

Anand Enterprises and anr. Vs. State of H.P and anr.

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Court : Himachal Pradesh

Decided On : Aug-27-2008

Reported in : 2008(2)ShimLC400

Judge : Deepak Gupta and; V.K. Ahuja, JJ.

Appellant : Anand Enterprises and anr.

Respondent : State of H.P and anr.

Advocate for Pet/Ap. : Shri. K.D. Sood

Disposition : Petition dismissed

Judgement :

Deepak Gupta, J.

1. The petitioners by means of this writ petition are challenging the notification dated 8th August, 2003 whereby the exemption from payment of entertainment duty notified vide notification dated 22nd May, 2001 published in H.P. Rajpatra on 26th May, 2001 has been withdrawn with immediate effect.

2. The allegations of the petitioners are that due to the advent of television programmes in India Cinema business all over the country started dwindling. Resultantly, many theatres were converted into commercial shopping centres, banquet halls, etc. Even in Himachal Pradesh a large number of theatres closed

down. The State of Himachal Pradesh issued a notification dated 22.5.2001 which was published in the 'Rajpatra' on 26.5.2001, which reads as follows:

In order to provide a boost to the Entertainment and Tourism Industry, arts, crafts and sports in the State, the Governor of Himachal Pradesh, in exercise of the powers conferred by Sub-section (3) of Section 12 of the Himachal Pradesh Entertainment Duty Act, 1968 (Act No. 12 of 1968), is pleased to order to exempt all kinds of entertainments, from liability to pay duty under this Act, in public interest, with effect from 1.4.2001, for a period of 10 years.

3. According to the petitioners, they, relying upon the incentive given in the said notification dated 22nd May, 2001 granting exemption from payment of entertainment duty for a period of 10 years, decided to start the construction of a theatre. Succinctly stated, the case of the petitioners is that by applying the doctrine of promissory estoppel, the respondent-State is debarred from withdrawing the exemption notification since the petitioners had changed their position pursuant to exemption notification. Relevant portion of the averments made in the writ petition in this regard are as follows:

Relying upon the incentives issued vide notification Annexure-P2, the petitioners conceived the idea of setting up of Cinema at Solan as there was hardly any good entertainment place in Solan more particularly for the Tourists visiting Solan. The construction of the cinema was started in June, 2001 and was completed on 10th of May, 2002 at a cost of rupees 90 lakhs approximately. The petitioners had thought that with the entertainment duty being not there for a period of ten years, they would cover the break through in eight years when it will be able to recover the cost of construction and thereafter would start yielding income. The petitioners had raised a loan of rupees 75 lakhs from the Oriental Bank of Commerce, Solan and had also raised loans from friends and relations apart from making their own investments in the cinema. This break-through in eight years was keeping in view the cinema constructed by the petitioners which is a multi-family entertainment centre which apart from cinema, includes shopping complex, Hotel and Restaurant, banquet Hall and other facilities for the tourists visiting Solan and other areas around Solan. The Financial Project Report Analysis of the petitioners

without payment of entertainment duty as per the exemption notification dated 22.5.2001, Annexure P2, is attached herewith as Annexure-P3.

4. The stand of the State in reply to the writ petition is that this is only an exemption notification and can be withdrawn at any time. According to the State, the exemption has not been totally withdrawn. Prior to 22.5.2001 entertainment duty was levied @ 100% of the admission charges. When the exemption notification was withdrawn another notification was simultaneously issued on 8.8.2003 wherein the entertainment duty leviable was fixed @ 20% of the admission. It was also urged that the principles of promissory estoppel are not applicable to the facts of this case.

5. We had heard this matter for some time on 17.7.2008. The pleadings in the petition have been quoted above. Since, we felt that the pleadings are not complete, we had passed the following order:

The case of the petitioner is totally based on the principle of promissory estoppel. The petitioner is directed to place on record the material to show as to when he submitted the building plans for the construction of the complex in which the cinema is house, the dates when he raised loans from the Oriental Bank of Commerce and shall also place on record all other necessary documents relating to the purchase of equipments, seeking permissions of the authorities concerned to set up the project, etc. The needful be done within 10 days. List the matter on 31st July, 2008.

6. In compliance to the aforesaid order, the petitioners filed an application placing on record a number of documents.

7. The doctrine of promissory estoppel is now an established part of the legal jurisprudence of this country. A number of decisions relied to the law of promissory estoppel have been cited before us. We may make reference to some of the latest decisions. The Supreme Court in MRF Ltd. Kottayam v. Asstt. Commissioner (Assessment) Sales, tax and Ors. : 2008[12]S.T.R.206 , held as follows:

34. In Kasinka Trading case and Rom Industries v. State of J & K, on which reliance has been placed by the learned Counsel for the respondent do not disturb the settled position in law that where a right has already accrued, for instance, the right to exemption of tax for a fixed period and the conditions for that exemption have been fulfilled, then the withdrawal of the exemption during that fixed period cannot affect the already accrued right. Of course, overriding public interest would prevail over a plea based on promissory estoppel, but in the present case there is not even a whisper of any overriding public interest or equity. Notification SRO No. 38/98 was an amendment and not a clarification of SRO No. 1729/93 and was expressly made prospective w.e.f. 15.1.1998.

8. The Supreme Court in Southern Petrochemical Industries Company Ltd. v. Electricity Inspector and ETIO and Ors. : AIR 2007 SC1984 , after considering the entire law on the subject held as follows:

121. The doctrine of promissory estoppel would undoubtedly be applicable where an entrepreneur alters his position pursuant to or in furtherance of the promise made by a State to grant inter alia exemption from payment of taxes or charges on the basis of the current tariff. Such a policy decision on the part of the State shall not only be expressed by reason of notifications issued under the statutory provisions but also under the executive instructions. The appellants had undoubtedly been enjoying the benefit of (sic exemption from) payment of tax in respect of sale/consumption of electrical energy in relation to the cogenerating power plants.

9. In a latest decision of the Supreme Court reported in U.P. Power Corporation Ltd. and Anr. v. Sant Steels and Alloys Pvt. Ltd. and Ors. : AIR 2008 SC693 , the Apex Court held as follows:

27. In this background, in view of various decisions noticed above, it will appear that the Court's approach in the matter of invoking the principle of promissory estoppel depends on the facts of each case. But the general principle that emerges is that once a representation has been made by one party and the other party acts on that representation and makes investment and thereafter the other party resiles, such act cannot be stated to be fair and reasonable. When the State

Government makes a representation and invites the entrepreneurs by showing various benefits for encouraging to make investment by way of industrial development of the backward areas or the hill areas, and thereafter the entrepreneurs on the representations so made bona fide make investment and thereafter if the State Government resiles from such benefits, then it certainly is an act of unfairness and arbitrariness. Consideration of public interest and the fact that there cannot any estoppel against a statute are exceptions.

28. Learned Senior Counsel for the appellant has cited nine instances which can be loosely categorised into two i.e. (i) that there cannot be any estoppel against the statute and (ii) overriding public interest. So far as the first part is concerned i.e. the revocation has the statute flavour i.e. the benefit which was extended under Section 49 of the Act of 1948 and the notification had been issued revoking the same benefit under Section 49 of the Act of 1948 by invoking the provisions of the General Clauses Act that an authority granting exemption has a right to revoke the same also. It is true that it has a right to revoke the same but if the other party has suffered on that account then such representation (sic revocation) will be against the public policy and the morality. Notification issued under Section 49 of the Act of 1948 for giving the benefit of exemption for the hill areas was in the nature of delegated legislation and not an Act framed by the State Legislature. Therefore, a distinction has to be made between the delegated legislation and the primary legislation framed by the Legislature.

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32. No person can be permitted to misuse the concession or benefit and invoke promissory estoppel. Promissory estoppel is not one sided affair, it is rather two sided affair. If one party abuses the concession then it is always open to the other party to revoke such concession but if one party avails the benefit and is acting on the same representation made by the other party then the other party who has granted the said benefit cannot revoke the same under the garb of public interest.

Therefore the grounds that the revocation notification was issued in public interest and that same has the flavour of the statute, cannot persuade us to uphold it sustained.

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34. xx.. xx.. xx.. xx..

35. In this 21st century, when there is global economy, the question of faith is very important. Government offers certain benefits to attract the entrepreneurs and the entrepreneurs act on those beneficial offers. Thereafter, the Government withdraws those benefits. This will seriously affect the credibility of the Government and would show the shortsightedness of the governance. Therefore, in order to keep the faith of the people, the Government or its instrumentality should abide by their commitments. In this context, the action taken by the appellant-Corporation in revoking the benefits given to the entrepreneurs in the hill areas will sadly reflect their credibility and people will not take the word of the Government. That will shake the faith of the people in the governance. Therefore, in order to keep the faith and maintain good governance it is necessary that whatever representation is made by the Government or its instrumentality which induces the other party to act, the Government should not be permitted to withdraw from that. This is a matter of faith.

10. From a reading of the aforesaid judgments, it is apparent that the party invoking the principles of promissory estoppel must show that it has acted on the representation made by the other side and on the basis of the said representation has altered its position. Further, the party invoking the principles of promissory estoppel must show that the revocation of the representation will adversely affect its business.

11. Applying the principle to the present case, we have to find out whether the petitioners, in fact, changed their position pursuant to the representation held out to them or not. As noted above, we had directed the petitioners to produce all the records. The averments made in the original petition were extremely vague and the petitioners had not given any material dates to show whether they had

conceptualized the project before the exemption notification was issued or whether they had in fact changed their position on the basis of the said notification. Alongwith their application, the petitioners filed a number of documents. It is apparent that the petitioners applied for sanction of a building plan on 22.9.1998, which was sanctioned by the Municipal Council, Solan on 13.10.1998. These plans have been produced on record. The sanctioned plan shows that there was a provision for a hall, though it was not specifically shown as a theatre. It is not disputed that thereafter on 28.5.2001, the petitioners applied for a revised plan, which revised plan was also sanctioned, in which there was a specific provision for a theatre.

12. Shri K.D. Sood, learned Counsel for the petitioners contended that the Hon'ble Chief Minister of the State of Himachal Pradesh in a speech in Vidhan Sabha while presenting the budget estimates had stated that a proposal would be brought in to give 10 years tax holidays to entertainment and tourism related facilities. According to him, petitioners started acting on the basis of this announcement. We cannot accept this argument. Such a plea has not been raised in the writ petition or even in the application now filed pursuant to the orders of the Court. This for the first time has been raised at the time of hearing. Even otherwise, we are clearly of the view that when an act was in existence providing for a levy of 100% excise duty, mere announcement by the Chief Minister could not induce any entrepreneur to act on the same without the same actually being notified under the provisions of law. An announcement made against the existing law has no value.

13. The petitioners have also placed on record, letter dated 26.4.2002, written by the petitioners to the Additional District Magistrate, Solan. Relevant portion of the letter reads as follows:

That the applicants after getting the permission to construct a Mini Theatre in Mauja Kather (The Mall) Solan from M.C. Solan on 13.10.1998 order No. 832/98 has completed the same and now wants to run/exhibition the same, since the machineries and other formalities have been completed and hence this application for seeking permission to run the said mini theatre in mauja Kather (The Mall) Solan, H.P.

14. A perusal of this letter clearly shows that the petitioners sought permission to construct a mini theatre from the M.C. Solan on 13.10.1998, as is also reflected from the letter sanctioning the original construction plan. According to the petitioners, they had completed the theatre and had purchased the machinery and were seeking permission to run the mini theatre. This letter was written by the petitioners on 26.4.2002, before the exemption notification was issued on 22.5.2001. In this letter the petitioners made reference to the order dated 13.10.1998 granting permission for starting the theatre. Reference may also be made to a letter dated 15.4.2001 Annexure P-14 placed on record. The petitioners by means of this letter have sought a loan from the Manager, Oriental Bank of Commerce. In this letter, they have stated that they will construct a Commercial Complex consisting of an ultra modern theatre and in addition thereto there would be a hotel, restaurant, coffee shop, bar and a conference hall. The complex will also consist of shopping arcade and an office complex. In this letter, it is stated that the project is already in progress and the basement has already been constructed. This letter is dated 15.4.2001 before the issuance of the exemption notification and mentions that a theatre having a five hundred seat capacity is being built. The revised plan was applied for on 28.5.2001 after the issuance of the notification but this letter shows that even prior to the issuance of this notification the petitioners had already undertaken the construction of the project which also included a theatre.

15. From the aforesaid facts, it is more than apparent that the petitioners did not raise the theatre pursuant to the exemption notification but they had already conceived the idea of setting up a theatre and had started construction of a theatre prior to the issuance of the exemption notification. Therefore, it is more than obvious that they did not act on the representation made by the respondent-State. They had already decided to make the investment and in fact had invested huge amount before issuance of the notification. They had as far back in the year 1998 sought permission to construct a theatre and also taken permission from the District Magistrate in this regard. The petitioners had applied to the Bank for grant of loan prior to the issuance of the exemption notification. The mere fact that they in fact raised the construction and purchased the machinery after the issuance of the said notification does not entitle them to invoke the doctrine of promissory

estoppel. The basis premise of this doctrine is that the party invoking the doctrine has changed its position acting on the representation of the State. This the petitioners have failed to prove in the present case.

16. We also find that the conduct of the petitioners in this case is not above board. The petitioners in the original writ petition did not mention any date with regard to the seeking permission, grant of loan, etc., which were relevant for deciding the issue. We are of the considered opinion that the petitioners purposely withheld certain material facts from this Court. Therefore, also the petitioners cannot invoke the principles of doctrine of promissory estoppel.

17. In view of the above discussion, there is no merit in the petition, which is accordingly rejected, with costs assessed at Rs. 10,000/-.

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