T

SURINDER SINGH NIJJAR, J.

1. This appeal has been filed by the State of Bihar challenging the judgment and order dated 24.04.2002 of the High Court of Judicature at Patna in CWJC No.6838 of 2000, whereby, the High Court has allowed the writ petition filed by the respondent herein. The respondent – M/s. Kalyanpur Cement Ltd. (hereinafter referred to as

'the Company'), is a public sector company incorporated in the year 1937 as a Lime-producing Company. It is engaged in the business of cement manufacturing and marketing operations since 1946. It had commenced production with a capacity of 46000 metric tonnes. It underwent a series of expansion in 1958, 1968 and 1980. Nowadays, the Company is operating one-million-tonne cement plant. In view of the changes in the technology worldwide, it has set up a brand new state-of-art 'dry process' plant in 1994 at a capital cost of Rs.250-260 crores. This was made possible with financial assistance of World Bank and the All India Financial Institutions. Its advisor and financial collaborator is Holder Bank (HOLCIM) at Switzerland. The Company claims to be one of the very few large scale surviving industrial units in the State of Bihar. It is the only large scale industry in central part of the State. Over 2000 persons are in the employment of the Company. The Company claims that due to circumstances beyond its control such as recession in the cement industry as well

as Government related problems; delayed decision in granting Sales Tax Deferment benefit the Company began to suffer heavy losses. This was accentuated by the non-availability of the sanctioned working capital from the financial institutions in the absence of the sale tax exemption under the Industrial Policy, 1995. There was continuous loss in production for a number of years. This has resulted in erosion of Net-Worth of the Company, as the total Net-Worth of the Company was less than its accumulated losses in December, 2002, it has registered with Board for Industrial and Financial Reconstruction (hereinafter referred to as 'BIFR') as a sick unit. It has been actually declared as sick Company by BIFR on 28.05.2002. Its reference case is pending with the BIFR. The Company in order to rehabilitate itself sought the assistance from financial institutions for restructuring package. The Company's proposal for financial assistance and restructuring has been approved by various financial institutions, in principal. However, the same has been made conditional on certain

preconditions being met. One of the conditions imposed by the financial institutions was that the restructuring package would be made available only on the Company obtaining a Sales Tax exemption for a period of 5 years from the State Government, in terms of Industrial Policy, 1995. Accordingly, Company submitted an application to the State Government on 21.11.1997 for grant of Sales Tax exemption under the Industrial Policy, 1995 for a period of 5 years w.e.f. 01.01.1998. Thereafter, the matter remained pending for consideration by the State Government and the financial institutions. There were a series of joint meetings of the Government, Financial Institutions and the Company, over the next three years. In all these meetings, as well as correspondence categoric assurances were given that the necessary Sales Tax exemption notification would be issued shortly. However, no such notification was issued causing great hardship to the Company. It was, therefore, constrained to file writ petition (CWJC No.6838 of 2000) in the High Court at Patna.

2. In this writ petition, the prayer was for issuance of the writ in the nature of mandamus directing the State of Bihar to issue necessary Notification under Clause 24 of the 1995 Policy. The claim of the Company was that Notification under Clause 24 of the Industrial Policy, 1995 ought to have been issued within one month of the release/publication of the Policy in September, 1995. Voluminous record was produced before the High Court in support of the submission that the Company is entitled to exemption under the 1995 Policy. The State of Bihar contested the writ petition by filing a counter affidavit. Supplementary counter affidavit was filed on behalf of the Government through Secretary-cum-Commissioner, Department of Commercial Taxes (respondent No.4 in the writ petition) on 05.12.2000. In paragraph 5 of the aforesaid affidavit it is stated as under:-

> *"5. That the Hon'ble Minister, Department of Commercial Taxes has approved the proposal along with draft notification regarding extension of Sales Tax related incentives to sick industrial units."*

3. In paragraph 8 of the affidavit it is averred *"That the deponent states that it shall be possible to issue necessary notification after approval of the proposal of the relevant notification by the Hon'ble Chief (Finance) Minister of the Cabinet."* It is also stated in the affidavit "*That the deponent has further requested the Secretary-cum-Commissioner, Department of Finance, vide letter dated 28.11.2000 to take necessary approval earliest as the same has to inform to the Hon'ble Court."* Thereafter, yet another supplementary counter affidavit dated 09.01.2001 was filed by Shri Krishan Nand Roy, Assistant Commissioner, Commercial Taxes, Bihar. In the affidavit, it was contended that the State Government in a meeting under the Chairmanship of the Chief Minister held on 06.01.2001 has decided upon due deliberation not to grant any Sales Tax incentives to sick industrial units. Therefore, the claim of the Company has been rejected. The four stated reasons justifying the aforesaid decision were as under:-

> "*(1) The period of Industrial Policy 1995 was from 1.9.1995 to 31.8.2000. Therefore, this policy is not effective to date.*

(2) The question to provide facility to those sick units are mentioned in clause 22 of the above policy. No notification has been issued by the Government to provide facility of Sales Tax till now, on whose basis, there could be right of any specialized person/unit to get the facility.

(3) So far as the question of applicants' Unit in petition No. CWJC No.6838/2000 is concerned, his matter has not yet been approved by the High Level Empowered Committee under the Chairmanship of Chief Secretary under Clause 22(1) of Industrial Policy, 1995. It is worth mentioning here that in absence of above mentioned, even approval cannot be provided.

(4) Tax reforms at All India Level, which has been continuing last one year it has been decided at the conference of Chief Ministers that except States of Special Category Sales Tax facility must be ended by rest all other States. The States would not do this, there could be possibility of cut down the payable Central Assistance to those States."

4. Therefore, the Company amended the writ petition and challenged the decision dated 06.01.2001 of the State Government. It was pleaded by the Company that the grounds for rejection of the Company's case and non-issuance of the Notification was not in accordance with law It appears that another counter affidavit was filed on 16.02.2001 by

respondent No.4. This was followed by yet another supplementary counter affidavit filed by Virendra Kumar Singh, Joint Commissioner, Commercial Taxes, Headquarter, Patna on 02.08.2001. In this affidavit it was brought to the notice of the Court that the decision taken on 06.01.2001 was considered by the Cabinet in its meeting held on 05.03.2001 wherein it was decided not to issue any notification for granting any concession/facility to sick industrial units in the State. This decision was duly conveyed by letter dated 05.03.2001 to the IDC Bihar, Patna. In view of the aforesaid decision the Secretary Industries Department rejected the company's application and communicated the decision to the Company on 14.05.2001. Both the decisions were sought to be justified by the State Government.

5. The High Court considered the entire issue. The Company as well as the State made detailed reference to the documents which were placed on the record. Ultimately, the writ petition has been allowed. The decisions dated 06.01.2001 and 05.03.2001 have been quashed. Further directions issued to the State Government are as follows;

> "*The concerned departments and organizations are hereby directed to issue follow up notification to give effect to the provisions of the policy within one month from today. After the notification is issued a Committee headed by the Industrial Development Commissioner would be constituted to evolve suitable measures for potentially viable non BIFR sick industrial unit (the present petitioner) and the said Committee would submit its recommendations before the State Level Empowered Committee which in its turn shall place the said recommendations before the Government. After receiving the said recommendations from the State Level Empowered Committee, the Government shall take final decision in the matter. The petition is thus allowed."*

6. This decision has been challenged by the appellant-State.

7. At this stage it would be appropriate to notice the orders passed by this Court during the proceedings. On 18.11.2002, following directions were issued:-

> *"Heard learned counsel for the parties.*
>
> *As an interim arrangement during the pendency of this appeal, with a view to protect the interests of either side, we direct the respondent to deposit an amount equivalent to the sale tax payable by it as and when it becomes due in an interest bearing account in a nationalized bank. This amount and the amount accrued during the pendency of the appeal, shall not be withdrawn by either side.*

The amount so kept in deposit shall become payable to the party which ultimately succeeds in this appeal.

The appellants are directed to issue the exemption orders and on receipt of such order, the above said amount shall be deposited. The issuance of the exemption orders is without prejudice to the case of the parties in this appeal.

The IA is thus disposed of."

8. Thereafter IA No.3 of 2006 was filed by the appellant seeking stay of the judgment of the High Court, it has been stated that the application has been necessitated because of the intervening circumstances and the conduct of the Company. It was further stated that pursuant to the direction issued by this Court on 18.11.2002, the appellant issued Notification No.SO-174 dated 18.10.2004 granting exemption to the Company. The Notification was to have effect for five years from the date of publication in the Official Gazette or till the disposal of the Special Leave Petition. The Notification was issued on the following terms:-

"2. Terms and conditions-

> *(a) Tax payable by M/s Kalyanpur Cement Ltd. shall be deposited per month in an interest-bearing account in a nationalized bank.*
>
> *(b) M/s Kalyanpur Cement Ltd. shall provide information of such bank account to the circle where he is registered.*
>
> *(c) M/s Kalyanpur Cement Ltd. shall submit the details regarding amount of payment in the bank account as mentioned in para (a) above along with brief abstract each month.*

9. Thereafter the appellant requested the company to comply with the directions of this court. The Company, however, informed the appellant that it was unable to comply with the directions because of its 'sickness'. Since the Company failed to comply with the aforesaid order, a prayer was made for recalling the same.

10. The Company in its reply elaborately explained the efforts being made by the financial institutions to ensure the survival of the Company. It reiterated that the Company had acted honestly and in good faith on assurances/approval given by the appellant at various stages. The Company continued with its operation in anticipation of receiving the appellant's

approval at some point of time. Had the appellant not given the assurances, the Company could have suspended its operation. The Government gave assurances and granted approval on 07.01.1998, 23.01.1998, 12.03.1998, 21.01.1999, 12.07.1999, 29.10.1999, 02.12.1999, 17.12.1999, 25.01.2000, 31.03.2000, 29.05.2000 and 30.06.2000. It was also pointed out that even the officers of the Commercial Taxes Department including Commissioner, Commercial Taxes to the effect that the Notification was in the process of being issued. It was also pointed out that even after the VAT regime being introduced, Sales Tax related incentives to industries are being given to industries by various States. In fact under the Industrial Policy 2003 as well as the Industrial Policy, 2006, Sales Tax incentives in some form or the other have been retained/provided. It is further pointed out that the Notification dated 18.10.2004 was issued after expiry of two years from the date of the order passed by this Court. The delayed action of the Appellant practically crippled the Company financially and jeopardized efforts for revival as the Sales Tax benefit is crucial for the Company's revival and

continued operations. It is reiterated that the Company is entitled to get the benefit under the Industrial Policy, 1995. With regard to the non-deposit of the *"amount equivalent to the Sales Tax payable by it as and when it becomes due"*, it is stated that the Company had *bona fide* opened the Bank account with a Nationalized Bank but could not deposit the amount equivalent to the Sales Tax due because of circumstances beyond its control.

11. During the pendency of the Interim Application, proposal for the approval of the reconstruction package of the Company was under the active consideration of the State. Therefore, the proceedings were adjourned from time to time.

12. During this period an application was also filed by the Assets Reconstruction Company (I) Ltd. for being impleaded as a party. The aforesaid application has been allowed by this Court on 04.09.2006 and the applicant has been impleaded as respondent No.2.

13. We have heard the Counsel for the parties. Dr. Rajiv Dhawan and Mr. Dinesh Dwivedi, Senior Advocates made the submissions on behalf of the appellant. Dr. Dhawan submits

that in the aforesaid judgment the High Court has held that:

i. *the petitioner had a right to be granted sales tax exemption under 1995 Industrial Policy;*

ii *the decision of 6 January 2001 denying such exemption was arbitrary (which was challenged but alleged not to be on record);*

iii. *the decision of 5 March 2001 was wrong, even though not on record and not challenged.*

14. According to Dr. Dhawan the High Court has wrongly quashed the order dated 06.01.2001 on the basis that it was an arbitrary somersault after 05.12.2000. This conclusion is erroneous as the aforesaid order had given four cogent reasons in support of the decisions which have been duly noticed by the High Court. The aforesaid reasons could not be said to be extraneous to the decision dated 06.01.2001. Thereafter, it is submitted that the relevant rule/clauses 22 and 24 were wrongly interpreted because it stated "*Clause 22.2 of the policy would come into force after a notification under Clause 24 is issued.*" The High Court has wrongly held that the precondition of revival under Clause 22 came into effect after

the final decision under Clause 24. According to the learned senior counsel the High Court failed to notice that clause 22.2 was about revival of the Company and not just granting Sales Tax exemptions. Furthermore, Clause 22.3 barred exemption/deferment to be given to such sick and closed industrial units which have once availed of such facilities in the past. This Company has availed the deferment in the past and had not paid the sums due. It is then emphasized that Clause 24 was a monitoring Clause, but the time period of one month was simply a target. Therefore, it was neither mandatory nor directory.

15. Learned Senior counsel then submitted that the High Court has wrongly based its decision on ***Mangalore Chemical and Fertilizer Ltd. Vs. Deputy Commissioner of Commercial Taxes and others,*** *(1992) Suppl.1 SCC 21*. According to Dr. Dhawan, this case would be inapplicable because in fact, in that case, prior permission had already been granted. He further submitted that the High Court wrongly ignored the significance of the Chief Ministers' Conference although the High Court notices the Conferences

of the Chief Ministers, it failed to give sufficient importance to this national public policy aspect emanating from the Conferences between the Chief Ministers of all States and the Union Government. Dr. Dhawan further submitted that the High Court has wrongly assumed that there was any allurement offered to the Company. In fact the High Court did not properly apply the doctrine of 'Promissory Estoppel'. At best the High Court only found a case of possible intention on the part of the State to grant exemption to the Company during the limited period from 5th December, 2000 to 6th January, 2001. Yet the High Court issued a writ in the nature of Mandamus directing the State to issue the exemption notification.

16. In support of his submissions, learned senior counsel has made detailed reference to the facts and the documents on record. According to him, the facts in this case are not such as to give rise to a cause of action, relying on the doctrine of 'promissory estoppel'. There is no material on the record to show that any unequivocal promise was made to the Company and it had acted on such a promise. All the meetings were

only exploratory in nature. In any event, no mandamus could have been issued after the Scheme had lapsed and no default by the appellant-State has been established. According to the learned senior counsel, the impugned judgement of the High Court is wrong in law, in respect of the rules, orders of the State and the Scheme of the Industrial Policy. It is also wrong on facts.

17. Learned Senior counsel relied on number of judgments in support of the submissions ***Central London Property Trust, Ltd. Vs. High Trees House, Ltd. (1956) 1 AII ER 256; Kasinka Trading vs. Union of India (1995) 1 SCC 274; STO vs. Shree Durga Oil Mills (1998) 1 SCC 572; Bakul Cashew Co. vs. STO (1986) 2 SCC 365; Sharma Transport vs. Govt. of AP (2002) 2 SCC 188; Bannari Amma Sugars Ltd. Vs. Commercial Tax Officer (2005) 1 SCC 625 at 637; Shri Bakul Oil Industries vs. State of Gujarat (1987) 1 SCC 31; Motilal Padampat Sugar Mills Co. Ltd. Vs. State of UP (1979) 2 SCC 409; DCM Ltd. Vs. Union of India (1996) 5 SCC 468; Shrijee Sales Corpn. Vs. Union of India***

(1997) 3 SCC 398; Pawan Alloys & Castings (P) Ltd. UP SEB (1997) 7 SCC 251.

18. Mr. Dinesh Dwivedi, Senior Advocate submitted that there are two categories of cases, where incentive is given (i) to set up or start an industry;(ii) benefits to improve the industry. The incentive in the second category can be withdrawn as it is only an enabling provision. In such circumstances, the Executive is permitted to resile. Referring to the detailed provisions of the 1995 Policy, he submitted that Clause 16(1) and 16(2) relate to new unit. 16(3) relates to units undertaking expunction/diversification. Clause 22.1 relates to industrial sickness in SSI sector. Clause 22.2 deals with sickness in large and medium scale sector. According to him, under this Clause nothing definite is promised. It permits the Committee to recommend concessions and facilities for revival of the sick units to the State-level Empowered Committee (SLEC). Therefore, any recommendations made by this Committee cannot be said to be assurances capable of attracting the doctrine of 'promissory estoppel'. According to the learned Senior Counsel the entire matter is covered against the

Company by the judgment of this Court in ***M.P. Mathur vs. DTC (2006) 13 SCC 706.*** Learned Senior Counsel also relied on Kasinka Trading (supra) in support of his submission that clear foundation has to be laid of the assurance that was given. It is further submitted that the claim of the Company cannot possibly succeed by invoking the doctrine of 'promissory estoppel' as the Company has not altered its position by relying on the assurances given by the appellant-State. Learned counsel then submitted that the Company has misunderstood the meaning of exemption. They are under the impression that they can collect tax and not pay to the Government. That according to the learned Senior Counsel is not correct. Exemption simply means that no tax shall be chargeable on goods. In the affidavit filed in reply to IA No.3, it is admitted by the Company that the tax collected has not been deposited. Therefore, the Company is in contempt of the interim orders passed by this Court. The Company is liable to refund the amount of Rs.60 crores to the Government.

19. Learned Senior counsel submitted that no relief can be granted to the Company as it had taken advantage of the

interim order without complying with the preconditions of the order. In support of this, he relied upon ***Prestige Lights Ltd. Vs. State Bank of India, (2007) 8 SCC 449***. It is submitted that a direction ought to be issued to the Company to refund the amount of tax collected. He relied on ***Amrit Banaspati Co. Ltd and another vs. State of Punjab (1992) 2 SCC 411.*** Mr. Dwivedi, thereafter, submitted that the Policy of granting exemption had lapsed on 31st August, 2000. Therefore, no exemption notification could have been issued thereafter. He further submits that Industrial Policy, 1995 was only a temporary scheme, therefore, no benefit could be given after expiry. He relied on ***State of UP and another vs. Dinkar Sinha, (2007) 10 SCC 548; M/s. Velji Lakhamsi and Co. and others vs. M/s. Benett Coleman and Co. and others (1977) 3 SCC 160; District Mining Officer and others vs. Tata Iron and Steel Co. and another (2001) 7 SCC 358.***

20. Mr. Ravi Shankar Prashad, Senior Advocate appearing for the respondent No.1 submitted that the Company is only the large scale industry left in the State of Bihar. In the 1990s, the cement industry was in a bad state, as the expectations of

the Government of increase in demand did not fructify. The Company is a viable unit. It has been made sick by the inaction of the Government. He further submitted that the exemption has been duly recommended by the Committee under Clause 22.2(i). It cannot be denied the benefit on the basis of Clause 22(3). At the time when earlier benefits were given the Company was not sick. It would be entitled to the benefit in view of Clause 22(1)(vi). According to the learned Senior counsel, the Company has gone into a whirlpool as the rehabilitation package has not been given as the Government has not issued the exemption notification under Clause 24 of the Industrial Policy, 1995. Relying on the facts and figures on the record, it is submitted that the Company would be able to clear its liability within a short period. He further submitted that the doctrine of 'promissory estoppel' is fully applicable in the facts of this case. The unequivocal representation is contained in the Industrial Policy, 1995. This representation is further reinforced in the documents which have been relied upon by the Company. According to him, the eligibility of the Company for exemption is not

doubted. In the proceedings before the High Court, the appellants had filed an affidavit admitting that the draft notification has been prepared and it is only to be gazetted. This affidavit was filed after the expiry of the Industrial Policy, 1995. Therefore, it cannot now be submitted by the appellant that no exemption could be granted since the Policy had lapsed. Learned senior counsel further submitted that for three years the State Government had issued assurances that the notification would be duly issued. The financial institutions had also approved the rehabilitation package, in principal, provided the State Government granted the necessary Sales Tax exemption. It is, therefore, not open to the appellant to submit that the Government can now resile from the promise. According to him, that the justification with regard to the discontinuation of the Sales tax related concessions/exemptions consequent upon introduction of the VAT regime is without any basis. These incentives are continuing even under the Industrial Policy, 2003 and 2006. It was for these reasons that the High Court set aside the decisions dated 06.01.2001 and 05.03.2001. Mr. Prasad

further submits that by now it is settled that promissory estoppel gives a cause of action and also preserves a right. The action of the appellants in passing the impugned orders is arbitrary and whimsical. It cannot be supported on any of the four reasons mentioned in the Order dated 06.01.2001. In support of its submissions, the Learned Senior counsel relied on **Mangalore Fertilizer** (supra), ***Union of India and Others vs. Godfrey Philips India Ltd. (1985) 4 SCC 369; State of Punjab vs. Nestle India Ltd. and another (2004) 6 SCC 465; Southern Petrochemical Industries Co. Ltd. vs. Electricity Inspector & ETIO and others (2007) 5 SCC 447; MRF Ltd., Kottayam vs. Asstt. Commissioner (Assessment) Sales Tax and others (2006) 8 SCC 702; Amrit Banaspati (supra).*** Relying on the aforesaid judgments, it is submitted that the High Court has estopped the appellant State Government from hiding behind the technicality and deny the Sales Tax exemption to respondent No.1 under the Industrial Policy, 1995. It is further submitted that during the pendency of appeal before this Court the Company had submitted a modified package to the State

Government in October, 2006. This was rejected by the Government vide order dated 12th March, 2007, the proposal was rejected only on the ground that the Company has huge liability amounting to Rs.314.12 crores. According to Mr. Ranjit Singh, the aforesaid figure is not a correct present figure of the financial status of the Company making detailed figures to certain facts and figures. He further submitted that the total amount due from the Company is Rs.46.81 crores out of which it is eligible to a relief of Rs.30.04 crores under notification No.24 dated 27.07.2006. The Company is, therefore, viable. The modified package has been arbitrary rejected by the appellants.

21. Mr. Ranjit Singh appearing for respondent NO.2 submits that under the SARFAESI Act, the secured creditor Assets Reconstruction Company (I) Ltd.- respondent No.2 is now the lender instead of the financial institution. Aim of respondent No.2 is to revive the Company by reconstruction. It was submitted that the Company is a 'sick company' registered with the BIFR under the Sick Industrial Companies (Special Provisions) Act, 1985 and undergoing a process of

restructuring. The Company's proposal for financial assistance and restructuring was earlier approved by the financial institutions, namely, IFCI IDBI, ICICI and IIBI in the year 1998 subject to the condition of grant of Sales Tax exemption for a period of 5 years in terms of the Industrial Policy, 1995 of the Government of State of Bihar. Respondent No.2 is a Securitization and Reconstruction Company established under Section 3 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 with the mandate to assist the Banks and financial institutions in reducing Non-Performing Assets (NPA) by adopting method for recovery or reconstruction. As such it has been assigned the loan outstandings of a number of financial institutions noted above. Now it is a secured creditor to the extent of approximately 94.2% of the total secured debt of the Company. Therefore, respondent No.2 being an assignee of the outstanding is committed to the rehabilitation and revival of the Company. The Company has already filed a Scheme of Arrangement under Section 391 of the Companies Act, 1956

for revival of the Company. The Scheme has the support of respondent No.2. However, the Scheme is pending approval as it is based on certain relief and concessions to be granted to the Company by the State Government. One such concession is the Sales Tax exemption to be given by the State Government. The claim made by the Company with regard to being one of the most modernized and efficient cement plants is reiterated. It is further stated that the plant has a capacity of about 10 lac tonnes per annum at Rohtas District of the State. It is further pointed that the main reason for the sickness of the Company has been the industry and region specific externalities. It is submitted that the viability studies conducted by the specialized agencies have confirmed the Company's viability and ability to convert its Net-Worth into positive and repay back Government due another term loan within 8 to 10 years. It is further submitted that any change in the Sales Tax exemption would adversely affect the implementation of the proposed Scheme. However, the modified revival package which was given to the Government has been arbitrarily rejected.

22. We have considered the submissions made by the learned counsel for the parties.

23. We have considered the detailed facts and relevant documents which are on the record. However, in our opinion, before we consider the submissions made on the factual situation of this case, it would be appropriate to consider the primary issue as to whether the Company could have invoked the principle of 'promissory estoppel' in support of its claim.

24. It is well-known that the doctrine of promissory estoppel has been recognized and enforced in the Courts in England for a considerable period of time. The principle of 'promissory estoppel' was stated by Denning, J in the oft-quoted judgment in ***Central London Property Trust Ltd. v. High Trees House, Ltd. 1956) 1 All ER 256.*** In this matter the landlords had let a new block of flats in 1957 to the tenants on a 90-99 lease at a ground rent of ₤2500 (Pound Sterling). However, in view of war time conditions and without consideration, as a result of discussions, an arrangement was made between the parties to reduce the ground rent to ₤1,250 for the years 1941, 1942, 1943 and 1944 the tenants paid the

reduced rent. At the end of the war in September, 1945, the landlord, however, claimed that the original ground rent reserved under the lease had to be paid. The landlord also claimed arrears for the years when the reduced rent was paid in the sum of €7916. No payment was received. The landlord, therefore, brought an action to test the proposition of law. The Court notices the plea of the tenant as follows -*"The tenants said first that the reduction of €1,250 was to apply throughout the term of ninety-nine years, and that the reduced rent was payable during the whole of that time. Alternatively, they said that was payable up to Sept.24, 1945, when the increased rent would start."* Upon consideration of the entire issue, it is observed by Denning, J as follows:-

> "*If I consider this matter without regard to recent developments in the law there is no doubt that the whole claim must succeed……."*
>
> *"As to estoppel, this representation with reference to reducing the rent was not a representation of existing fact, which is the essence of common law estoppel; it was a representation in effect as to the future – a representation that the rent would not be enforced at the full rate but only at the reduced rate…….. "So at common law it seems to me there would be no answer to the whole claim. "*

> *"What, then, is the position in view of developments in the law in recent years? The law has not been standing still even since Jorden v. Money (1854) (5 HL Cas. 185). There has been a series of decisions over the last fifty years which, although said to be cases of estoppel, are not really such. They are cases or promises which were intended to create legal relations and which, in the knowledge of the person making the promise, were going to be acted on by the party to whom the promise was made, and have been so acted on. In such cases the Courts have said these promises must be honoured."*
> *"I am satisfied that the promise was understood by all parties only to apply in the conditions prevailing at the time of the flats partially let, and the promise did not extend any further than that."*

25. The doctrine of promissory estoppel as developed in the administrative law of this country has been eloquently explained in ***Kasinka Trading v. Union of India (1995) 1 SCC 274*** by Dr. A.S. Anand, J, in the following words:-

> ***"11****. The doctrine of promissory estoppel or equitable estoppel is well established in the administrative law of the country. To put it simply, the doctrine represents a principle evolved by equity to avoid injustice. The basis of the doctrine is that where any party has by his word or conduct made to the other party an unequivocal promise or representation by word or conduct, which is intended to create legal*

relations or effect a legal relationship to arise in the future, knowing as well as intending that the representation, assurance or the promise would be acted upon by the other party to whom it has been made and has in fact been so acted upon by the other party, the promise, assurance or representation should be binding on the party making it and that party should not be permitted to go back upon it, if it would be inequitable to allow him to do so, having regard to the dealings, which have taken place or are intended to take place between the parties."

"***12.*** *It has been settled by this Court that the doctrine of promissory estoppel is applicable against the Government also particularly where it is necessary to prevent fraud or manifest injustice. The doctrine, however, cannot be pressed into aid to compel the Government or the public authority "to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make". There is preponderance of judicial opinion that to invoke the doctrine of promissory estoppel clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and that bald expressions, without any supporting material, to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press into aid the doctrine. In our opinion, the doctrine of promissory estoppel cannot be invoked in the abstract and the courts are bound to consider all aspects including the results sought to be achieved and*

> *the public good at large, because while considering the applicability of the doctrine, the courts have to do equity and the fundamental principles of equity must for ever be present to the mind of the court, while considering the applicability of the doctrine. The doctrine must yield when the equity so demands if it can be shown having regard to the facts and circumstances of the case that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation."*

26. In our opinion, the aforesaid statement of law covers the submissions of Dr. Dhawan and Mr. Dwivedi that in order to invoke the aforesaid doctrine, it must be established that (a) that a party must make an unequivocal promise or representation by word or conduct to the other party (b) the representation was intended to create legal relations or affect the legal relationship, to arise in the future (c) a clear foundation has to be laid in the petition, with supporting documents (d) it has to be shown that the party invoking the doctrine has altered its position relying on the promise (e) it is possible for the Government to resile from its promise when public interest would be prejudiced if the Government were required to carry out the promise (f) the Court will not apply

the doctrine in abstract. However, since the judgments have been cited, we may notice the law laid down therein.

27. In ***STO vs. Durga Oil Mills (1998) 1 SCC 572*** it was held that "Moreover, as it has been noted earlier that the IPR itself had not granted any exemption but had indicated that orders will be issued by various departments for granting the exemptions. The exemption order under Sales Tax could only be issued under Section 6 which could be amended or withdrawn altogether. This is expressly provided by Section 6. If the respondent acted on the basis of a notification issued under Section 6 it should have known that such notification was liable to be amended or rescinded at any point of time, if the Government felt that it was necessary to do so in public interest."

28. In ***Bakul Cashew Co. v. STO (1986) 2 SCC 365*** "In cases of this nature the evidence of representation should be clear and unambiguous. It "must be certain to every intent". The statements that are made by ministers at such meetings, such as, "let us see", "we shall consider the question of granting of exemption sympathetically", "we shall get the

matter examined," "you have a good case for exemption" etc. even if true, cannot form the basis for a plea of estoppel."

29. In ***Sharma Transport v. Govt. of AP (2002) 2 SCC 188*** it is observed that "*There is preponderance of judicial opinion that to invoke the doctrine of promissory estoppel, clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and that bald expressions, without any supporting material, to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press into aid the doctrine."*

30. In ***Shri Bakul Oil Industries vs. State of Gujarat,*** this Court held that "*Viewed from another perspective, it may be noticed that the State Government was under no obligation to grant exemption from sales tax. The appellants could not, therefore, have insisted on the State Government granting exemption to them from payment of sales tax. What consequently follows is that the exemption granted by the Government was only by way of concession. Once this position emerges it goes without saying that a concession can be*

withdrawn at any time and no time limit can be insisted upon before the concession is withdrawn. The notifications of the Government clearly manifest that the State Government had earlier granted the exemption only by way of concession and subsequently by means of revised notification issued on July 17, 1971, the concession had been withdrawn. As the State Government was under no obligation, in any manner known to law, to grant exemption it was fully within its powers to revoke the exemption by means of a subsequent notification. This is an additional factor militating against the contentions of the appellants."

31. In ***Motilal Padampat Sugar Mills Co. Ltd. vs. State of UP (1979) 2 SCC 409***, it is held that "*we do not think it is necessary, in order to attract the applicability of the doctrine of promissory estoppel, that the promisee, acting in reliance on the promise, should suffer any detriment. What is necessary is only that the promisee should have altered his position in reliance on the promise…"*

"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 an equity in favour of the promisee and enforce the promise against the Govenrment. 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 alter 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."

In the same paragraph it is further observed that:-

> "24……*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 appraisement 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 what precisely is the changed policy and also its reason and justification so that the Court can judge for 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 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 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*"

32. It is further held that "*Lastly, a proper reading of the observation of the Court clearly shows that what the Court intended to say was that where the Government owes a duty to the public to act differently, promissory estoppel cannot be invoked to prevent the Government from doing so. This proposition is unexceptionable, because where the Government owes a duty to the public to act in a particular manner, and here obviously duty means a course of conduct enjoined by law, the doctrine of promissory estoppel cannot be invoked for preventing the Government from acting in discharge of its duty under the law. This doctrine of promissory estoppel cannot be applied in teeth of an obligation or liability imposed by law.*"

33. In ***DCM Ltd. vs. Union of India (1996) 5 SCC 468***, this Court reiterated that "*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 inter-position 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 find a cause of action. This doctrine is applicable against the Government in the exercise of its governmental public or executive functions and the doctrine of executive necessity or freedom of future executive action, cannot be invoked to defeat the applicability of this doctrine. It is further well established that the doctrine of promissory estoppel must yield when the equity so requires. If it can be shown by the Government or public authority that having regard to the facts as they have transpired, it 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."

34. In ***Shrijee Sales Corpn. Vs. Union of India (1997) 3 SCC 398*** it was held that *"It is not necessary for us to go into a historical analysis of the case – law relating to promissory estoppel against the Government. Suffice it to say that the principle of promissory estoppel is applicable against the Government but in case there is a supervening public equity, the Government would be allowed to change its stand; it would then be able to withdraw from representation made by it which induced persons to take certain steps which may have gone adverse to the interest of such persons on account of such withdrawal. However, the Court must satisfy itself that such a public interest exits."*

35. In ***Pawan Alloys & Casting (P) Ltd. v. UP SEB (1997) 7 SCC 251*** it is held that *"(31). The appellants will not be able to enforce the equity by way of promissory estoppel against the Board if it is shown by the Board that public interest required it to withdraw this incentive rebate even prior to the expiry of three years as available to the appellants concerned. It has*

also to be held that even if such withdrawal of development rebate prior to three years is not based on any overriding public interest, if it is shown that by such premature withdrawal the appellant-promisees would be restored to status quo ante and would be placed in the same position in which they were prior to the grant of such rebate by earlier notifications the appellants would not be entitled to succeed."

36. In ***Shreeji Sales Corpn.(supra)*** it is also held that "*However, in the present case, there is a supervening public interest and hence it should not be mandatory for the Government to give a notice before withdrawing the exemption."*

37. In ***Bannari Amman Sugars Ltd. vs. Commercial Tax Officer (2005) 1 SCC 625*** it is observed that *"We find no substance in the plea that before a policy decision is taken to amend or alter the promise indicated in any particular notification, the beneficiary was to be granted an opportunity of hearing. Such a plea is clearly unsustainable. While taking policy decision, the Government is not required to hear the persons who have been granted the benefit which is sought to be withdrawn."*

38. In ***Rom Industries Ltd. vs. State of J&K*** *(2005) 7 SCC 348,* this Court held that *"We are not prepared to hold that the government policy by itself could give rise to any promissory estoppel in favour of the appellants against the respondents since the policy itself made it absolutely clear that if would come into effect only on appropriate notification being issued. The notification was issued in exercise of the admitted powers of the State Government under the State General Sales Tax Act. The State Government having power and competent to grant the exemption was equally empowered to withdraw it. As we have also noticed there was nothing either in the notification or in the policy which provided that the Negative List would not be amended or altered. On the contrary clause (vii) of para 7 to GO No.10 of 1995 expressly reserved the Government's right to amend the Negative List. The right if any of the appellants was a precarious one and could not found a claim for promissory estoppel."*

39. Both the learned Senior counsel had also emphasized that there is a distinction between cases (a) where a policy automatically applies subject to eligibility [e.g. Pawan alloys

(supra)] (b) where the idea was to allure people and all persons who set up industries were entitled to an exemption; and (c) where the exemption would apply only after a considered decision is taken to consider eligibility and worthiness [e.g. Rom Industries (supra)].

40. According to the learned Senior counsel there is also a distinction between cases where (a) an exemption is granted but taken away prematurely [e.g. Pawan Alloys (supra)]; (b) an exemption is to be given after due consideration. Thus, in the present appeal, the promise would be considered to be made only when a decision is actually made by the empowered authority after being satisfied that the revival of the Company was possible.

41. The learned Senior counsel also placed reliance on Sharma Transport (supra) wherein it was held that "*It is equally settled law that the promissory estoppel cannot be used to compel the Government or public authority to carry out a representation or promise which is prohibited by law or which was devoid of the authority or power of the officer of the Government or the public authority to make.*"

42. Learned Senior counsel also relied on the decision in ***State of Jharkhand vs. Ambay Cements (2005) 1 SCC 368,*** in support of his submission where promissory estoppel applies only where a person is eligible consistent with the purpose for which the policy was made. In that case, it was held that *"In our view, the conditions prescribed by the authorities for grant of exemption are mandatory for availing the exemption and the High Court exercising jurisdiction under Article 226 of the Constitution cannot direct the grant of exemption in favour of the respondent overlooking the statutory conditions prescribed for such grant and that too in the absence of any challenge to the validity of such conditions."*

43. In addition Mr. Dwivedi, learned Senior counsel relied on a number of other decisions which we may notice.

44. In ***M.P. Mathur*** (supra), wherein this Court reiterated that in order to invoke the doctrine of promissory estoppel clear, sound and positive foundation must be made in the petition itself by the party invoking the doctrine and bald expressions without any supporting material would not be sufficient.

45. In ***Excise Commissioner vs. Ram Kumar (1976) 3 SCC***

540 this Court reiterated that "*it is now well settled by a catena of decisions that there can be no question of estoppel against the Government in the exercise of its legislative, sovereign or executive powers.*"

46. With respect to the submissions made by the learned Senior counsel on IA No.3 reliance is placed on ***Prestige Lights*** (supra), wherein this Court reiterated the principle that the Court may refuse to hear the parties on merits who has violated the directions issued by the Court. Since not hearing a party on merits is a "drastic step" it should not be taken except in grave and extraordinary situations, "*but sometimes such an action is needed in the larger interest of justice when a party obtaining interim relief intentionally and deliberately flouts such order by nor abiding by the terms and conditions on which a relief is granted by the court in his favour.*"

47. In ***Amrit Banaspati*** (supra), it is observed that "*But promissory estoppel being an extension of principle of equity, the basic purpose of which is to promote justice founded on fairness and relieve a promisee of any injustice perpetrated due to promisor's going back on its promise, is incapable of being*

enforced in a court of law if the promise which furnishes the cause of action nor the agreement, express or implied, giving rise to binding contract is statutorily prohibited or is against public policy."

"11. *Exemption from tax to encourage industrialization should not be confused with refund of tax. They are two different legal and distinct concepts. An exemption is a concession allowed to a class or individual from general burden for valid and justifiable reason."*

"12. But refund of tax is made in consequence of excess payment of it or its realization illegally or contrary to the provisions of law. A provision or agreement to refund tax due to realize in accordance with law cannot be comprehended. No law can be made to refund tax to a manufacturer realized under a statute. It would be invalid and ultra vires."

48. In the case of ***Dinakar Sinha*** (supra), this Court observed that "*31. The 1973 Rules was a temporary statute. It died its natural death on expiry thereof. The 1980 Rules does not contain any repeal and saving clause. The provisions of the relevant provisions of the General Clauses Act will, thus, have*

no application. Once a statute expires by efflux of time, the question of giving effect to a right arising thereunder may nor arise…."

49. In ***M/s. Bennett Coleman*** (supra), this Court held that *"This pivotal point canvassed by the learned Counsel for the appellants though it looks attractive at first sight cannot stand a close scrutiny. It is true that the offences committed against a temporary statute have, as a general rule, to be prosecuted and punished before the statute expires and in the absence of a special provision to the contrary, the criminal proceedings which are being taken against a person under the temporary statute will ipso facto terminate as soon as the statute expires. But the analogy of criminal proceedings or physical constraint cannot, in our opinion, be extended to rights and liabilities of the kind with which we are concerned here for it is equally well settled that transactions which are concluded and completed under the temporary statute while the same was in force often endure and continue in being despite the expiry of the statute and so do the rights or obligations acquired or incurred thereunder*

depending upon the provisions of the statute and nature and character of the rights and liabilities."

50. In ***District Mining Officer*** (supra), this Court observed that "*A statute can be said to be either perpetual or temporary. It is perpetual when no time is fixed for its duration and such a statute remains in force until its repeal, which may be express or implied. But a statute is temporary when its duration is only for a specified time and such a statute expires on the expiry of the specified time, unless it is repealed earlier. The relevant provisions of the different State laws relating to cesses or taxes on minerals having been deemed to have been enacted by Parliament and having been deemed to have been enacted by Parliament and having been deemed to have remained in force up to the 4th day of April, 1991 under the Validation Act, those laws relating to cesses or taxes on minerals must be held to be temporary statutes in the eye of law. Necessarily, therefore, its life expired and it would be difficult to conceive that notwithstanding the expiry of the law itself, the collecting machinery under the law could be operated upon for making the collection of the cess or tax collectable upto*

4.4.1991. Admittedly, to a temporary statute, the provisions of Section 6 of the General Clauses Act, 1897 will have no application."

51. Let us now examine the factual situation in the light of the observations made by this Court in various judgments relied upon by the learned counsel for the parties.

52. The Company applied to the State Government on 21.11.1997 for grant of sales tax exemption under the Industrial Policy, 1995. Even though the Company was entitled under the aforesaid Policy to exemption for 8 years, it made an application only for 5 years' exemption. This request of the Company was considered by the State-level Committee on Rehabilitation in a meeting held on 07.01.1998. This was attended by the senior Officers of the State Government,

representatives of the financial Institutions and the Company. It was observed as follows:-

> *"It was felt that the Company is potential sick unit and is fit for consideration for exemption from payment of Sales Tax for a period of 5 years from 1.1.1998.*
>
> *The Committee recommended that as per the provision of Industrial Policy 1995 the Sales Tax exemption on finished products can be granted to M/s. Kalyanpur Cement Ltd. for a period of five years from 1.1.1998 to 31.12.2002 to improve liquidity of the Company for its rehabilitation and sound financial position and decided to put up the case in the meeting of the High Empowered Committee under the Chairmanship of the Chief Secretary for final decision."*

53. In a meeting held on 23.01.1998 it was noticed that the Company has been provided the facility of deferment of commercial taxes on two earlier occasions. The deferred amount is being repaid even though payment of the unit is not up-to-date. It was also accepted that the benefits under the Industrial Policy, 1995 which are to be given to the new units are also to be given to sick and closed units. However, it was observed that the opinion of the Advocate General should be taken as to whether any amendment is required in the Sales

Tax rules. In an another meeting held on the same date i.e. on 12th March, 1998 the reconstruction proposal of the Company was again considered in a meeting of the High Level Authorisation Committee (HLAC) held under the Chairmanship of the Chief Secretary. In this meeting, it was noticed that the Company is running in losses. The main reason for the present position of the Company is sluggishness in the cement market. The Company had, therefore, made an application for Sales Tax exemption from 01.01.1998 to 31.12.2002 under the Industrial Policy, 1995. Upon consideration and discussion, it was decided that before exempting the Company from Sales Tax, opinion of Advocate General should be taken as to whether any amendment is required in the Bihar Finance Act. Subsequently, the Advocate General opined that no amendments are required in the Bihar Finance Act, 1981 and that the exemption can be considered for a class of dealers i.e. sick units in terms of Section 7(3)(b) of that Act.

54. In an another meeting held on 12.07.1999 at IFCI Head Office, New Delhi, the representatives of the State Government

clearly stated that the Government of Bihar was committed to the revival of industry in the State in general and that of ACL in particular as it was located in one of the backward districts of Bihar and provided direct employment to over 2000 persons. With regard to the Sales Tax exemption it was stated that the legal opinion of the Advocate General, Bihar had already been obtained and the final decision of the Cabinet sub-Committee is expected within 2-3 months' time. The Indian promoters of the Company had been invited to join the meeting and were requested to respond to the observations of the participants. It was explained on behalf of the Company that although the performance of the Company was consistently above the rated capacity, it had not been able to achieve optimum level of operations mainly due to lack of adequate working capital. Since the promoters were not to bring any further funds, most of the required amount would have to be met out of the proposed funding and expected Sales Tax exemption. In the summary record of the proceedings of the Joint Meeting, it was recorded that "*there was further discussion amongst the participants and there was a general*

consensus that a restructuring package would be necessary for ensuring the revival of KCL and accordingly, KCL be advised to submit, at the earliest, a revised restructuring proposal with a cut off date of 31.12.1999……". "It was considered necessary to stipulate preconditions such as the State Government of Bihar granting the Sales Tax exemption and renewal/revalidation of the mining leases for the proposed restructuring packages, as and when sanctioned."

54. Thereafter, the representatives of the Company were invited to join the meeting held between the Government of Bihar and financial institutions on 29.10.1999. Reference was made, in this meeting, to the deliberations at the previous meeting held on 12.07.1999, when it was decided to undertake revised restructuring exercise in respect of the Company. Accordingly, a revised restructuring proposal was formulated by the Industrial Finance Corporation of India Ltd. (hereinafter referred to as 'IFCI'). In this meeting of the representative of the State Government mentioned that the legal opinion of the Advocate General Bihar has been obtained. However, decision of the Sales Tax exemption proposal had been held up due to

the Election. It was now expected to be taken up in December, 1999. The financial institutions stated that they would consider granting reliefs only after grant of Sales Tax exemptions by the State Government of Bihar.

55. Thereafter by letter dated 02.10.1999, the State Government informed the financial institutions as under:-

> "*The State Government has since decided to notify the provisions of providing Sales Tax benefits to "Sick Units" and potentially viable non-BIFR sick units in the meeting of the Economic Sub-Committee held on November 30,1999. We shall forward a copy of the notification as soon as it is gazetted…."*

56. From the above it becomes apparent that the State Government had been consistently giving assurances not only to the Company but also to the financial institutions that the necessary Sales Tax exemption notification will be issued. In our opinion the Company had laid a clear, sound and a positive foundation for invoking the doctrine of 'promissory estoppel'. Therefore, it is not possible to accept the submissions made by Dr. Dhawan and Mr. Dwivedi that no definite promises were ever made. This, however, is not the

end of the matter.

57. Even in the meeting held on 17.12.1999 under the Chairmanship of the Minister for Water Resources and Industry, Bihar the problems being faced by the Company were discussed. It was pointed out by the Industrial Development Commissioner that future of thousands of people is linked with the Company and, therefore, positive cooperation of financial institutions/bank is desirable for its rehabilitation. The Chairman of the Company was invited to apprise the meeting of the financial and other difficulties. It was accepted by the whole-time Director of IFCI, Mr. Ganguly that the financial institutions have always been supporting the Company and will support in the future. It was also stated by him that in the Industrial Policy, 1995 there is a provision of giving Sales Tax exemption for 8 years to a sick company. However, the Company had asked for the above facility only for 5 years. So far as the viability of the Company is concerned, it was stated to have already been established. After hearing all the concerned parties, the Minister mentioned that the Government of Bihar is very keen for rehabilitation of

the Company and that all possible support will be provided for implementation of the rehabilitation package prepared by financial institutions. So far as the Sales Tax relief is concerned, it was stated that "*a decision will be taken in a day or two and the notification relating therewith will be issued by 2nd week of January, 2000....".* With this assurance a consensus had emerged among the financial institutions and the Banks that if the Government implements the Industrial Policy, 1995 in its true spirit particularly on the issue relating to deferment/ exemption Sales Tax, the financial institutions and Banks will give their full cooperation. A number of very important decisions were taken in the aforesaid meeting. Decision No.4 was that "*State Government will ensure that the notification regarding Sales Tax exemption is issued by the 2nd week of January, 2000".*

58. On 25th January, 2000, the State Government informed the lead institution (IFCI) that the matter was discussed in the Cabinet Sub-Committee and draft notification was approved therein. It was further pointed out that due to ensuing Assembly Elections, it was being examined whether it was a

violation of Model Code of Conduct or not. Once it is sorted out, action will be taken in this regard. Again vide letter dated 31.03.2000, the State Government informed the IFCI that the matter was delayed due to election and the necessary notification shall be issued soon. There was another meeting held on 29.05.2000 under the Chairmanship of the Minister of Industries on problems faced by the Company. The meeting recorded as follows:-

> "*After intense discussion in the meeting, the following decisions were taken:*
>
> > *1. Under the Industrial Policy, 1995 the Commercial Tax Department shall immediately issue the matching notification to provide the facility of exemption/deferment from Sales Tax to be potentially sick and closed units.*
> >
> > *2. The Forest and Environment Deptt. Will take necessary steps immediately to take out the Limestone bearing areas from the Kaimur Wild Life Sanctuary and for grant of Mining Leases to KCL so that the Limestone availability to the Company is ensured uninterruptedly and thousands of workers working are saved from unemployment (given Forest and Environment Deptt.)"*

59. All the aforesaid material would lead to a conclusion that

the Company as well as the financial institutions were entitled to rely upon the repeated assurances given by the State Government. However, since the promised notification was not forthcoming, the Company was constrained to file the writ petition.

60. Before the High Court the Company had claimed that it was eligible to avail Sales Tax incentive for a period of 8 years under clause 22(ii) of the 1995 Policy. This incentive was necessary for the revival of the Unit. It has been found to be eligible for exemption at the highest level of the Government. The State Government had held out clear and unequivocal assurances and promises to the Company as also the financial institutions with the necessary Notification under Clause 24 of the Industrial Policy, 1995 would be issued. The assurances/promises are contained in official documents. It was, therefore, submitted that the Government cannot be permitted to resile from the representations.

61. During the course of the proceedings in the writ petition, the State Government in its supplementary affidavit dated 05.12.2000 filed on behalf of respondent No.4 (i.e. Secretary-

cum-Commissioner, Commercial Taxes Department) again categorically reiterated that "*the Hon'ble Minister, Department of Commercial Taxes has approved the proposals along with draft notification regarding extension of Sales Tax related incentives to sick industrial units……".* It had been submitted to the Chief (Finance) Minister on 18.11.2000. It shall be possible to issue necessary notification after approval of the proposal by the Chief (Finance) Minister. Having made the aforesaid statements in an affidavit before the High Court, the Government has resiled from the unequivocal representations in the decisions dated 06.01.2001 and 05.03.2001. Therefore, strong reliance was placed on clauses 22 and 24 of the 1995 Policy and the doctrine of 'promissory estoppel' in support of the plea that the action of the State Government in issuing orders dated 06.01.2001 and 05.03.2001 are wholly arbitrary and unjust.

62. In reply, it was contended that the decision dated 06.01.2001 had been taken for the four reasons stated earlier. It was further stated that the decisions taken in the meeting of the Cabinet held on 05.03.2001 was upon thoughtful and due

consideration of all the relevant factors. Taking into consideration the totality of the circumstance, a policy decisions had been taken that notification relating to the Sales Tax incentive be not issued. Therefore, the Company was not entitled to any relief. It was on consideration of the entire matter that the High Court concluded as follows:-

> "*When the State Government gives an assurance and undertaking, in form of a policy then in fact it allures person/industries to enter into the individual ventures, invest money on the assurances contained in the policy, would it be justified on the part of the State Government to say later on that on a second thought they were withdrawing the policy and the benefits flowing from that policy? We are unable to agree to this argument.*"

63. We are of the opinion that the aforesaid conclusion reached by the High Court is based on due consideration of the material placed before it. We see no reason to differ with the opinion expressed by the High Court. We are unable to accept the submissions made by Dr. Dhawan and Mr. Dwivedi that no clear-cut assurances were held out to the Company. We are also unable to accept the submissions of Mr. Dwivedi that the Company has failed to place on the record sufficient

material to establish that unequivocal promises and representations had been made by the appellant to the Company by word and by conduct.

64. In our opinion, the matter is squarely covered by the observations made by this Court in the ***Mangalore Chemicals*** (supra) "*There is, as set out earlier, no dispute that the appellant was entitled to the benefit of the Notification dated June 30, 1969. There is also no dispute that the refunds were eligible to be adjusted against sales tax payable for respective years. The only controversy is whether the appellant, not having actually secured the "prior permission" would be entitled to adjustment having regard to the words of the Notification of August 11, 1975, that "until permission of renewal is granted by the Deputy Commissioner of Commercial Taxes, the new industry should not be allowed to adjust the refunds". The contention virtually means this: "No doubt you were eligible and entitled to make the adjustments. There was also no impediment in law to grant you such permission. But see language of clause 5. Since we did not give you the permission you cannot be permitted to adjust." Is this the effect*

of the law?

"10. The sales tax already paid by the appellant on the raw materials procured by it is the subject matter of the refunds. The sales tax against which the refund is sought to be adjusted is the sales tax payable by appellant on the sales of goods manufactured by it. If the contention of the Revenue is correct, the position is that while the appellant is entitled to the refund it cannot, however, adjust the same against current dues of the particular year but should pay the tax working out its refunds separately. The situation may well have been such but the snag comes here. If the adjustments made by the appellant in its monthly statements are disallowed, the sales tax payable would be deemed to be in default and would attract a penalty ranging from 1 1/2 per cent to 2 1/2 per cent per month from the date it fell due. That penalty, in the facts of this case, would be very much more than the amounts of refund."

"11. What emerges from the undisputed facts is that appellant was entitled to the benefit of these adjustments in the

respective years. It had done and carried out all that was necessary for it to do and carry out in that behalf. The grant of permission remained pending on account of certain outstanding inter-departmental issues as to which of the departments — the Department of Sales Tax or the Department of Industries — should absorb the financial impact of these concessions. Correspondence indicates that on account of these questions, internal to administration, the request for permission to adjust was not processed."

"22……There is no dispute that appellant had satisfied these conditions. Yet the permission was withheld — not for any valid and substantial reason but owing to certain extraneous things concerning some inter-departmental issues. Appellant had nothing to do with those issues. Appellant is now told, "We are sorry. We should have given you the permission. But now that the period is over, nothing can be done". The answer to this is in the words of Lord Denning:[4] *"Now I know that a public authority cannot be estopped from doing its public duty, but I do think it can be*

estopped from relying on a technicality and this is a technicality".

23. *Francis Bennion in his Statutory Interpretation, (1984 edn.) says at page 683:*

"Unnecessary technicality: Modern courts seek to cut down technicalities attendant upon a statutory procedure where these cannot be shown to be necessary to the fulfillment of the purposes of the legislation."

65. The law with regard to the applicability of the doctrine of promissory estoppel was again comprehensively considered by this Court in the case of ***Nestle India*** (supra). Ruma Pal, J. speaking for the Bench observed as follows:-

"24. But first a recapitulation of the law on the subject of promissory estoppel. The foundation of the doctrine was laid in the decision of Chandrasekhara Aiyar, J. in Collector of Bombay v. Municipal Corpn. of the City of Bombay……"
"…….Chandrasekhara Aiyar, J. concurred with the conclusion of Das, J. but based his reasoning on the fact that by the resolution, representations had been made to the Corporation by the Government and the accident that the grant was invalid did not wipe out the existence of the representation nor the

fact that it was acted upon by the Corporation. What has since been recognised as a signal exposition of the principles of promissory estoppel, Chandrasekhara Aiyar, J. said: (AIR p. 476, paras 21 & 22)

"The invalidity of the grant does not lead to the obliteration of the representation.

Can the Government be now allowed to go back on the representation, and, if we do so, would it not amount to our countenancing the perpetration of what can be compendiously described as legal fraud which a court of equity must prevent being committed. If the resolution can be read as meaning that the grant was of rent-free land, the case would come strictly within the doctrine of estoppel enunciated in Section 115 of the Evidence Act. But even otherwise, that is, if there was merely the holding out of a promise that no rent will be charged in the future, the Government must be deemed in the circumstances of this case to have bound themselves to fulfil it. … Courts must do justice by the promotion of honesty and good faith, as far as it lies in their power."

***"25.** In other words, promissory estoppel long recognised as a legitimate defence in equity was held to found a cause of action against the Government, even when, and this needs to be emphasised, the representation sought to be enforced was legally invalid in the sense that it was made in a manner which was not in conformity with the procedure prescribed by statute."*

***"26.** This principle was built upon in Union of India v. Anglo Afghan Agencies where it was said (SCR at p. 385): (AIR p 728, para 23)*

"23. Under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an ex parte appraisement of the circumstances in which the obligation has arisen."

xxxx xxxx xxxx xxxx

"44. Of course, the Government cannot rely on a representation made without complying with the procedure prescribed by the relevant statute, but a citizen may and can compel the Government to do so if the factors necessary for founding a plea of promissory estoppel are established. Such a proposition would not "fall foul of our constitutional scheme and public interest". On the other hand, as was observed in Motilal Padampat Sugar Mills case and approved in the subsequent decisions: (SCC p. 442, para 24)

"It is indeed the pride of constitutional democracy and rule of law that the Government stands on the same footing as a private individual so far as the obligation of the law is concerned: the former is equally bound as the latter. It is indeed difficult to see on what principle can a Government, committed to the rule of law, claim immunity from the doctrine of promissory estoppel."

"46. *……Nevertheless, the Court having found that the essential prerequisites for the operation of*

promissory estoppel had been established, directed the issuance of the exemption notification."

66. In ***Petrochemical*** (supra), this Court has clearly reiterated the promissory estoppel would apply where a party alters his position pursuant to or in furtherance of the promise made by a State. It is also clearly held that such a policy decision can be expressed in notifications under statutory provisions or even by executive instructions. Whenever the ingredients for invoking the principle of promissory estoppel are established, it could give rise to a cause of action. Not only may it give rise to a cause of action but would also preserve a right. The relevant observations are as under:-

"121. The doctrine of promissory estoppel would undoubtedly be applicable where an entrepreneur alters his position pursuant to or in furtherance of the promise made by a State to grant inter alia exemption from payment of taxes or charges on the basis of the current tariff. Such a policy decision on the part of the State shall not only be expressed by reason of notifications issued under the statutory provisions but also under the executive instructions. The appellants had

undoubtedly been enjoying the benefit of (sic exemption from) payment of tax in respect of sale/consumption of electrical energy in relation to the cogenerating power plants."

"122. Unlike an ordinary estoppel, promissory estoppel gives rise to a cause of action. It indisputably creates a right. It also acts on equity. However, its application against constitutional or statutory provisions is impermissible in law."

"130. We, therefore, are of the opinion that doctrine of promissory estoppel also preserves a right. A right would be preserved when it is not expressly taken away but in fact has expressly been preserved."

67. This Court in ***MRF Ltd. Kottayam*** (supra) considered the legality of a notification withdrawing the exemption granted by an earlier notification. Relying on the representations contained in the earlier notification, MRF had altered its position. Whilst setting aside the subsequent notification withdrawing the exemptions, this Court held that the whole actions of the State including exercise of executive power has to be tested on the touchstone of Article 14 of the Constitution of India. It was held that the action of the State must be fair.

In this context we may notice the observations made in paragraph 38 and 39 of the judgment:-

> **"38.** *The principle underlying legitimate expectation which is based on Article 14 and the rule of fairness has been restated by this Court in Bannari Amman Sugars Ltd. v. CTO[21]. It was observed in paras 8 and 9: (SCC pp. 633-34)*
>
> > *"8. A person may have a 'legitimate expectation' of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. The doctrine of legitimate expectation has an important place in the developing law of judicial review. It is, however, not necessary to explore the doctrine in this case, it is enough merely to note that a legitimate expectation can provide a sufficient interest to enable one who cannot point to the existence of a substantive right to obtain the leave of the court to apply for judicial review. It is generally agreed that 'legitimate expectation' gives the applicant sufficient locus standi for judicial review and that the doctrine of legitimate expectation to be confined mostly to right of a fair hearing before a decision which results in negativing a promise or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightaway from the administrative authorities as no crystallised right as such is involved. The protection of such legitimate expectation does*

not require the fulfilment of the expectation where an overriding public interest requires otherwise. In other words, where a person's legitimate expectation is not fulfilled by taking a particular decision then the decision-maker should justify the denial of such expectation by showing some overriding public interest. (See Union of India v. Hindustan Development Corpn)

9. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for discernible reasons, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualised than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so,

does it really satisfy the test of reasonableness." (emphasis supplied)"

***"39.** MRF made a huge investment in the State of Kerala under a promise held to it that it would be granted exemption from payment of sales tax for a period of seven years…….. ".…….The action of the State cannot be permitted to operate if it is arbitrary or unreasonable. This Court in E.P. Royappa v. State of T.N observed that where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14. Equity that arises in favour of a party as a result of a representation made by the State is founded on the basic concept of "justice and fair play". The attempt to take away the said benefit of exemption with effect from 15-1-1998 and thereby deprive MRF of the benefit of exemption for more than 5 years out of a total period of 7 years, in our opinion, is highly arbitrary, unjust and unreasonable and deserves to be quashed."*

68. We are also unable to accept the submission with the decisions dated 06.01.2001 and 05.03.2001 had been taken due to the change in the national policy. This was sought to be justified by Dr. Dhawan on the basis of the Conferences of Chief Ministers/Finance Ministers. It is settled law as noticed by Bhagwati, J in ***Motilal Padampat*** (supra) that the Government cannot, claim to be exempt from liability to carry out the promise, on some indefinite and undisclosed ground of

necessity or expediency. The Government is required to place before the Court the entire material on account of which it claims to be exempt from liability. Thereafter, 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 liability. It is only when the Court is satisfied that the Court would decline to enforce the promise against the Government. However, the burden would be upon the Government to show that it would be inequitable to hold the Government bound by the promise. The Court would insist a highly rigorous standard of proof in the discharge of this burden. In the present case, the claim of the Government is based on a change in policy advocated in the Chief Ministers' Conference. These Conferences have taken place before the affidavit is filed on 05.12.2001. Therefore, the High Court concluded that the Government has not been candid in disclosure of the reasons for passing the order dated 06.01.2001. In our opinion, the aforesaid decisions with regard to the discontinuance of the Sales Tax

exemptions from 01.01.2000 could not have affected the rights of the Company under the Industrial Policy, 1995. Necessary application was made to the Government seeking exemption on 21.11.1997. For more than 3 years, the Company and the financial institutions had been assured by the Government that the notification will be issued forthwith. However, it was not issued. We are of the opinion that the action of the appellants is arbitrary and indefensible.

69. Learned Senior counsel for the appellants had also submitted that it was not necessary to issue the notification within one month as stipulated in clause 24 of the Industrial Policy, 1995. In order to appreciate the aforesaid submission, it would be necessary to make a reference to the relevant clauses of the Industrial Policy, 1995. Clause 22, 23 and 24 are as under:-

> ***"REVIVAL OF SICK UNITS.***
>
> *The continuing problems of industrial sickness is a matter of great concern for the Government. Closure of units leads to unemployment and locking up of capital deployed in such ventures. The State Government is determined to take effective*

measures and to render all possible assistance for the amelioration of this malaise.

22.1. INDUSTRIAL SICKNESS IN SSI SECTION

The State Government proposes to take the following measures for the revival of SSI units:

i. there are scores of medium and small scale units which are sick but have the potential of becoming viable. For such SSI units which are outside the purview of the Bureau of Industrial and Financial Reconstruction (BIFR), the State Government proposes to form an apex body on the lines of BIFR with Director of Industries as its Head to consider their revival.

ii. The State level apex body for rehabilitation of sick industry would be vested with adequate powers so that it can effectively implement management and financial restructuring.

iii. The sick SSI units would be identified as per guidelines given by RBI/IDBI. Appropriate packages of reliefs and concessions for such units would be approved for their rehabilitation.

iv. Sick units undergoing rehabilitation will not have to take sickness certificate every year. The approved revival package for each sick unit would indicate the period of revival.

v. The Apex Body shall monitor the progress of the revival package.

vi. A sick unit being revived would be entitled to Sales Tax exemption/deferment exemption from Minimum Guarantee etc. as determined in the revival package.

vii. The State level Apex body would besides representatives of Government Department/ Organisations/ financial institutions will also have its members one representative each of confederation of Indian Industries, Bihar Industries Association and Bihar Chamber of Commerce.

The rehabilitation package would be implemented within a fixed time frame so that the process of revival is not delayed.

22.2 SICKNESS IN LARGE AND MEDIUM SECTOR

i. A committee with Industrial Development Commissioner as its head will be constituted to evolve suitable measures for potentially viable non-BIFR sick industrial units including PSUs in the large and medium sector.

The Committee will recommend concessions and facilities including those in this policy statement if considered necessary for revival of the Unit; These recommendations would be placed before the Government through State level Empowered Committee (SLEC) already constituted under the chairmanship of Chief Secretary for final decision.

ii. Concessions and facilities identified under the Scheme of rehabilitation prepared by the Board for Industrial and Financial Reconstruction (BIFR) or by Inter-Institutional Committee of IRBI, BICICO/BSFC and Bank would be placed before the Committee headed by the Industrial Development Commissioner for consideration and recommendation to Government through SLEC for approval.

iii. Rehabilitation measures for sick but potentially viable industrial units may, inter alia, include reliefs and concessions or sacrifice from various government departments/ organizations and or additional facilities including allocation of power from BSEB/DVC and any other agency/statutory body/local authority."

22.3 Such closed and sick industrial units which have once availed of the facility of Sales Tax exemption/deferment under a rehabilitation package prepared by BIFR shall not get the same facility again if they turn sick or are closed again. This will also apply to other facilities given to such sick and closed industrial units which have once availed of such facilities in the past. However, the State Government may consider extending such facilities on case to case basis as required.

23. Definition(s) given in the Annexure form(s) part of the policy.

24. MONITORING AND REVIEW

> *All concerned departments and organizations will issue follow up notifications to give effect to the provisions of the policy within a month. This will be appropriately monitored by the Govt.*
>
> *The State Government may carry out Mid Term Review of this Policy."*

70. A perusal of the aforesaid policy clearly shows that the Government was determined to take effective measures to render all possible assistance for amelioration of the continuing problem of industrial sickness in the State. It was viewed as a matter of great concern for the Government. Under Clause 22(1), the State Government was to constitute an apex body on the lines of BIFR with Director of Industries to consider the revival of sick Medium and Small Scale Units. Clause 22(2) deals with sickness in large and medium sector. Under clause 22(2)(i), a Committee headed by the Industrial Development Commissioner was to evolve suitable measures for potentially viable non-BIFR sick industrial units. Under Clause 22(2)(ii) the Committee was to recommend concessions and facilities which were considered necessary for revival of the unit. The Company was, therefore, eligible under the

aforesaid Clause 22(2)(ii). The Industrial Policy, 1995 did not envisage sickness in its strict terms as defined under the Sick Industrial Companies (Special Provisions) Act, 1985. The policy was of a wider application and included industrial sickness not only *qua* BIFR companies but also in relation to non-BIFR potentially viable sick companies. The Clause 6 of the Annexure attached to the Policy defines a sick unit as under:-

> **"*Sick Unit*:**
>
> *Sick unit means an industrial unit declared sick by the Board of Industrial and Financial Reconstruction under the Sick Industrial Companies (Special Provision) Act, 1985 or by the Apex Body headed by the Director of Industries for SSI or the High Level Empowered Committee headed by the Chief Secretary for large and medium sector."*

71. The aforesaid definition makes it abundantly clear that the sickness of the Company could also be decided by the SLEC headed by the Chief Secretary. The exemption claim of the Company was duly considered by the Committee constituted under Clause 22.2(i). Its recommendations were

duly placed before the SLEC under Clause 22.2(ii). The recommendations were not implemented only because the Government failed to issue a notification under Clause 24 of the Industrial Policy, 1995 within the stipulated period of one month. Even if we are to accept the submissions of Dr. Dhawan and Mr. Dwivedi that the provisions contained in Clause 24 was mandatory the time of one month for issuing the notification could only have been extended for a reasonable period. It is inconceivable that it could have taken the Government 3 years to issue the follow up notification. We are of the considered opinion that failure of the appellants to issue the necessary notification within a reasonable period of the enforcement of the Industrial Policy, 1995 has rendered the decisions dated 06.01.2001 and 05.03.2001 wholly arbitrary. The appellant cannot be permitted to rely on its own lapses in implementing its policy to defeat the just and valid claim of the Company.

72. For the same reason we are unable to accept the submissions of the learned senior counsel for the appellant that no relief can be granted to the Company as the Policy has

lapsed on 31.08.2000. Accepting such a submission would be to put a premium and accord a justification to the wholly arbitrary action of the appellant, in not issuing the notification in accordance with the provisions contained in Clause 24 of the Industrial Policy, 1995. The entire sequence of meetings adverted to above would clearly indicate that rehabilitation package for the Company was considered by the financial institutions keeping in view the provisions contained in the Industrial Policy, 1995. The two Committees constituted under the aforesaid policy had duly recommended granting of exemptions. This was much before the policy lapsed on 31.08.2000.

73. The assurances given in various meetings were reiterated before the High Court in the Affidavit dated 05.12.2000. It was clearly stated that the draft notification was being prepared and being approved. It was thus obvious that the notification merely had to be published in the Official Gazette. After making the aforesaid statements in the affidavit, order dated 06.01.2001 was issued. The four reasons given in support of the decision are clearly arbitrary. It was no longer

open to the appellant not to issue the notification on the ground that the Policy had lapsed on 31.08.2000. The second reason that the exemption could not be granted to the Company as no notification had been issued under Clause 24 cannot be accepted as the appellant-State cannot be permitted to take advantage of its own wrong. The third reason given is that the State-level Empowered Committee (SLEC) had not approved the rehabilitation package. This clearly is against the record which has been examined by us in the earlier part of the judgment. Not only the exemption was recommended by the competent Committees under the Industrial Policy, 1995, emphatic assurances were given that the notification will be issued within a very short period. The fourth reason with regard to the resolution passed at the Chief Ministers' Conference is equally extraneous to the issue. The Company had made the application for exemption at a much prior time in 1997. No material has been placed either before the High Court or before this Court about the legal enforceability of the resolutions passed at the Chief Ministers' Conference. In our opinion the decision making process which culminated in

passing of the orders dated 06.01.2001 and 05.03.2001 is seriously flawed, therefore, the same have been justifiably quashed by the High Court.

74. We may now consider the submissions made in IA No.3 of 2006. On 18.11.2002, this Court passed the following order:

> "As an interim arrangement during the pendency of this appeal, with a view to protect the interests of either side, we direct the respondent to deposit an amount equivalent to the sale tax payable by it as and when it becomes due in an interest hearing account in a nationalized bank. This amount and the amount accused during the pendency of the appeal, shall not be withdrawn by other side.
>
> The amount so kept in deposit shall become payable to the party which ultimately succeeds in this appeal.
>
> The appellants are directed to issue the exemption orders and on receipt of such order, the above said amount shall be deposited. The issuance of the exemption order is without prejudice to the case of the parties in this appeal.
>
> The I.A. in the disposed of."

75. It is not in dispute for us that pursuant to the aforesaid directions the appellant has issued the Notification No. SO-

174 dated 18.10.2004 granting exemption to the company. The notification was to have effect for five years from the date of publication in the official gazette or till the disposal of special leave petition No.5181 of 2002, whichever is earlier. The notification was issued subject to the terms and conditions notice earlier in the judgment. Under the aforesaid terms and conditions, the company was to deposit the tax payable per month with an interest bearing (wrongly typed in the order as hearing) account in a nationalized bank. The company was also to provide information of the bank account to the circle where it is registered. Details regarding amount of payment made each month was also to be supplied to the appellant.

76. It is now the submission of the learned counsel for the appellant that the company has neither complied with the order passed by this Court on 18.11.2002 nor the conditions stipulated in the notification dated 16.10.2004. It is further submitted that prayers in the application were to recall the order dated 18.11.2002 and to stay the operation of a judgment under appeal dated 24.04.2002. However the

application was not finally disposed of, even though the pleadings were complete.

77. During the pendency of the proceedings there have been some further development, which will now need to be taken into consideration by the Court, to do justice between the parties.

78. During the interregnum the company has been collecting the amount equivalent to the tax from the consumers. According to Dr. Rajiv Dhawan, Mr. Dwivedi during this period the company has collected more than Rs.60 crores on the sale of cement by virtue of the directions issued by this Court in the Order dated 18.11.2002. In view of the law laid down by this Court in *Amrit Banaspati* (supra) the company cannot be permitted to retain the amount collected from the customers. This would amount unjust enrichment. Therefore, a direction is required to be issued that the amount deposited by the company with the bank pursuant to the orders of this Court be released to the appellant State. On the other hand, Mr. Parshad has submitted that the delay in issuance of the exemption Notification by the State has crippled the Company

financially. Even then the Company is trying to revive itself through financial restructuring. The survival of the Company now depends on the approval of the Financial Restructuring Package prepared by the respondent No.2. This package has been submitted to the Chief Minister of Bihar which is still on the consideration of the Government. With regard to the non-deposit of amount equivalent to the tax due, Mr. Parshad reiterated that the Company had made bona fide efforts, but was unable to deposit the amount due to its 'sickness'. On the one hand the revised rehabilitation package is kept under consideration, on the other the appellants seeks the vacation of the order dated 18.11.2002. The application, according to the learned senior counsel, deserves outright dismissal.

79. We have considered the submissions made by the learned counsel. It would be not possible to accept the submissions of Mr. Parshad that in view of the financial condition of the company it may be permitted to retain the amount collected under the orders of this Court. The amount was collected from the consumer to offset the tax liability. Such amount cannot be permitted to be retained by the

company. In *Amrit Banaspati* case (supra) it has been held that exemption and refund of tax are two different legal and distinct concepts. The objective of the exemption is to grant incentive to encourage industrialization. It is to enable the industry to compete in the market. On the other hand, refund of tax is made only when it has been realized illegally or contrary to the provisions of law. Tax lawfully levied and realized cannot be refunded. In view of the settled position of the law, we decline to accept the suggestion made by Mr. Parshad.

80. Direction is, therefore, issued that the amount deposited by the company in the designated account opened and operated pursuant to the order of this Court dated 18.11.2002 together with accrued interest shall be released to the appellant State, forthwith.

81. I.A. No.3 is therefore allowed in the aforesaid terms.

82. In view of the above, the appeal filed by the State challenging the judgment and order dated 24.4.2002 is dismissed, however, I.A. No.3 is allowed to the extent indicated above.

.....J
(TARUN CHATTERJEE)

.....J
(SURINDER SINGH NIJJAR)

NEW DELHI
JANUARY 08, 2010.