Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal Nos. 3860-3862 of 2020
(Arising out of SLP (C) Nos. 14156-14158 of 2020)

The State of Jharkhand and Ors. .... Appellants

Versus

Brahmputra Metallics Ltd., Ranchi and Anr. .... Respondents

J U D G M E N T

Dr. Dhananjaya Y. Chandrachud, J

A The appeal

B The issue

C Captive power plant : assessment to electricity duty

D Industrial Policy 2012

E Exemption from Electricity Duty

F Before the High Court

G Submissions of Counsel

H Analysis

H.I A State in breach of policy commitments

H.2 Building on **Motilal Padampat**

H.3 Promissory estoppel – origins and evolution

H.4 From estoppel to expectations

H.5 Indian Law and the doctrine of legitimate expectations

H.6 Expectations breached by the State of Jharkhand

H.7 The technical defences to the claim

I Conclusion

PART A

1 Leave granted.

A The appeal

2 This appeal arises from a judgment of the High Court of Jharkhand. While allowing a petition instituted by the respondents under Article 226 of the Constitution, the Division Bench:

(i) struck down the last paragraph of a notification dated 8 January 2015 issued by the State government in its Department of Commercial Taxes, giving prospective effect to the rebate/deduction from electricity duty offered under the Jharkhand Industrial Policy, 2012[1];

(ii) directed that the notification shall be deemed to be in effect from 1 April 2011, when the Industrial Policy 2012 was enforced with retrospective effect; and

(iii) upheld the claim of the respondent that it was entitled to a rebate/deduction from electricity duty in terms of the representation held out in the Industrial Policy 2012, and that the denial of the exemption by the State government for FYs 2011-12, 2012-13 and 2013-14 was contrary to the doctrine of *promissory estoppel*.

The State is in appeal to challenge the judgment dated 11 December 2019.

[1] "Industrial Policy 2012"

B The issue

3 The issue for determination is whether the respondent is entitled to claim a rebate or deduction of 50 per cent of the amount assessed towards electricity duty for FYs 2011-12, 2012-13 and 2013-14. The respondent claims its entitlement on the basis of the Industrial Policy 2012 (notified by the appellant on 16 June 2012) and a statutory notification dated 8 January 2015 issued under Section 9 of the Bihar Electricity Duty Act 1948[2]. The Bihar Act 1948 was adopted with effect from 15 November 2000 for the State of Jharkhand under the provisions of the Bihar Reorganization Act 2000.

[2] "the Bihar Act 1948"

C Captive power plant : assessment to electricity duty

4 The respondent was granted a certificate of commencement of commercial production on 31 May 2013. The certificate records that the integrated manufacturing unit of Sponge Iron and Mild Steel Billets, together with a captive thermal plant of 20 MW capacity set up by the respondent commenced commercial production on 17 August 2011. A certificate of registration was granted to the respondent on 22 November 2011 under Rule 4 of the Bihar (Jharkhand) Electricity Duty Rules 1949[3], according to which it was liable to pay duty for distribution and/or consumption of the energy from 1 October 2011. On the basis of the returns submitted by the respondent in Form-III, read with Rule 9 of the Bihar Rules 1949, assessment orders were passed by the assessing officer for FY 2011-12 on 9 December 2014, for FY 2012-13 on 18 December 2015 and for FY 2013-14 on 16 December 2016.

[3] "the Bihar Rules 1949"

PART D

D Industrial Policy 2012

5 The Industrial Policy 2012 was notified by the State government on 16 June 2012. Some of the salient features of the Industrial Policy 2012 need to be visited:

(i) Clause 32.10 provided an exemption from the payment of 50 per cent of the electricity duty for a period of five years, for captive power plants established for self-consumption or captive use:

> "32.10 **Incentive for captive power plant**
>
> New or existing industrial units setting up captive power plant shall be exempted from the payment of 50% of electricity duty for a period of five years for self - consumption or captive use (i.e. in respect of power being used by the plant) from the date of its commissioning".

(ii) Clause 35.7(b) envisaged that the entitlement would ensue from the financial year following the Date of Production (DoP):

> "35.7(b) Industrial units will be entitled for reimbursement / payment of subsidy / incentives under different categories only from the next financial year of DoP."

(iii) Clause 38(b) stipulated that notifications enforcing the terms of the industrial policy would be issued within a period of one month by the Departments of the State government:

> "38. **Monitoring and Review**
>
> (b) All concerned departments and organizations would issue necessary follow up notifications within a month to give effect to the provisions of this Policy. The implementation of this policy will be duly monitored by Government at the level of Chief Secretary at least once in a quarter, so that the State Government may carry out a mid - term review of this Policy."

E Exemption from Electricity Duty

6 Though the Industrial Policy 2012 which was notified on 16 June 2012 envisaged that notifications by the Departments of the State government would be issued within one month, there was a failure to comply with the time schedule. In order to give effect to the exemption from electricity duty, a notification under Section 9 of the Bihar Act 1948 was necessary. Section 9 recognizes the power of the State government to grant exemptions[4].

7 Rule 6 of the Bihar Rules 1949 casts a duty on every assessee to pay the duty which falls due within two calendar months of the month to which it relates. Rule 9 requires the submission of a return in Form-III within a period of two calendar months from the expiry of the month to which the return relates[5].

8 Since an exemption notification was not issued by the State of Jharkhand under Section 9, a writ petition was filed under Article 226 of the Constitution before the High Court of Jharkhand by a company by the name of Usha Martin Limited[6]. Eventually, the State government issued an exemption notification on 8 January 2015 but made it effective from the date on which it was issued. The exemption notification is extracted below:

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[4] "Section 9. Power of State Government to grant exemptions-
The State Government shall have power to exempt any person or class of persons notified in this behalf from the duty payable under this Act and such exemptions, may be subject to such conditions and exemptions if any, as may be mentioned in the said notification."

[5] **Rule 6**. Payment of duty. - Every assessee shall pay the full amount of the duty due from him under section 4 within two calendar months of the month to which the duty relates.
Rule 9. Submission of Returns. - Every assessee shall submit to the appropriate inspecting authority of the Circle or sub-circle as the case may be, a return in Form III, within two calendar months from the expiry of the month to which the return relates. The return shall be verified in the manner indicated therein and shall be signed by the assessee or by his authorised agent. When an assessee holds more than, one license, separate returns shall be submitted in respect of each license.

[6] WP (T) No. 6008 of 2014, decided on 3/4 February 2015.

> "S.O.67 dated 8th January, 2015 – In the light of Para 32.10 of Jharkhand Industrial Policy, 2012 and in exercise of the powers conferred by the Section 9 of the adopted Bihar Electricity Duty Act, 1948, the Governor of Jharkhand is pleased to exempt new or existing industrial units setting up captive power plant for self-consumption or captive use (in respect of power being used by the plant) from the payment of 50% of Electricity Duty from the date of the commissioning of the power plant.
>
> This notification shall be effective from the date of issue and shall remain effective till the period mentioned in the relevant provisions of the Jharkhand Industrial Policy, 2012."

9 The Industrial Policy 2012 announced an incentive in the form of a rebate or deduction on electricity duty for a period of five years from the commencement of production. If a notification under Section 9 had been issued by the State government within a month, in terms of the representation held out by the Industrial Policy 2012, the respondent would have had the benefit of almost the entire period of exemption contemplated by the policy. But since the exemption notification dated 8 January 2015 was made prospective, the respondent (and other similar units) would receive the benefit of the exemption from electricity duty for a much lesser period. Faced with this situation, the respondent instituted writ proceedings before the High Court of Jharkhand in August 2019.

F Before the High Court

10 Placing reliance on the doctrine of *promissory estoppel,* the respondent sought, in its submissions before the High Court, one of two reliefs or directions. First, the respondent claimed that the clause in the notification making it prospective should be effaced since it was contrary to the representation that was held out by the Industrial Policy 2012. Alternately, the respondent sought a

direction that it would be entitled to an exemption from electricity duty for a period of five years from the date of the issuance of the notification (the period of five years being the envisaged period under the Industrial Policy 2012).

11 The High Court accepted the first of the two courses of action noted above, placing reliance on the decisions of this Court in **State of Bihar** vs **Kalyanpur Cement Limited**[7] ("**Kalyanpur Cement Ltd.**") and **Manuelsons Hotels Private Limited** vs **State of Kerala**[8] ("**Manuelsons Hotels Pvt. Ltd.**"). These decisions are premised on the doctrine of *promissory estoppel* enunciated in **Motilal Padampat Sagar Mills Co. Ltd.** vs **State of UP**[9] ("**Motilal Padampat**"). The High Court held that a promise was made by the State government to give the benefit of an exemption of 50 per cent in electricity duty for a period of five years, for self-consumption or captive use, to all new and existing industrial units setting up captive power plants in the State of Jharkhand. The High Court observed that it was not the case of the State government that it did not intend to give the benefit to these industrial units since, as a matter of fact, it had issued a notification, though belatedly, on 8 January 2015.

12 Finding fault with the delay on the part of the government in issuing an exemption notification, the High Court held that there was no specific reason for the delay and that "but for the lethargic approach of the state authorities" the exemption should have been issued within a month of the issuance of the Industrial Policy 2012. The effect of the belated notification was to deny industrial units of the benefit of the promise held out by the State government. The High

[7] (2010) 3 SCC 274.
[8] (2016) 6 SCC 766.
[9] (1979) 2 SCC 409.

Court noted that the benefit was to be given with effect from FY 2011-12 for a period of five years which ended in FY 2015-16. Since the exemption notification was issued on 8 January 2015, the unit of the respondent and similarly placed units would receive the benefit for only one or two years instead of promised five years, as the Industrial Policy 2012 envisaged. In this backdrop, the conclusion of the High Court was that the failure of the State to issue an exemption notification within time should not stand in the way of the industrial units getting the benefit which was promised and its denial of such benefit for FYs 2011-12, 2012-13 and 2013-14 was contrary to the doctrine of *promissory estoppel.* The issuance of an exemption notification being a ministerial act, the High Court held that it should not stand in the way of industrial units obtaining relief under the doctrine as a result of the unconscionable delay caused by the State government. It was on this rationale that the High Court concluded that the notification dated 8 January 2015 issued by the Commercial Tax Department of the State government ought not to be construed with prospective effect and the clause making it prospective would have to be struck down. The notification was deemed to be in effect from the date of the Industrial Policy 2012 (1 April 2011). The electricity duty deposited for FYs 2011-12, 2012-13 and 2013-14 was directed to be adjusted against the future liability of the respondent towards electricity duty. Since the amount has already been deposited no refund, but an adjustment of future payments was directed.

13 The State is in appeal.

G Submissions of Counsel

14 Mr Tapesh Kumar Singh, Additional Advocate General appearing for the State of Jharkhand submits that:

(i) In terms of the rebate/concession admissible under the Industrial Policy 2012, the respondent was required by Column 6(iv) of Form-III to raise a claim for exemption from the payment of electricity duty;

(ii) In all the three returns which were furnished by the respondent, a rebate/deduction was sought only towards "auxiliary consumption", which was accepted and allowed by the assessing officer;

(iii) In the absence of a claim for rebate/deduction sought before the assessing officer, the assessing officer could not have granted a concession to the respondent;

(iv) The three assessment orders demonstrate that the respondent paid electricity duty without protest or demur, and the computation made by the assessing officer of the payable amount was accepted;

(v) The three returns filed by the respondent for the corresponding assessment years were belated and an amount of Rs 2000/- was levied as penalty;

(vi) The submission that the notification under Section 9 of the Bihar Act 1948 was belatedly issued on 8 January 2015 is not available to the respondent since two of the three assessment orders were issued eleven months and twenty-three months after the issuance of the notification. Hence, in the

assessment orders of FYs 2012-13 and 2013-14, no prejudice has been caused to the respondent by the belated issuance of the notification;

(vii) For FY 2011-12, it has been conceded during the course of the hearing by the respondent that upon a correct construction of the relevant terms of the Industrial Policy 2012, it is not entitled in law to claim a rebate/deduction or adjustment in view of Clause 35.7(b);

(viii) The relief which has been granted by the High Court to another similarly situated writ petitioner on 4 February 2015 shall operate *erga omnes*;

(ix) In 2019, the respondent instituted three writ petitions for the corresponding three assessment years – FYs 2011-12, 2012-13 and 2013-14 with a view to overcome the period of limitation under the general law and these have erroneously been allowed by the common judgment and order of the High Court;

(x) The law laid down in the judgments of the Constitution Bench in **State of Madhya Pradesh** vs **Bhailal Bhai**[10] ("**Bhailal Bhai**") and **Suganmal** vs **State of Madhya Pradesh**[11] ("**Suganmal**") continues to hold the field;

(xi) The above judgments hold that any claim for refund could be made only within the period of limitation prescribed under the general law for the filing of suits for the recovery of amounts due and the High Court ought not to entertain a petition under Article 226 in the exercise of its extra-ordinary writ jurisdiction;

[10] AIR 1964 SC 1006.
[11] AIR 1965 SC 1740.

(xii) In the absence of any pleading before the High Court, there is a presumption in law against the respondent that the amount claimed as rebate/deduction from electricity duty has already been passed on to its customers. Hence, the adjustment which has been granted by the High Court would result in unjust enrichment to the respondent. Reliance was placed on the decision of this Court in **Mafatlal Industries Ltd.** vs **Union of India**[12] ("**Mafatlal Industries**");

(xiii) An alternative and efficacious statutory remedy of an appeal under Section 9A of the Bihar Act 1948 was available to the respondent against the orders of assessment, and hence the High Court should have refused to allow recourse to the extra-ordinary writ jurisdiction; and

(xiv) Since the unit of the respondent commenced commercial production on 17 August 2011, whereas the Industrial Policy is of 2012, the doctrine of *promissory estoppel* cannot be extended "backwards in favour of the respondent".

15 On the other hand, opposing these submissions on behalf of the respondent and in support of the judgment of the High Court, Mr. Devashish Bharuka, learned Counsel urged the following submissions:

(i) The act of the State government in making the exemption notification prospective in effect from 8 January 2015 is in derogation to the promise held out by the State in its Industrial Policy 2012. The High Court in placing reliance on the doctrine of *promissory estoppel* has correctly relied upon

[12] (1997) 5 SCC 536.

the decisions of this Court in **Motilal Padampat** (supra), **Kalyanpur Cement Ltd** (supra) and **Manuelsons Hotels Pvt Ltd.** (supra);

(ii) As regards the claim of exemption by the first respondent:

(a) The benefit of a rebate/deduction could not have been claimed in the returns for FYs 2011-12, 2012-13 and 2013-14. The exemption notification was issued only on 8 January 2015, and that too with prospective effect;

(b) The first respondent has, as a matter of fact, received a rebate/deduction only for the period 8 January 2015 to 31 March 2015 and for FY 2015-16;

(iii) As regards the submission that there has been a delay in instituting the writ petitions before the High Court under Article 226:

(a) The issue of delay has not been raised by the State government either before the High Court or in the Special Leave Petition;

(b) Once the High Court entertained the writ petition on merits, this Court ought not to interfere on the ground of delay alone, particularly when the judgment of the High Court is legally sustainable;

(c) Delay by itself in filing a Writ Petition may not defeat the claim unless the position of the opposite party has been so altered that it cannot be retracted on account of a lapse of time or inaction of the writ petitioner. The State has neither pleaded nor argued any change in its position;

(d) This is a case where the opposite party has not been put through any hardship by reason of the delay in approaching the High Court; and

(iv) The decisions in **Bhailal Bhai** (supra) and **Suganmal** (supra) are distinguishable as they relate to a writ petition seeking refund of illegally collected tax.

16 On the above grounds, it has been submitted that the respondent is entitled to the benefit of a rebate for a period of five years as held out in clause 32.10 of the Industrial Policy 2012.

17 The respondent has submitted that the period of five years may commence from 17 August 2011 (the date of commercial production) or from FY 2012-13 (in accord with clause 35.7(b) of Industrial Policy 2012) or from 8 January 2015 (the date of the notification).

H Analysis

18 The rival submissions will now be considered.

H.I A State in breach of policy commitments

19 The Industrial Policy 2012 refers to the earlier Industrial Policy, which was formulated in 2001 after the formation of the State of Jharkhand. The policy notes that “considerable progress in industrialization has been achieved during the policy period”. Yet, according to Clause 1.8, there is a need to “boost economic activities to sustain the current level of growth and achieve even better pace of development”. Clause 1.9 takes notice of the fact that “there has been large scale

change in (the) industrialization environment (sic) due to economic liberalization, privatization and globalization". The policy document states in Clause 1.12 that it "aims at creating (an) industry-friendly environment for maximizing investment":

> "1.12. The present policy aims at creating industry-friendly environment for maximizing investment especially in mineral and natural resource based industries, MSMEs, infrastructure development and rehabilitation of viable sick units. The objective here is to maximize the value addition to state's natural resources by setting up industries across the state, generating revenue and creating employment."

Clause 1.13 stipulates that the policy was drafted after intensive interaction with stakeholders and to accommodate their views. It was expected that the policy would, upon implementation, facilitate industrialization of the State, generate employment and add to its overall growth.

20 As an integral component of the policy, Clause 32.10 envisages the grant of an exemption from the payment of 50 per cent of the electricity duty for a period of five years both for new and existing industrial units setting up captive power plants for self-consumption or captive use The period of five years was to be reckoned from the date of the commissioning of the plant. Under Clause 35.7(b), the entitlement would ensue from the financial year following the date of production. The State government was cognizant of the need to implement the policy immediately to secure the benefit to eligible units over the entire term of five years. Recognizing this need, Clause 38(b) envisaged that notifications by its diverse departments to enforce the terms of the policy would be issued within a period of one month.

PART H

21 The alacrity expected by the Industrial Policy 2012 of the State of Jharkhand did not find a resonance in its administrative apparatus. The High Court has justifiably referred to this as a case of bureaucratic lethargy. As a matter of first principle, there can be no gainsaying the fact that when a statute, such as the Bihar Act 1948, empowers the state to grant an exemption from its provisions, the State has the discretion to determine the date from which and the period over which the exemption will operate. An individual or entity cannot compel the State to issue a notification providing for an exemption or to insist upon the terms on which the government does so. Whether an exemption should be issued and if so, the terms for the exemption, have to be determined by the State. But this case does not rest on that principle nor did the claim of the respondent require the High Court to make a departure from it. The Industrial Policy 2012 contained a representation that a rebate/deduction would be granted. It held out a representation that a notification would be issued in a month. These were solemn commitments made by the State of Jharkhand. What remained was their implementation by issuing a notification, which was to be done within one month. The State government evidently intended to implement and act in pursuance of its commitment. For, ultimately, it did issue a notification. But it did so on 8 January 2015 – after a period of a month envisaged under the Industrial Policy 2012 had dragged on for nearly three years.

22 It is time for the State government to take notice of the observations of the High Court in regard to administrative lethargy. If the object of formulating the industrial policy is to encourage investment, employment and growth, the

administrative lethargy of the State apparatus is clearly a factor which will discourage entrepreneurship. The policy document held out a solemn representation. It contemplated the grant of a rebate/deduction from the payment of electricity duty not only to new units but to existing units as well who had or would set up captive power plants. The State, in the present case, held out *inter alia* a solemn representation in terms of Clauses 32.10 and 35.7(b) of the entitlement of the exemption for a period of five years from the date of production. Besides this, it also contemplated in Clause 38(b) that a follow-up exemption notification would be issued within one month. That period of one month stretched on interminably with the result that the purpose and object of granting the exemption would virtually stand defeated. The net result was that when belatedly, the State government issued a notification under Section 9 of Bihar Act 1948 on 8 January 2015, it was prospective. As a consequence, by the time that the exemption notification was issued, a large part of the term for which the exemption was to operate in terms of the Industrial Policy 2012 had come to an end.

23 The State government was evidently inclined to grant the exemption. This is not a case where due to an overarching requirement of public interest, the State government decided to override the representation which was contained in the Industrial Policy 2012. To the contrary, it sought to implement the representation *albeit* in fits and starts. Firstly, there was a delay of three years in the issuance of the notification. Secondly, by making the notification prospective, it deprived units such as the respondent of the full benefit of the exemption which was originally envisaged in terms of the Industrial Policy 2012.

PART H

H.2 Building on Motilal Padampat

24 In this backdrop, the High Court has, with justification, adverted to two decisions of this Court. In **Kalyanpur Cement** (supra), an industrial policy had been notified in 1995 in the State of Bihar. The policy contained a provision for monitoring and reviewing and envisaged that all departments and organizations would issue a follow-up notification to give effect to the policy within one month. This was similar to clause 38(b) of the policy in the present case. No notification was issued by the State of Bihar to give effect to the industrial policy, which lapsed on 31 August 2000. The claim to sales tax exemption by the unit was rejected by the State government on the ground that it had decided not to grant an incentive to a sick industrial unit. A follow-up notification was issued during the pendency of the case before this Court. In the backdrop of these facts, this Court speaking through Justice S S Nijjar, observed:

> "85. Even if we are to accept the submissions…that the provisions contained in Clause 24 were 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 three 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 6-1-2001 and 5-3-2001 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. 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 31-8-2000. 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."

PART H

25 In the decision in **Manuelsons Hotels Private Limited** v. **State of Kerala** (supra), speaking through Justice Rohinton F Nariman, the Court had to construe a notification dated 11 July 1986 of the Government of Kerala enabling those engaged in tourism promotional activities to become automatically eligible for concessions/ incentives as provided to the industrial sector from time to time. An amendment to the Kerala Building Tax Act 1975 was made with effect from 6 November 1990 giving an exemption as promised in 1986 and the amendment was deleted with effect from 1 March 1993. Relying on the earlier decision of this Court *inter alia* in **Motilal Padampat** (supra), this Court held:

> "3… The non-exercise of such discretionary power is clearly vitiated on account of the application of the doctrine of promissory estoppel in terms of this Court's judgments in Motilal Padampat [Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P., (1979) 2 SCC 409 : 1979 SCC (Tax) 144 : (1979) 2 SCR 641] and Nestle [State of Punjab v. Nestle India Ltd., (2004) 6 SCC 465] . This is for the reason that non-exercise of such power is itself an arbitrary act which is vitiated by non-application of mind to relevant facts, namely, the fact that a G.O. dated 11-7-1986 specifically provided for exemption from building tax if hotels were to be set up in the State of Kerala pursuant to the representation made in the said G.O. True, no mandamus could issue to the legislature to amend the Kerala Building Tax Act, 1975, for that would necessarily involve the judiciary in transgressing into a forbidden field under the constitutional scheme of separation of powers. However, on facts, we find that Section 3-A was, in fact, enacted by the Kerala Legislature by suitably amending the Kerala Building Tax Act, 1975 on 6-11-1990 in order to give effect to the representation made by the G.O. dated 11-7-1986. We find that the said provision continued on the statute book and was deleted only with effect from 1-3-1993. This would make it clear that from 6-11-1990 to 1-3-1993, the power to grant exemption from building tax was statutorily conferred by Section 3-A on the Government. And we have seen that the Statement of Objects and Reasons for introducing Section 3-A expressly states that the said section was introduced in order to fulfil one of the promises contained in the G.O. dated 11-7-1986. We find that the appellants, having relied on the said G.O. dated 11-7-1986, had, in fact,

> constructed a hotel building by 1991. It is clear, therefore, that the non-issuance of a notification under Section 3-A was an arbitrary act of the Government which must be remedied by application of the doctrine of promissory estoppel, as has been held by us hereinabove. The ministerial act of non-issue of the notification cannot possibly stand in the way of the appellants getting relief under the said doctrine for it would be unconscionable on the part of the Government to get away without fulfilling its promise."

H.3 Promissory estoppel – origins and evolution

26 Before the High Court, the State of Jharkhand sought to sustain its action on the ground that though the follow-up notification under Section 9 was issued on 8 January 2015, no outer limit for the issuance of a notification was prescribed and there was no vested right on the part of the respondent to get the notification implemented from an earlier date or to obtain the benefit of the policy until it was implemented by a follow-up notification. The decision in **Kalyanpur Cement** (supra) was sought to be distinguished on the ground that in that case no follow-up notification had been issued at all until the policy lapsed. In sum and substance, the objection was that the writ petitioner – the respondent here - had no vested right to claim that a follow-up notification should be issued and that the doctrine of *promissory estoppel* would not, in the facts, apply.

27 In order to analyze the contentions relating to the doctrine of *promissory estoppel* in the present case, it is necessary to discuss the origin of the doctrine and the evolution of its application. The common law recognizes various kinds of equitable estoppel, one of which is promissory estoppel. In **Crabb** vs **Arun DC**[13],

[13] [1976] 1 Ch 179 (Court of Appeal).

Lord Denning, speaking for the Court of Appeal, traced the genesis of promissory estoppel in equity, and observed:

> "The basis of this proprietary estoppel – as indeed of promissory estoppel – is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law. The early cases did not speak of it as "estoppel". They spoke of it as "raising an equity" If I may expand that, Lord Cairns said: "It is the first principle upon which all Courts of Equity proceed", that it will prevent a person from insisting on his legal rights – whether arising under a contract or on his title deed, or by statute – when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties."

28 The requirements of the doctrine of *promissory estoppel* have also been formulated in Chitty on Contracts[14] ("**Chitty**"):

> "4.086. For the equitable doctrine to operate there must be a legal relationship giving rise to rights and duties between the parties; a promise or a representation by one party that he will not enforce against the other his strict legal rights arising out of that relationship; an intention on the part of the former party that the latter will rely on the representation; and such reliance by the latter party. Even if these requirements are satisfied, the operation of the doctrine may be excluded if it is, nevertheless, not "inequitable" for the first party to go back on his promise. The doctrine most commonly applies to promises not to enforce contractual rights, but it also extends to certain other relationships.
>
> 4.088…..The doctrine can also apply where the relationship giving rise to rights and correlative duties is non-contractual: e.g. to prevent the enforcement of a liability imposed by statute on a company director for signing a bill of exchange on which the company's name is not correctly given; or to prevent a man from ejecting a woman, with whom he has been cohabitating, from the family home."

Chitty (supra) clarifies that the doctrine of *promissory estoppel* may be enforced even in the absence of a legal relationship. However, it is argued that this would

[14] Hugh Beale, *Chitty on Contracts* (32nd edn., Sweet & Maxwell 2017).

be an incorrect application of the doctrine since it gives rise to new rights between the parties, when the intent of the doctrine is to restrict the enforcement of previously existing rights:

> "4.089. It has, indeed, been suggested that the doctrine can apply where, before the making of the promise or representation, there is no legal relationship giving rise to rights and duties between the parties, or where there is only a putative contract between them: e.g. where the promisee is induced to believe that a contract into which he had undoubtedly entered was between him and the promisor, when in fact it was between the promisee and another person. But it is submitted that these suggestions mistake the nature of the doctrine, which is to restrict the enforcement by the promisor of previously existing rights against the promisee. Such rights can arise only out of a legal relationship existing between these parties before the making of the promise or representation. To apply doctrine where there was no such relationship would contravene the rule (to be discussed in para.4-099 below) that the doctrine creates no new rights."

29 Generally speaking under English Law, judicial decisions have in the past postulated that the doctrine of *promissory estoppel* cannot be used as a 'sword', to give rise to a cause of action for the enforcement of a promise lacking any consideration. Its use in those decisions has been limited as a 'shield', where the promisor is estopped from claiming enforcement of its strict legal rights, when a representation by words or conduct has been made to suspend such rights. In **Combe** vs **Combe**[15] ("**Combe**"), the Court of Appeal held that consideration is an essential element of the cause of action:

> "It [promissory estoppel] may be part of a cause of action, but not a cause of action itself.
>
> ……

[15] [1951] 2 K.B. 215.

> The principle [promissory estoppel] never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind."

30 Even within English Law, the application of the rule laid down in **Combe** (supra) has been noticed to be inconsistent[16]. The scope of the rule has also been doubted on the ground that it has been widely framed[17]. Hence, in the absence of a definitive pronouncement by the House of Lords holding that promissory estoppel can be a cause of action, a difficulty was expressed in stating with certainty that English Law has evolved from the traditional approach of treating promissory estoppel as a 'shield' instead of a 'sword'[18]. By contrast, the law in the United States[19] and Australia[20] is less restrictive in this regard.

31 India, as we shall explore shortly, adopted a more expansive statement of the doctrine. Comparative law enables countries which apply a doctrine from across international frontiers to have the benefit of hindsight.

This Court has given an expansive interpretation to the doctrine of *promissory estoppel* in order to remedy the injustice being done to a party who has relied on a promise. In **Motilal Padampat** (supra), this Court viewed *promissory estoppel* as a principle in equity, which was not hampered by the doctrine of consideration

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[16] **Wyvern Development, Re**, [1974] 1 W.L.R. 1097 cited in Susan M. Morgan, "A Comparative Analysis of the Doctrine of Promissory Estoppel in Australia, Great Britain and the United States", (1985) 15 Melbourne University Law Review 134, 139-141.

[17] In **Tungsten Electric Co Ltd.** vs **Tool Metal Manufacturing Co. Ltd.,** [1955] 1 W.L.R. 761, Lord Simonds states, "I do not wish to lend the authority of this House to the statement of the principle which is to be found in Combe v. Combe and may well be far too widely stated".

[18] In **Baird Textiles Holdings Ltd.** vs **Marks and Spencer Plc.**, [2002] 1 All ER (Comm) 737, Court of Appeal stated that "there is no real prospect of the claim [estoppel] succeeding unless and until law is developed, or corrected, by the House of Lords".

[19] American Law Institute, *Restatement of the Law (2d), Contracts* (1981), para 90.

[20] **Waltons Stores (Interstate) Ltd** vs **Maher**, (1988) 164 CLR 387.

as was the case under English Law. This Court, speaking through Justice P N Bhagwati (as he was then), held thus:

> "12....having regard to the general opprobrium to which the doctrine of consideration has been subjected by eminent jurists, we need not be unduly anxious to project this doctrine against assault or erosion nor allow it to dwarf or stultify the full development of the equity of promissory estoppel or inhibit or curtail its operational efficacy as a justice device for preventing injustice…We do not see any valid reason why promissory estoppel should not be allowed to found a cause of action where, in order to satisfy the equity, it is necessary to do so."

H.4 From estoppel to expectations

32 Under English Law, the doctrine of *promissory estoppel* has developed parallel to the doctrine of legitimate expectations. The doctrine of legitimate expectations is founded on the principles of fairness in government dealings. It comes into play if a public body leads an individual to believe that they will be a recipient of a substantive benefit. The doctrine of substantive legitimate expectation has been explained in **R** vs **North and East Devon Health Authority, ex p Coughlan**[21] in the following terms:

> "55…. But what was their legitimate expectation?" Where there is a dispute as to this, the dispute has to be determined by the court, as happened in In re Findlay. This can involve a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion.
> ……
> 56….Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established,

[21] [2001] QB 213.

> the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."
>
> (emphasis supplied)

33 Under English Law, the doctrine of legitimate expectation initially developed in the context of public law as an analogy to the doctrine of *promissory estoppel* found in private law. However, since then, English Law has distinguished between the doctrines of *promissory estoppel* and legitimate expectation as distinct remedies under private law and public law, respectively. *De Smith's Judicial Review*[22] notes the contrast between the public law approach of the doctrine of legitimate expectation and the private law approach of the doctrine of *promissory estoppel* :

> "[d]espite dicta to the contrary [*Rootkin v Kent CC*, (1981) 1 WLR 1186 (CA); *R v Jockey Club Ex p RAM Racecourses Ltd*, [1993] AC 380 (HL); *R v IRC Ex p Camacq Corp*, (1990) 1 WLR 191 (CA)], it is not normally necessary for a person to have changed his position or to have acted to his detriment in order to qualify as the holder of a legitimate expectation [*R v Ministry for Agriculture, Fisheries and Foods Ex p Hamble Fisheries (Offshore) Ltd*, (1995) 2 All ER 714 (QB)]. . . Private law analogies from the field of estoppel are, we have seen, of limited relevance where a public law principle requires public officials to honour their undertakings and respect legal certainty, irrespective of whether the loss has been incurred by the individual concerned [*Simon Atrill, 'The End of Estoppel in Public Law?' (2003) 62 Cambridge Law Journal 3*]."
>
> (emphasis supplied)

34 Another difference between the doctrines of *promissory estoppel* and legitimate expectation under English Law is that the latter can constitute a cause

[22] Harry Woolf and others, *De Smith's Judicial Review* (8th edn, Thomson Reuters 2018).

of action[23]. The scope of the doctrine of legitimate expectation is wider than promissory estoppel because it not only takes into consideration a promise made by a public body but also official practice, as well. Further, under the doctrine of *promissory estoppel*, there may be a requirement to show a detriment suffered by a party due to the reliance placed on the promise. Although typically it is sufficient to show that the promisee has altered its position by placing reliance on the promise, the fact that no prejudice has been caused to the promisee may be relevant to hold that it would not be "inequitable" for the promisor to go back on their promise.[24] However, no such requirement is present under the doctrine of legitimate expectation. In **Regina (Bibi)** vs **Newham London Borough Council**[25], the Court of Appeal held:

> "55 The present case is one of reliance without concrete detriment. We use this phrase because there is moral detriment, which should not be dismissed lightly, in the prolonged disappointment which has ensued; and potential detriment in the deflection of the possibility, for a refugee family, of seeking at the start to settle somewhere in the United Kingdom where secure housing was less hard to come by. In our view these things matter in public law, even though they might not found an estoppel or actionable misrepresentation in private law, because they go to fairness and through fairness to possible abuse of power. To disregard the legitimate expectation because no concrete detriment can be shown would be to place the weakest in society at a particular disadvantage. It would mean that those who have a choice and the means to exercise it in reliance on some official practice or promise would gain a legal toehold inaccessible to those who, lacking any means of escape, are compelled simply to place their trust in what has been represented to them."
>
> (emphasis supplied)

[23] Rebecca Williams, "The Multiple Doctrines of Legitimate Expectations", (2016) 132(Oct) Law Quarterly Review 639, 645.
[24] *Supra* note 19 at para 4-095.
[25] [2002] 1 W.L.R. 237.

35 Consequently, while the basis of the doctrine of *promissory estoppel* in private law is a promise made between two parties, the basis of the doctrine of legitimate expectation in public law is premised on the principles of fairness and non-arbitrariness surrounding the conduct of public authorities. This is not to suggest that the doctrine of *promissory estoppel* has no application in circumstances when a State entity has entered into a private contract with another private party. Rather, in English law, it is inapplicable in circumstances when the State has made representation to a private party, in furtherance of its *public functions*[26].

H.5 Indian Law and the doctrine of legitimate expectations

36 Under Indian Law, there is often a conflation between the doctrines of *promissory estoppel* and legitimate expectation. This has been described in Jain and Jain's well known treatise, *Principles of Administrative Law*[27] :

> "At times, the expressions 'legitimate expectation' and 'promissory estoppel' are used interchangeably, but that is not a correct usage because 'legitimate expectation' is a concept much broader in scope than 'promissory estoppel'.
>
> …
>
> A reading of the relevant Indian cases, however, exhibit some confusion of ideas. It seems that the judicial thinking has not as yet crystallised as regards the nature and scope of the doctrine. At times, it has been referred to as merely a procedural doctrine; at times, it has been treated interchangeably as promissory estoppel. However both these ideas are incorrect. As stated above, legitimate expectation is a substantive doctrine as well and has much broader scope than promissory estoppel.
>
> …

[26] Nicholas Bamforth, "Legitimate Expectation and Estoppel" (1998) 3 Jud Rev 196.
[27] M.P. Jain and S.N. Jain, *Principles of Administrative Law* (7th edn., EBC 2013).

> In Punjab Communications Ltd. v. Union of India, the Supreme Court has observed in relation to the doctrine of legitimate expectation:
>
> "the doctrine of legitimate expectation in the substantive sense has been accepted as part of our law and that the decision maker can normally be compelled to give effect to his representation in regard to the expectation based on previous practice or past conduct unless some overriding public interest comes in the way Reliance must have been placed on the said representation and the representee must have thereby suffered detriment."
>
> It is suggested that this formulation of the doctrine of legitimate expectation is not correct as it makes "legitimate expectation" practically synonymous with promissory estoppel. Legitimate expectation may arise from conduct of the authority; a promise is not always necessary for the purpose."

37 While this doctrinal confusion has the unfortunate consequence of making the law unclear, citizens have been the victims. Representations by public authorities need to be held to scrupulous standards, since citizens continue to live their lives based on the trust they repose in the State. In the commercial world also, certainty and consistency are essential to planning the affairs of business. When public authorities fail to adhere to their representations without providing an adequate reason to the citizens for this failure, it violates the trust reposed by citizens in the State. The generation of a business friendly climate for investment and trade is conditioned by the faith which can be reposed in government to fulfil the expectations which it generates. Professors Jain and Deshpande characterize the consequences of this doctrinal confusion in the following terms:

> "Thus, in India, the characterization of legitimate expectations is on a weaker footing, than in jurisdictions like UK where the courts are now willing to recognize the capacity of public law to absorb the moral values underlying the notion of estoppel

> in the light of the evolution of doctrines like LE [Legitimate Expectations] and abuse of power. If the Supreme Court of India has shown its creativity in transforming the notion of promissory estoppel from the limitations of private law, then it does not stand to reason as to why it should also not articulate and evolve the doctrine of LE for judicial review of resilement of administrative authorities from policies and long-standing practices. If such a notion of LE is adopted, then not only would the Court be able to do away with the artificial hierarchy between promissory estoppel and legitimate expectation, but, it would also be able to hold the administrative authorities to account on the footing of public law outside the zone of promises on a stronger and principled anvil. Presently, in the absence of a like doctrine to that of promissory estoppel outside the promissory zone, the administrative law adjudication of resilement of policies stands on a shaky public law foundation."

38 We shall therefore attempt to provide a cogent basis for the doctrine of legitimate expectation, which is not merely grounded on analogy with the doctrine of *promissory estoppel*. The need for this doctrine to have an independent existence was articulated by Justice Frankfurter of the United State Supreme Court in **Vitarelli** vs **Seton**[28] :

> "An executive agency must be rigorously held to the standards by which it professes its action to be judged. Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword."

39 However, before we do this, it is important to clarify the understanding of the doctrine of legitimate expectation in previous judgements of this Court. In **National Buildings Construction Corporation** vs **S. Raghunathan**[29] ("**National**

[28] 359 US 535 (1959); the principle espoused in this judgment has been followed by this Court in **Amarjit Singh Ahluwalia (Dr)** vs **State of Punjab**, (1975) 3 SCC 503, **Sukhdev Singh** vs **Bhagatram Sardar Singh Raghuvanshi**, (1975) 1 SCC 421 (concurring opinion of Justice K K Mathew) and **Ramana Dayaram Shetty** vs **International Airport Authority of India**, (1979) 3 SCC 489.
[29] (1998) 7 SCC 66.

Buildings Construction Corpn."), a three Judge bench of this Court, speaking through Justice S. Saghir Ahmad, held that:

> "18. The doctrine of "legitimate expectation" has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without any iota of abuse of discretion. The policy statements cannot be disregarded unfairly or applied selectively. Unfairness in the form of unreasonableness is akin to violation of natural justice. It was in this context that the doctrine of "legitimate expectation" was evolved which has today become a source of substantive as well as procedural rights. But claims based on "legitimate expectation" have been held to require reliance on representations and resulting detriment to the claimant in the same way as claims based on promissory estoppel."
>
> (emphasis supplied)

However, it is important to note that this observation was made by this Court while discussing the ambit of the doctrine of legitimate expectation under English Law, as it stood then. As we have discussed earlier, there was a substantial conflation or overlap between the doctrines of legitimate expectation and *promissory estoppel* even under English Law since the former was often invoked as being analogous to the latter. However, since then and since the judgment of this Court in **National Buildings Construction Corporation** (supra), the English Law in relation to the doctrine of legitimate expectation has evolved. More specifically, it has actively tried to separate the two doctrines and to situate the doctrine of legitimate expectations on a broader footing. In **Regina (Reprotech (Pebsham) Ltd)** vs **East Sussex County Council**[30], the House of Lords has held thus:

> "33 In any case, I think that it is unhelpful to introduce private law concepts of estoppel into planning law. As Lord

[30] [2003] 1 WLR 348.

> Scarman pointed out in Newbury District Council v Secretary of State for the Environment [1981] AC 578 , 616, estoppels bind individuals on the ground that it would be unconscionable for them to deny what they have represented or agreed. But these concepts of private law should not be extended into "the public law of planning control, which binds everyone". (See also Dyson J in R v Leicester City Council, Ex p Powergen UK Ltd [2000] JPL 629 , 637.)
>
> 34 There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power… But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote. Public law can also take into account the hierarchy of individual rights which exist under the Human Rights Act 1998, so that, for example, the individual's right to a home is accorded a high degree of protection (see Coughlan's case, at pp 254–255) while ordinary property rights are in general far more limited by considerations of public interest: see R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] 2 WLR 1389.
>
> 35 It is true that in early cases such as the Wells case [1967] 1 WLR 1000 and Lever Finance Ltd v Westminster (City) London Borough Council [1971] 1 QB 222 , Lord Denning MR used the language of estoppel in relation to planning law. At that time the public law concepts of abuse of power and legitimate expectation were very undeveloped and no doubt the analogy of estoppel seemed useful…..It seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet."
>
> (emphasis supplied)

40 In a concurring opinion in **Monnet Ispat and Energy Ltd.** vs **Union of India**[31] ("**Monnet Ispat**"), Justice H L Gokhale highlighted the different considerations that underlie the doctrines of *promissory estoppel* and legitimate expectation. The learned judge held that for the application of the doctrine of promissory estoppel, there has to be a promise, based on which the promisee

[31] (2012) 11 SCC 1.

has acted to its prejudice. In contrast, while applying the doctrine of legitimate expectation, the primary considerations are reasonableness and fairness of the State action. He observed thus:

> "Promissory Estoppel and Legitimate Expectations
>
> 289. As we have seen earlier, for invoking the principle of promissory estoppel there has to be a promise, and on that basis the party concerned must have acted to its prejudice. In the instant case it was only a proposal, and it was very much made clear that it was to be approved by the Central Government, prior whereto it could not be construed as containing a promise. Besides, equity cannot be used against a statutory provision or notification.
>
> 290…..In any case, in the absence of any promise, the Appellants including Aadhunik cannot claim promissory estoppel in the teeth of the notifications issued under the relevant statutory powers. Alternatively, the Appellants are trying to make a case under the doctrine of legitimate expectations. The basis of this doctrine is in reasonableness and fairness. However, it can also not be invoked where the decision of the public authority is founded in a provision of law, and is in consonance with public interest."
>
> (emphasis supplied)

41 In **Union of India** vs **Lt. Col. P.K. Choudhary**[32], speaking through Chief Justice T S Thakur, the Court discussed the decision in **Monnet Ispat** (supra) and noted its reliance on the judgment in **Attorney General for New South Wales** vs. **Quinn**[33]. It then observed:

> "This Court went on to hold that if denial of legitimate expectation in a given case amounts to denial of a right that is guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power or in violation of principles of natural justice, the same can be questioned on the well-known grounds attracting Article 14 of the Constitution but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles."

[32] (2016) 4 SCC 236.
[33] (1990) 64 Aust LJR 327: (1990) 170 CLR 1.

Thus, the Court held that the doctrine of legitimate expectation cannot be claimed as a right in itself, but can be used only when the denial of a legitimate expectation leads to the violation of Article 14 of the Constitution.

42 As regards the relationship between Article 14 and the doctrine of legitimate expectation, a three judge Bench in **Food Corporation of India** vs **Kamdhenu Cattle Feed Industries**[34], speaking through Justice J S Verma, held thus:

> "7. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.
>
> 8. The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in

[34] (1993) 1 SCC 71.

> each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."
>
> (emphasis supplied)

More recently, in **NOIDA Entrepreneurs Assn.** vs **NOIDA**[35], a two-judge bench of this Court, speaking through Justice B. S. Chauhan, elaborated on this relationship in the following terms:

> "39. State actions are required to be non-arbitrary and justified on the touchstone of Article 14 of the Constitution. Action of the State or its instrumentality must be in conformity with some principle which meets the test of reason and relevance. Functioning of a "democratic form of Government demands equality and absence of arbitrariness and discrimination". The rule of law prohibits arbitrary action and commands the authority concerned to act in accordance with law. Every action of the State or its instrumentalities should neither be suggestive of discrimination, nor even apparently give an impression of bias, favouritism and nepotism. If a decision is taken without any principle or without any rule, it is unpredictable and such a decision is antithesis to the decision taken in accordance with the rule of law.
>
> …
>
> 41. Power vested by the State in a public authority should be viewed as a trust coupled with duty to be exercised in larger public and social interest. Power is to be exercised strictly adhering to the statutory provisions and fact situation of a case. "Public authorities cannot play fast and loose with the powers vested in them." A decision taken in an arbitrary manner contradicts the principle of legitimate expectation. An authority is under a legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood conferred. In this context, "in good faith" means "for legitimate reasons". It must be exercised bona fide for the purpose and for none other...]"

[35] (2011) 6 SCC 508.

(emphasis supplied)

As such, we can see that the doctrine of substantive legitimate expectation is one of the ways in which the guarantee of non-arbitrariness enshrined under Article 14 finds concrete expression.

H.6 Expectations breached by the State of Jharkhand

43 Applying the abovementioned principles in the present case, we are unable to perceive any substance in the submission of the State which was urged in defense before the High Court. Not only did the State in the present case hold out a solemn representation, this representation was founded on its stated desire to encourage industrialization in the State. The policy document spelt out:

(i) The nature of the incentives;

(ii) The period during which the incentives would be available; and

(iii) The time limit within which follow-up action would be taken by the State government through its departments for implementing the Industrial Policy 2012.

44 The State having held out a solemn representation in the above terms, it would be manifestly unfair and arbitrary to deprive industrial units within the State of their legitimate entitlement. The State government did as a matter of fact, issue a statutory notification under Section 9 but by doing so prospectively with effect from 8 January 2015 it negated the nature of the representation which was held out in the Industrial Policy 2012. Absolutely no justification bearing on reasons of policy or public interest has been offered before the High Court or before this

Court for the delay in issuing a notification. The pleadings are completely silent on the reasons for the delay on the part of the government and offer no justification for making the exemption prospective, contrary to the terms of the representation held out in the Industrial Policy 2012.

45 It is one thing for the State to assert that the writ petitioner had no vested right but quite another for the State to assert that it is not duty bound to disclose its reasons for not giving effect to the exemption notification within the period that was envisaged in the Industrial Policy 2012. Both the accountability of the State and the solemn obligation which it undertook in terms of the policy document militate against accepting such a notion of state power. The state must discard the colonial notion that it is a sovereign handing out doles at its will. Its policies give rise to legitimate expectations that the state will act according to what it puts forth in the public realm. In all its actions, the State is bound to act fairly, in a transparent manner. This is an elementary requirement of the guarantee against arbitrary state action which Article 14 of the Constitution adopts. A deprivation of the entitlement of private citizens and private business must be proportional to a requirement grounded in public interest. This conception of state power has been recognized by this Court in a consistent line of decisions. As an illustration, we would like to extract this Court's observations in **National Buildings Construction Cororation** (supra):

> "The Government and its departments, in administering the affairs of the country are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without any iota of abuse of discretion. The policy statements cannot be disregarded unfairly or applied selectively. Unfairness in the form of unreasonableness is akin to violation of natural justice."

46 Therefore, it is clear that the State had made a representation to the respondent and similarly situated industrial units under the Industrial Policy 2012. This representation gave rise to a legitimate expectation on their behalf, that they would be offered a 50 per cent rebate/deduction in electricity duty for the next five years. However, due to the failure to issue a notification within the stipulated time and by the grant of the exemption only prospectively, the expectation and trust in the State stood violated. Since the State has offered no justification for the delay in issuance of the notification, or provided reasons for it being in public interest, we hold that such a course of action by the State is arbitrary and is violative of Article 14.

H.7 The technical defences to the claim

(i) Assessment and recourse to Article 226

47 We have not been impressed with the submission of the State on the technicalities of the respondent not having filed in its assessment returns, a claim for exemption from electricity duty. What is significant is that since no exemption notification had been issued under Section 9, a writ petition was initially filed before the High Court by Usha Martin Limited. As a result of the writ petition, an exemption notification was issued on 8 January 2015. Now it is correct that in the case of FYs 2012-13 and 2013-14, the orders of assessment were passed on 8 December 2015 and 16 December 2016, which was after the date of the exemption notification. However, the fact remains that so long as the clause in the exemption notification granting it prospective effect continued to hold the field,

the assessing officer as a creature of the statute was bound to enforce the terms of the exemption and accordingly denied any exemption for a period prior to 8 January 2015. The only remedy which was available to the respondent, was to challenge the terms of the exemption notification which it did by instituting writ proceedings before the High Court under Article 226.

(ii) The argument of delay

48 An earnest effort has been made on behalf of the appellant to submit that the writ petitions before the High Court ought not to have been entertained since they were instituted in 2019. However, Mr. Devashish Bharuka, learned Counsel on behalf of the respondents has, in the course of his submissions, correctly urged that the issue of delay has never been raised in the course of the proceedings before the High Court or raised as a ground in the Special Leave Petition before this Court. In **High Court of Judicature of Patna** vs **Madan Mohan Prasad**[36], a two judge Bench of this Court, speaking through Justice J M Panchal, held thus:

> "19. The contention advanced on behalf of the appellant that the writ petition was filed by Respondent 1 on 10-11-1990 i.e. seven years after he had superannuated from service, and therefore, the writ petition should have been dismissed on the ground of delay and laches, cannot be accepted. The impugned judgment nowhere shows that such a point was argued by the appellant before the High Court. No grievance is made in the memorandum of SLP that point regarding delay and laches was argued before the High Court but the same was not dealt with by the High Court when impugned judgment was delivered."

Further, Mr Bharuka has submitted that once the High Court has held the respondent's writ petition to be legally sustainable on merits, this Court should

[36] (2011) 9 SCC 65.

not interfere on grounds on delays and laches alone. This finds support in the judgment of this Court in **Dayal Singh** vs **Union of India**[37], where a three judge Bench, speaking through Justice S B Sinha, held thus:

> "41. It was submitted that the respondents having filed a writ petition after a period of eight years, the same ought not to have been entertained. Primarily a question of delay and laches is a matter which is required to be considered by the writ court. Once the writ court has exercised its jurisdiction despite delay and laches on the part of the respondents, it is not for us at this stage to set aside the order of the High Court on that ground alone particularly when we find that the impugned judgment is legally sustainable."

Mr Bharuka is also correct in submitting that the State cannot possibly contend that the result of the delay has led to it altering its position to its detriment. Nor is it a case where third parties may be affected as a consequence of a delay in instituting writ proceedings. This submission finds support in **Hindustan Petroleum Corporation Ltd.** vs **Dolly Das**[38], where a two judge Bench, speaking through Justice S Rajendra Babu, noted thus:

> "8. So far as the contention regarding laches of the respondent in filing the writ petition is concerned, delay, by itself, may not defeat the claim for relief unless the position of the appellant had been so altered which cannot be retracted on account of lapse of time or inaction of the other party. This aspect being dependent upon the examination of the facts of the case and such a contention not having been raised before the High Court, it would not be appropriate to allow the appellants to raise such a contention for the first time before us. Besides, we may notice that the period for which the option of renewal has been exercised has not come to an end. During the subsistence of such a period certainly the respondent could make a complaint that such exercise of option was not available to the appellants and, therefore, the jurisdiction of the High Court could be invoked even at a later stage. Further, the appellants are not put to undue hardship in any manner by reason of this delay in approaching the High Court for a relief."

[37] (2003) 2 SCC 593.
[38] (1999) 4 SCC 450.

In this view of the matter, we are not inclined to interfere with the judgment of the High Court on the ground of delay alone when the judgment is based on legally sustainable principles. The delay of the respondent in filing a writ petition by itself should not defeat the claim unless the position of the State has been so altered that it cannot be retracted on account of a lapse of time or the inaction of the writ petitioner. The State has not in the present case either pleaded or argued any hardship if the respondent were to be granted relief. Finally, the decisions in **Bhailal Bhai** (supra) and **Suganmal** (supra) related to a petitioner seeking a refund of an illegally collected tax. In the present case, we are not concerned with such a situation. Rather, the petitioner has come before this Court due to arbitrariness in State action which led to the non-fulfillment of their legitimate expectations.

(iii) The defence of unjust enrichment

49 Nor is the court inclined to accept the plea of unjust enrichment – the High Court has not ordered a refund at all since the duty has been paid. The respondent cannot be deprived of an adjustment of the excess duty paid. Further, the State's submission that there was no pleading by the respondent in the High Court on whether the amount being claimed as rebate/deduction had been passed on by the respondent to its customers is factually incorrect. In the writ petition filed before the High Court, the respondent specifically asserted that the burden of differential amount of electricity duty, realized by the State from the respondent herein, was not passed by the latter to its customers, either directly or indirectly or in any other manner. The relevant excerpt of the pleading in the respondent's writ petition reads thus:

> "41. That, at this stage, it is most humbly stated and submitted that if the amount of 50% of the electricity duty is refunded to the Petitioner, the same would not lead to unjust enrichment in the hands of the Petitioner as the Petitioner has not passed on the burden of differential amount of electricity duty, realized by Respondent-State from the Petitioner, to its customers either directly or indirectly or in any other manner.
>
> 42. That it is most humbly stated and submitted that for the period in question 100% of electricity duty has been realized from the Petitioner by Respondent-State of Jharkhand and, thus, extra 50% of the electricity duty has been borne by the Petitioner out of the own pocket and the burden of the same cannot be passed by the Petitioner to its customers.
>
> 43. That it is most humbly stated and submitted that the Petitioner is a manufacturer of Sponge Iron and M.S. Billet and the price of the said commodity is market driven and is controlled by the market. The amount of electricity duty paid by the Petitioner was out of its own pocket affecting the gross profit of the Petitioner on sale of its final product. It is categorically reiterated herein that burden of the amount of electricity has not been passed on by the Petitioner to its customers."

As regards the petitioner's reliance on the nine judge Bench decision of this Court in **Mafatlal Industries** (supra), we would like to advert to the holding in the majority opinion of Justice B P Jeevan Reddy, speaking for himself and four other learned judges, in the following terms:

> "108(iii). A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition (ii) above, can succeed only if the Petitioner/Plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a

> case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition.
>
> The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person."

In the present case, as we have previously held, the present respondent did not collect the electricity duty from both ends, to deploy the above phrasing. As a result, this doctrine has no application to the facts of the case at hand.

50 In **Indian Council for Enviro-Legal Action** vs **Union of India**[39], a two judge Bench of this Court, speaking through Justice Dalveer Bhandari, outlined the ingredients of unjust enrichment in the following terms:

> "152. "Unjust enrichment" has been defined by the court as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another."

Applying this definition to the facts of the case at hand, the doctrine of unjust enrichment could have been attracted if the respondent had passed on the electricity duty to its customers and then retained the refund occasioned by the 50 per cent rebate in its own pocket. This is not demonstrated to be the factual

[39] (2011) 8 SCC 161.

position and hence, the respondent cannot be denied relief on the application of the doctrine.

I Conclusion

51 The narrow issue is whether the respondent is entitled to a rebate/deduction from electricity duty which is answered in the affirmative. It is necessary, however, to clarify that the respondent would not be entitled to a rebate/deduction for FY 2011-12. In terms of Clause 35.7(b) of the Industrial Policy 2012, the entitlement ensues from the financial year following the commencement of production. The respondent commenced production on 17 August 2011. Hence, the order of the High Court would have to be confirmed for FYs 2012-13 and 2013-14. In conclusion, we are in agreement with the conclusion of the High Court that the respondent was entitled to an exemption from electricity duty, although for the reasons indicated in this judgment. Further, the relief granted would stand confined to FYs 2012-13 and 2013-14. The appeals shall stand disposed of in the above terms. There shall be no order as to costs.

52 Pending application(s), if any, stand disposed of.

.....J.
[Dr. Dhananjaya Y. Chandrachud]

.....J.
[Indu Malhotra]

New Delhi;
December 01, 2020.