

MANU/BH/0035/1994

Equivalent Citation: AIR1994Pat162, 1994(2)BLJR1403

**IN THE HIGH COURT OF PATNA
FULL BENCH**

C.W.J.C. Nos. 6155, 6156 and 10730 of 1993

Decided On: 26.04.1994

Appellants:**Shakti Tubes Ltd. and Ors.**
Vs.

Respondent:**State of Bihar and Ors.**

Hon'ble Judges/Coram:

K.S. Paripoornan , C.J., U.P. Singh and N.K. Sinha , JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Basudeva Prasad, Sr. Adv., Pawan Kumar, Raj Kishore Prasad, Lakshmi Kant Tiwary

For Respondents/Defendant: Rameshwar Prasad, A.G., Rafat Alam, G.P. , Om Prakash Agrawal, Veena Kumari Jaiswal, Advs. and Shyam Narayan Sinha, J.C. to A.G.

JUDGMENT

K.S. Paripoornan, C.J.

1. This batch of three cases were heard together as common questions arose for consideration in these cases. In C.W.J.C. No. 6155 of 1993 alone there are two petitioners. The petitioners in all the three cases are companies. They are assessee to sales tax. Their complaint is that the State-respondent (Government of Bihar) has failed to disburse the interest free sales tax loan either fully or partially as per the resolution No. XI-IP-04/86-13730 dated 1st September, 1986, Department of Industries, Government of Bihar. The said resolution of the Government of Bihar is filed as Annexure 3 in C.W.J.C. No. 6155/93. The said resolution is filed as annexures in other cases also. C.W.J.C. No. 6155/93 was treated as the main case. So, we shall refer to the facts stated in the said case to solve the controversy raised in this batch of cases.

2. The prayer in this batch of writ petitions is for the issuance of directions to the respondents-State of Bihar and its officials to disburse the various amounts specified in the writ petitions stated to be due by way of interest free sales tax loan to the petitioners. The earlier resolutions passed by the State of Bihar dated 20-3-1973, 29-6-1975, 8-3-1980 and 20-1-1981 are referred to. They are only relevant to understand the background and the earlier history of the cases. By Annexure 3, Resolution No. 13730, dated 1-9-1986, the respondent-State of Bihar announced incentives to industries in Bihar and promised to give interest free sales tax loan to the industrial units which came into production on or after 1-9-1986. The petitioners state that the State made unequivocal promise to provide incentive to the industries for setting up the industry in the State of Bihar by providing interest free sales tax loan and other incentives. The first petitioner in C.W.J.C. No. 6155/93 came into production from 6-7-1987. They took all steps in pursuance to the incentive resolution dated 1-9-1986. An application was made for grant of interest free sales

tax loan. The respondent were pleased to sanction a sum of Rs. 10 lakhs to the petitioners and out of which a sum of Rs. 3,81,493/- has been disbursed and the balance sum of Rs. 6,18,508/- due has not been disbursed to the petitioners so far.

3 . The Managing Director, North Bihar Industrial Area Development Authority, Muzaffarpur, by his Memo No. 402, dated 9-3-1990, intimated to the petitioners that a sum of Rs. 6,18,508/- has been granted as per the order of the Government of Bihar by way of interest free sales tax loan. It was further intimated that to avail of the same the petitioners should execute an agreement. This is Annexure 4. It is stated in paragraph 15 of the petition, that the petitioners executed the said agreement and accepted the conditions made in the letter dated 9-3-1990 vide Annexure 5.

4 . The petitioners approached the respondents time without number for payment of the amount of interest free sales tax loan which was duly sanctioned and approved and for which an agreement was executed as per resolution dated 1-9-1986. The petitioners suite that in spite of repeated requests the action of the respondents in not paying the amount of interest free sales tax loan which has been duly sanctioned is illegal and arbitrary. The petitioners state that they have altered their position in pursuance to the various resolutions made by the State Government and have acted upon the same. They have made huge investments by setting up the industry in the State of Bihar and, so, the respondents are bound by the principle of "promissory estoppel" to fulfil their promise. There is no justification in not disbursing the amount of interest free sales tax loan which the petitioners are entitled to. In similar circumstances, in the case of M/s. Om Flour Mills, this Court directed the respondents to pay the amount of subsidy along with the interest on the said amount. The case is reported in 1992(1) Pat LJR 700. A similar decision was rendered by this Court in C.W.J.C. No. 2476/93 (M/s. Pooja Engineers (P.) Ltd. v. State of Bihar) vide Annexure 7. The petitioners state that they have got no other alternative than to move this Court for the relief sought for, under Article 226 of the Constitution of India.

5 . The petitioners have prayed for the issue of a writ of mandamus directing the respondents to disburse the amount of interest free sales tax loan of Rs. 6,18,508/- which has been duly approved by the State Government and also directing the respondents to grant interest on the amount of interest from sales tax loan which has duly been sanctioned and approved.

6 . The State has filed a detailed counter-affidavit dated 7-10-1993. It is stated therein that an application for loan is subject to the condition that the loan would be disbursed on availability of fund and Clause 10 of An-nexure 4 is conclusive of this matter. It is further submitted that the financial position of the State cannot afford to grant the loan by ignoring the compulsory legal and constitutional obligations as a sovereign authority and the grant of loan is a, matter of policy decision which cannot prevail upon legal and constitutional obligations. The loan sanctioned can only be granted after the fund is available. It is further submitted that due to financial constraints the Government is not in a position to spare any fund for fulfilling policy obligation in face of necessary and mandatory financial obligation. However, if the fund is available, the Government will disburse to the needy and deserving parties in an equitable manner. It is further submitted that the petition is premature in view of the fact that Clause 10 of the order (Annexure 4) clearly speaks about the contingency under which the loan would be paid.

7. A supplementary counter-affidavit has been filed by the State, dated 3-3-1994. It is stated therein that the payment of loan is subject to the availability of fund and it cannot be enforced when no funds are available. The State is facing financial constraints and the State is not in a position to grant loan as claimed by the petitioners. The promise made in Annexure 3 will not come within the purview of "promissory estoppel". A contractual obligation, not based on any statute, is not enforceable in writ proceedings. Similar is the position with regard to the capital subsidy. The public exchequer is facing serious financial constraints with regard to its financial resources. The State has to meet the increased expenditure to save the human lives and the public property from serious calamity of famine like situation which have occurred in the State. The State has also to meet the heavy expenditure for maintaining law and order. The State has to fix the priority for application of the funds to Industrial Department for different schemes. It is further submitted that due to non-availability of fund, it is not possible to make the payment till the end of the next financial year. It is further stated that the prayer for interest free loan equivalent to the amount of sales tax collected and deposited by the petitioner is virtually the refund of the sales tax realised and in view of the decision of the Supreme Court, reported in MANU/SC/0198/1992), the plea is not allowable. The claim made is only for money, which cannot be enforced in writ jurisdiction. A writ petition is not maintainable, for enforcement of a pure money claim. The petitioners have neither constitutional nor statutory right to get the relief as prayed for. It is due to financial constraints that the State is not in a position to fulfil its policy decision. The overriding public interest and obligation of the State deters the State from disbursing the amount. In the supplementary counter-affidavit, the State has also stated, with reference to official documents and figures, as to why it is not able to fulfil the obligation, if at all, and the reasons for the delay or the postponement. Many of the facts so stated require probe into volumes of official documents and also oral evidence. This is an important aspect to be borne in mind in evaluating the rival pleas and in deciding whether the discretionary jurisdiction under Article 226 of the Constitution deserves to be pressed into service, in all the circumstances of the case.

8. The petitioners have filed a reply-affidavit dated 4-3-1994. The petitioners have stated that the plea of the State, that the loan will be given when the financial position of the State becomes sound cannot stand. It is incorrect. The Government is bound to disburse the amount of loan. The policy decision in Annexure 3 is to accelerate the growth of the industries in the State of Bihar which is made in the larger public interest. There is no abnormal situation which has arisen for the State to resile from its promise. The State has given only incentive, as loan to be repaid by industries and it is not a case of refund of sales tax realised from the industries and, so, the decision of the Supreme Court reported in 85 STC 483 has no application. There is public duty cast upon the State to fulfil their promise and the petitioners are enforcing the promise made through the policy decision. The contractual obligation of the welfare State is to promote economic and other welfare schemes and the policy decision with regard to the same is enforceable. The incentives announced, vide Annexure 3, by the State is a welfare scheme for the economic betterment of the people of the State and acting upon which the industries have altered their position and, as such, the State Government is bound to fulfil their obligation which is a moral, legal and constitutional obligation.

9. The important feature in this batch of case's is that, in effect, the State does not disown or deny its liability to pay interest free sales tax loan as enunciated in Annexure 3. The plea made by the State is that it has at present no funds for disbursement and that the writ petition praying for disbursement of interest free sales

tax loan, either in whole or in part, is not maintainable, as it is stated by the State that the liability is purely contractual and the obligation arising out of such pure and simple contract cannot be enforced in a proceeding under Article 226 of the Constitution of India, It is further pleaded that the relief for disbursal of the amounts said to be due cannot be granted in writ proceedings.

10. We heard learned counsel for both sides on the larger question regarding the applicability of promissory or equitable estoppel, the extent to which such promissory or equitable principle will apply, the exceptions or extenuating circumstances, if any, in the matter and other aspects. We find that the State has not denied its obligation arising out of industrial resolution, Annexure 3, but has only pleaded that since no funds are available now, it is not in a position to fulfil its obligation. We are not adjudicating as to whether the circumstances pleaded by the State are extenuating ones, absolving it from the obligation or for the delay. It depends upon evidence. The only plea forcefully made is that the relief in the manner and form pleaded, for the disbursal of amounts stated to be due, cannot be granted in writ proceedings. The contractual obligation, pure and simple, not based on any statute, cannot be enforced in a proceeding under Article 226 of the Constitution of India. The liability is practically admitted but what is pleaded is that the relief prayed for is not available in this proceeding under Article 226 of the Constitution but otherwise. We do not propose to deal with the larger questions that were mooted at the Bar, in the above circumstances.

11. For the purpose of disposing of this batch of cases, we proceed on [he basis that the State is bound by its promise made in Annexure 3 and that the principle of promissory estoppel will apply. The principle of promissory estoppel is akin to the principle of legitimate expectation. Unless there is overriding reason of public policy or other compelling or overriding consideration of public . interest or other extenuating circumstances, proved in the case as laid down by the decisions of Courts, in normal circumstances, the State is bound to fulfil its promise contained in Annexure 3. The question is, even so, can a writ of mandamus be issued for disbursement of amounts stated to be due as per Annexure 3 either in whole or in part ? In our opinion, the answer can only be in the negative.

12. A writ of mandamus will not issue to enforce a contract against the Government, which has not been made in exercise of statutory power. But a writ may issue to enforce the promise made by the State relying on which the petitioners have altered their position to their prejudice. In such cases, the rule of promissory estoppel may apply. Appropriate relief can be granted in a proper case under Article 226 of the Constitution of India. Even so, is it open to the Court to issue a writ of mandamus (solely) for disbursal of the amounts, said to be due either as per the contract or by application of the principle of promissory estoppel ? Is the proceeding under Article 226 of the Constitution a substitute for the normal remedy available by way of a civil suit ? In our opinion, such a relief cannot be granted in a proceeding under Article 226 of the Constitution of India, In the case of *Burmah Construction Co. v. State of Orissa*, reported in MANU/SC/0314/1961 : AIR 1962 SC 1320 at p. 1323, delivering the judgment of the Constitution Bench, Shah, J. stated thus :

"The High Court normally does not entertain a petition under Article 226 of the Constitution to enforce a civil liability arising out of a breach of contract or a tort to pay an amount of money due to the claimant and leaves it to the aggrieved party to agitate the question in a civil suit filed for that purpose. But an order for payment of money may sometime be made in a petition

under Article 226 of the Constitution against the State or against an officer of the State to enforce a statutory obligation."

The above decision was quoted with approval in a subsequent constitution Bench decision, in the case of *Suganmal v. State of Madhya Pradesh*, MANU/SC/0230/1964 : AIR 1965 SC 1740 and the Court took the view that a petition praying merely for the issue of a writ of mandamus for refund of tax or any money due from the State cannot be normally maintained. It was held (at p. 1742 of AIR):

"Normally petitions solely praying for the refund of money against the State by a writ of mandamus are not to be entertained. The aggrieved party has the right of going to the Civil Court for claiming the amount and it is open to the State to raise all possible defences to the claim, defences which cannot, in most cases, be appropriately raised and considered in the exercise of the writ jurisdiction."

Admittedly, the liability, if any, of the State is only a civil liability now. We may add, that a prayer for disbursal of amounts said to be due, and a prayer for 'refund' of money, against the State stand on the same footing. In both, the plea is one for recovery of amounts, said to be due. Normally, a civil suit is the remedy in such a situation. The purpose of Article 226 of the Constitution is not to supersede the normal remedy available under law by way of a suit. It may be that in such a suit, the State will be in a position to substantiate, by oral and documentary evidence, the various defences which may absolve itself from the obligation or substantiate the reasons for the delay or postponement. That opportunity cannot be foreclosed. Later, a Bench of four Judges of the Supreme Court of India, in the case of *D. R. Mills v. Commissioner, Civil Supplies*, (MANU/SC/0065/1976 : AIR 1976 SC 2243) at page 2249, quoted the above two decisions with approval.

13. In the light of the above decisions of the Supreme Court of India, we hold that the prayer in this batch of writ petitions for disbursal of the interest free sales tax loan, either in whole or in part, as per Annexure 3, cannot be enforced by issue of a writ of mandamus in a proceeding under Article 226 of the Constitution of India.

14. We note that in the earlier decisions of this Court, in the case of *Om Flour Mills (P.) Ltd. v. State of Bihar*, (1992(1) Pat LJR 700) and C.W.J.C. No. 2476 of 1993, the relief by way of issue of a writ of mandamus for disbursal of the amount, either wholly or partly, due as per industrial resolution was granted. It does not appear that the point was ever taken or mooted in the said cases, to the effect that such a relief cannot be granted in a proceeding under Article 226 of the Constitution of India, as per the decisions of the Supreme Court aforesaid. The point as to whether such relief can be given was not mooted or decided but, on the other hand, it was assumed. So, we are of the view that the, said decision cannot be an authority for the proposition that the relief prayed for by the petitioners can be granted in a proceeding under Article 226 of the Constitution of India.

15. We are of the view that the facts in these cases do not warrant the exercise of extra-ordinary discretionary jurisdiction vested in this Court under Article 226 of the Constitution of India. The petitioners should seek the remedy for disbursal or recovery of amounts by way of suit in a Civil Court. It is an equally efficacious remedy. We, therefore, dismiss this batch of writ petitions.

U.P. Singh, J.

16. I agree.

N.K. Sinha, J.

17. I agree.

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