Southern Refineries Ltd. Vs State of Kerala and Others

Court: High Court Of Kerala

Date of Decision: Jan. 17, 2013

Acts Referred: Sick Industrial Companies (Special Provisions) Act, 1985 â€" Section 15, 22, 22(3), 22A, 25

Citation: (2013) 200 ECR 190 : (2013) 1 ILR (Ker) 696 : (2013) 64 VST 25

Hon'ble Judges: Pius C. Kuriakose, J; A.V. Ramakrishna Pillai, J

Bench: Division Bench

Advocate: A.K. Jayasankaran Nambiar, Sri P. Benny Thomas and Sri P. Gopinath Menon, for the Appellant; Sojan James, Special Government Pleader and Sri P. Parameswaran Nair, Assistant Solicitor General of India, for the Respondent

Final Decision: Allowed

Judgement

A.V. Ramakrishna Pillai, J.
Whether the State Government after having participated in the proceedings before the Board for Industrial and

Financial Reconstruction, for short, BIFR, can resile from giving sales tax exemption and concessional Central Sales Tax (CST) for a further

period in the light of the sickness of the appellant company and proceed to act in a manner contrary to the directions contained in the order of

BIFR without having preferred an appeal against the said order, is the short question which we are called upon to answer in this intra court appeal.

Briefly put, the appellant''s case is as follows:

The appellant company, a medium scale industrial undertaking which was set up for re-refining and repossessing of waste lubricating oil into

various grades of useful oil, fell sick due to initial problems like shortage of raw materials, ban on import of used oil, want of clearance from local

bodies, pollution control board etc. and the lowering of import duty on waste oil from 85% to 30% in February, 1994 which resulted in the back

out of other companies from their commitment to buy locally produced re-refined base stock. For the reasons aforesaid and the consequential

underutilization of capacity, the appellant company could avail only one third of the sales tax and central sales tax exemption limit of the Rs. 366.44

lakhs which was fixed as per Ext. P-1 order of the Board of Revenue, Government of Kerala.

2. BIFR, to which the company was referred u/s 15 of the Sick Industrial Companies (Special Provisions) Act, 1985, for short, the Act, after

making necessary enquiries into the matter declared the company sick vide Ext. P-2 order and placed the company under the control of the board

from the date of Ext. P-2 order. Though the scheme for revival was drawn up by the operating agency (ICICI), it could not take off and, therefore,

BIFR in its meeting held on 6-7-1999 directed the ICICI to formulate a fresh rehabilitation scheme based on the company"s revised proposal and

based on that, BIFR approved the rehabilitation scheme on 26-12-2000 vide Ext. P-3 order which, inter alia, provided for specific relief to the

company in the form of sales tax exemption and concessional Central Sales Tax (CST) under the Kerala Government Notifications No. SRO

520/1992 & 521/1992 without any ceiling. This was circulated among all concerned.

3. However, during January 2001, i.e., while the draft rehabilitation scheme was under consideration, the sales tax authorities under the State

Government raised demands against the appellant company and initiated steps for revenue recovery, besides freezing the company"s bank

accounts. As the appellant company felt that this action was in contravention of Section 22 of the Act which suggests that, where a scheme is under

preparation, consideration or implementation in a sick industrial company, no proceedings for execution or recovery of money can be initiated

against it notwithstanding anything contained in any other law except with the consent of the Board, the appellant company moved this Court by

filing O.P. No. 10157 of 2001, which was disposed of vide Ext. P-5 judgment directing the appellant company to approach the Government for

implementation of BIFR direction. In the meanwhile, the ICICI which is the operating agency submitted the draft rehabilitation scheme with

changes ordered by BIFR Bench on 28-5-2001 and accordingly, Ext. P-6 scheme was sanctioned by BIFR directing the State Government to

consider extending of sale tax exemption and concessional CST till 31-3-2006 without ceiling. By implementing the rehabilitation scheme, appellant

company was able to achieve positive net worth during 2005-2006 and accumulated losses were wiped off during the next accounting period.

4. The appellant company would allege that in view of the sales tax exemption envisaged in paragraph 39 (a) of Ext. P-6 revised scheme, the

company had not collected any sales tax on its products from 1-10-2010. However, CST was paid at concessional rate of 2% as envisaged in the

sanctioned scheme.

5. The further case of the appellant company is that taking note of reluctance on the part of the sales tax authority to extend the relief envisaged in

the sanctioned scheme, BIFR Bench vide Ext. P-7 order dated 20-6-2005 issued the following revised direction u/s 22A and 22(3) of the Act, for

compliance:

The ST Authorities, Government of Kerala, in order to ensure long-term viability of the company, would consider granting the reliefs, as envisaged

from them in Para 13.9(a), page 13 of the SS for the period commencing from 1-10-2000 to 31-3-2005 (instead of upto 31-3-2006) and would

also not raise any further demand/claim on the company for the said period. The company would, however, continue to pay the new value added

sales tax introduced by the Govt. of Kerala w.e.f. 1-4-2005 onwards.

6. While reviewing the implementation of the sanctioned scheme, BIFR Bench vide Ext. P-8 order dated 20-6-2006 reiterated that unimplemented

provisions of the sanctioned scheme and the unimplemented portions of subsequent directions issued by the Board vide Ext. P-7 would continue to

remain in full force.

7. The case of the appellant company is that though the company approached the State Government, pursuant to Ext. P-8 order with the request

for extending the exemption of KGST and concessional rate of CST till 31-3-2005 as contemplated in the order of BIFR, the State Government

by Ext. P-9 communication informed the appellant company that in view of the reduced rates of tax introduced by the Government with effect from

1-4-2005 under the KVAT Act its request for extension of exemption and concessional rate of CST could not be agreed to.

8. The appellant company took up the matter before the Ministry of Finance, Government of Kerala by submitting Ext. P-10 representation, but

without success. While so, the Tax Department issued Exts. P-11 to P-16 pre-assessment notices under the Kerala General Sales Tax (KGST)

for the years 2000-01, 2001-02, 2002-03 demanding sales tax from the appellant company, both under the KGST as well as CST without

extending the benefits of exemption under SRO 521/1992 as also the concessional rate of CST at the rate of 2%.

9. With this background the appellant company approached this Court requesting to quash Ext. P-9 order passed by the Government, as well as

Exts. P-11 to P-16 notices and also seeking for the benefit of Ext. P-6 scheme formulated by the BIFR contending that the same is binding on the

State Government. The learned Single Judge, who heard the writ petition dismissed the same by the impugned order. Hence this appeal.

10. Arguments have been heard and the impugned judgment was perused.

11. The appellant company was non suited by the learned Single Judge mainly on two grounds.

(a) Ext. P-6 scheme and the consequential orders passed by the BIFR only directs the Government to have the matter considered and there is no

positive order to provide any exemption as a matter of right and that the said direction itself is with reference to the benefit extendable under SRO

520 and 521.

(b) The question whether the claim for exemption as sought for could be granted, had come up for consideration in Prima Industries Ltd. Vs. State

of Kerala, and the same stands answered against persons like the appellant company.

12. The learned senior counsel appearing for the appellant company would argue that Ext. P-9 communication and the resultant pre-assessment

notices are illegal and arbitrary insofar as they have been issued in gross violation of the direction contained in the order of the BIFR dated 20-6-

2006 (Ext. P-7). It was argued that the State Government cannot, in the absence of an appeal against the order of the BIFR, proceed to act in a

manner contrary to the direction contained in the BIFR''s order, after having participated in the proceedings before the BIFR.

13. The learned Special Government Pleader (Taxes), per contra, would argue that the beneficiary of a concession has no legally enforceable right

against the Government to grant a concession except to enjoy the benefits of the concession during the period of its grant. In support of the

argument, the learned Special Government Pleader invited our attention to the decision of the Apex Court in State of Haryana and Others Vs.

Mahabir Vegetable Oils Pvt. Ltd., .

14. Before we proceed to examine the merit of the said argument, we would like to refer to the decision of this Court in Prima Industries Ltd. v.

State of Kerala (supra) relied on by the learned Single Judge. In that case the petitioner claimed that a benefit conferred by an SRO be extended

to the petitioner unit. The order was issued by the Government to give extension of exemption from tax to certain industrial units manufacturing

cement using fly ash. It was in tune with the policy of the Government of India to avoid environmental pollution due to the piling up of hazardous fly

ash in the country and considering the role of fly ash based industries in checking environmental pollution. As the petitioner company did not fall in

that class, their claim was negatived by the authorities and it was upheld by this Court. ''Prima Industries'' case rests on its own peculiar and

extraordinary facts and cannot possibly be considered to lay down any general rule of law.

15. Now we will examine the decision referred to by the learned Special Government Pleader. In Mahabir Vegetable Oils'' case (supra) the State

of Haryana announced an industrial policy in the year 1988 which, inter alia, brought incentive by way of sales tax exemption to industries set up in

backward areas in the State. Schedule III appended to the Rules provided for a negative list of industries and/or class of industries which were not

entitled to tax exemption. At the initial stage, solvent extraction plants were not included in the negative list. However, in the year 1996, the State

amended the rules to include solvent extraction plants also in the negative list which are not entitled to tax exemption. The request for exemption

placed by the respondent dealer, who initiated steps to establish his solvent extraction plant before the amendment, was rejected by the High Level

Screening Committee which was confirmed in writ petition by the High Court. On a further appeal before the Supreme Court, it was held that the

dealer was eligible for exemption. With regard to the quantum of exemption, the matter was remanded by the Supreme Court asking the Director

of industries for fresh adjudication. The Lower Level Screening Committee made a recommendation for grant of eligibility certificate with reference

to the investment made by the dealer prior to the date of the amendment and putting the unit in the negative list. This was confirmed by the

Appellate Authority. The matter was taken in Writ Petition before High Court which allowed the Writ Petition. On appeal by the Department to

the Supreme Court, it was held that the withdrawal of exemption ""in public interest"" is a matter of policy and the courts should not bind the

Government in its policy decision. Unfortunately, the said decision cannot be read into the present case. The reason for not interfering with the

policy of the Government by the Apex Court in that case was that it has never been the case of the dealer that the solvent extraction plant was a

non-polluting industry. Moreover, there was no allegation that the decision to put the solvent extraction plant in the negative list was actuated by

fraud or that the said decision was not bona fide.

16. During the course of argument, we had the good fortune to come across with the decision of the Apex Court in State of Punjab Vs. Nestle

India Ltd. and Another, , pointed out by Mr. Jayasankar Nambiar, the learned senior counsel appearing for the appellant company. In that case

the Highest State Authorities, including Finance Minister in the budget speech for 1996-1997 made representation to the effect that the State

Government had abolished the purchase tax on milk. The manufacturers of milk products therefore did not pay purchase tax on milk for the

assessment year 1996-1997. This fact was mentioned in their returns. These returns were entertained by the tax authorities. The said

manufacturers passed on the benefit of exemption to dairy farmers and milk producers. After the expiry of the assessment year, Government took

a decision not to abolish purchase tax on milk and the taxing authority therefore raised demands for the assessment year 1996-1997.

17. The validity of the subsequent decision was considered by the Apex Court and held that State Government cannot resile from its decision to

exempt milk and demand purchase tax. The development and growth of the doctrine of promissory estoppel in India was also traced in that case.

The appellant State contended that there could be no estoppel against the statute and the decision not to abolish purchase tax on milk had been

taken in public interest. The said contention was repelled by the Apex Court finding that the Government had not been able to establish any

overriding public interest which would make it inequitable to enforce estoppel against it. The Apex Court having found that the essential

prerequisite for the operation of the promissory estoppel had been established, dismissed the appeal preferred by the State.

18. In Mahabir Vegetable Oils'' case (supra) also the Apex Court had considered the doctrine of promissory estoppel. It was observed by the

Apex Court as under:

The doctrine of promissory estoppel is an equitable remedy and has to be moulded depending on the facts of each case and not straight-jacketed

into pigeon holes. In other words, there cannot be any hard and fast rule for applying the doctrine of promissory estoppel but the doctrine has to

evolve and expand itself so as to do justice between the parties and ensure equity between the parties, i.e., both the promiser and the promissee.

19. In the present case, the respondent State participated in the proceedings before the BIFR. Taking note of the reluctance by the sales tax

authorities to extend the relief envisaged by the sanctioned scheme, BIFR vide Ext. P-7 order issued revised directions under Sections 22A and

22B of the Act. It is relevant to note that though the Act envisages an appeal u/s 25 of the Act, the State Government did not prefer an appeal. It is

also crucial to note that in view of the sales tax exemption envisaged in paragraph (13.9A) of Ext. P-6 scheme, the company had not collected any

sales tax on its products from 1-10-2000 onwards. This has not been denied.

20. If Ext. P-9 and the consequential demand notices are allowed to stand, the same would put things out of gear and the entire efforts taken so far

by the BIFR for reviving the appellant company from sickness would terribly be watered down. The burden is heavily on the Government to

establish that it would be inequitable to hold the Government bound by the promise on account of public interest. That is the settled law. The

respondent State has been unable to establish overriding public interest, which makes it inequitable to enforce the estoppel against them. It would,

in the circumstances, be inequitable to allow the State Government to act in a manner contrary to the directions contained in Ext. P-6 scheme as

well as Exts. P-7 and P-8 orders. We, therefore, have to uphold the plea of promissory estoppel raised by the appellant company.

21. Though, it was strenuously argued by the Special Government Pleader (Taxes) that the Board as per Ext. P-6 scheme and Ext. P-7 order has

left the matter to the discretion of the State Government, we are not impressed by the said argument. What was directed by the Board as per Ext.

P-7 was that the sales tax authorities would consider the reliefs in order to ensure long term viability of the appellant company and would also not

raise any further demand (emphasis added). The discretion whatever left with the respondent Government as per Ext. P-6 scheme and Ext. P-7

had to be exercised in a reasonable manner. We have no hesitation to hold that the refusal of the State Government to exercise its discretion to

extend the benefit as envisaged by Ext. P-6 scheme and Ext. P-7 order to the appellant company was not reasonably exercised. In the result, we

allow the appeal as under:

(a) The impugned judgment is set aside.

(b) Ext. P-9 order as well as Exts. P-11 to P-16 and subsequent notices issued consequently are quashed.

(c) We direct the respondent State to reconsider the matter and pass fresh orders in the light of the observations made above and guided by the

directions in Ext. P-6 scheme as well as Exts. P-7 and P-8 orders.

Parties shall suffer their costs.