

**SUPREME COURT OF INDIA**

Kothari Industrial Corporation Ltd.

Vs.

Tamil Nadu Electricity Board & Anr.

C.A.No.9748 of 2003

(Ranjan Gagoi and Arun Mishra, JJ.)

29.01.2016

**JUDGMENT**

**Ranjan Gogoi, J.**

1. These cases have been referred by a two-Judges Bench of this Court on the question as to whether, in the facts of the case, the principles of promissory estoppel can be invoked in favour of the appellants so as to entitle them to the benefit of concessional tariff of electricity.

2. Civil Appeal No.9748 of 2003 and Civil Appeal No. 9750 of 2003 have identical facts. In fact the appellant in Civil Appeal No. 9750 of 2003 is the successor-in-interest of the appellant in Civil Appeal No. 9748 of 2003. The facts in the third appeal i.e. Civil Appeal No. 9749 of 2003 are also largely similar.

3. The appellant in C.A.No.9748 of 2003 M/s. Kothari Industrial Corporation Ltd. had proposed to set up a caustic soda manufacturing unit at Manali in the State of Tamil Nadu. As the manufacturing process involved high consumption of electrical power, the appellant applied for concessional tariff which was promised to it by a Government Letter dated 29.6.1976 for first five years after commencement of production. In the said letter it was specifically mentioned that the rate at which the appellants were required to pay tariff would be below the rate applicable to the other two established caustic soda units in the State for the first three years and thereafter the rates will be at par with that of the other two units in the State.

4. Admittedly the unit of the appellant had started commercial production with effect from January, 1979. On 23.2.1979 the Tamil Nadu Revision of Tariff Rates on supply of Electrical Energy Act, 1978 (hereinafter referred to as the "Act") came into force.

5. Section 2(b) of the Act defines tariff in the following terms:

“Tariff” means the rate of tariff leviable upon the consumption of any electrical energy in this State supplied by the Tamil Nadu Electricity Board and as specified in the Schedule to this Act.”

Section 3 of the Act provides that the tariff rates for consumption of electrical energy shall be as specified in the Schedule to the Act.

Under Section 4 the State Government is empowered to amend the provisions of the Schedule to the Act after taking into account the cost of production of energy and such other matter as may be prescribed.

The schedule to the Act, inter alia, provides that in the case of new industries, concessional tariff would be charged after commencement of the production in the following manner-

“For the first Three years 66-2/3 Per cent of the High Tension rates under 1(A) (B) as the case may be. For the fourth year 80 Percent of the High Tension rates under 1(A), 1(B) as the case may be. For the fifth year 90 Per cent of the High Tension rates under 1(A) (B) as the case may be. For the sixth year Full Tariff.”

6. In exercise of the power conferred by Section 4 of the Act, the Schedule thereto was amended by G.O. No.861 dated 30.4.1982. While maintaining the concessional tariff as noticed above, the Amendment provided that the same will not be available from the year when the industry starts earning profits. It is also an admitted fact that the appellants had furnished undertakings that it will be bound by amendment to the Schedule as affected by G.O. No.861 dated 30.4.1982.

7. On the above basis, a demand was raised on the appellants for consumption of electricity at the normal rate of tariff applicable on the ground that the industries had started earning profits. The said demand insofar as the appellant, M/s. Kothari Industrial Corporation Ltd. and Southern Petro Chemical Industries Corporation Ltd. is concerned is for the period from May 1982 to November, 1983, while for the appellant National Oxygen Ltd. the period is May 1982 to April, 1984.

8. The appellants protested against the said demand and eventually moved the High Court contending that under the Act the respondent State had promised concessional tariff for a period of five years starting from the date of commencement of commercial production. The said position could not have been revisited by any contrary action as has been done. Alternatively, it was contended that the appellants had not made any profits as claimed by the State. Therefore, even if the amendment in the Schedule to the Act is to be construed to be legally permissible, the same would have no application to the appellants which were loss making concerns. The said claim was negated by the High Court leading to the appeals before us.

9. We have heard Shri Pravin H. Parekh and Ms. Nalini Chidambaram, learned senior counsels for the appellants in C.A. No 9748 of 2003 and C.A. No 9750 of 2003 and Shri

Krishnamurthi Swami, learned counsel for the appellant in C.A.No.9749 of 2003. We have also heard Shri Subramonium Prasad, learned counsel for the respondents.

10. The question referred to this bench, as noticed, is whether the State would be estopped from altering/modifying the benefit of concessional tariff by means of the impugned G.O No. 861 dated 30.4.1982 on the principle of promissory estoppel. In fact, insofar as the caustic soda unit of M/s. Kothari Industrial Corporation Ltd., subsequently taken over by Southern Petro Chemical Industrial Corporation Ltd., is concerned, strictly speaking, the above question would not even arise inasmuch as at the time when the unit was set up and had started commercial production, the Act had not yet come into force. The promise, if any, was made by the letter dated 29.6.1976 on the terms noticed above, namely, the tariff payable by the industry was to be at a rate less than what was applicable to the other two units of the State for the first three years and thereafter at the rate equivalent to what was being paid by the said two units.

11. Be that as it may, the question referred has been squarely answered by this Court in *Shree Sidhali Steels Limited vs. State of Uttar Pradesh & Ors.*<sup>1</sup> wherein this Court has considered a similar question with regard to the withdrawal of concessional tariff/rebate to an industrial unit carrying on business in the hill areas of the State of U.P. (now the State of Uttarakhand). After an indepth consideration of the provisions of Section 48/49 of the Electricity Supply Act, 1948 under which the concessional tariff/rebate was granted and the provisions of Section 21 of the General Clauses Act as well as the provisions of the U.P. Electricity Reforms Act, 1999 under which the concessional tariff/rebate was later withdrawn this Court in para 51 came to the following conclusion –

“From the above discussion, it is clear that the petitioners cannot raise plea of estoppel against the Notification dated 7.8.2000 reducing hill development rebate to 0% as there can be no estoppel against the statute.”

12. In Para 47 of the report this Court has considered and had thought it appropriate to extract the views expressed in an earlier decision i.e. *State of Rajasthan vs. J.K. Udaipur Udyog Ltd.*<sup>2</sup>:

“25. An exemption is by definition a freedom from an obligation which the exemptee is otherwise liable to discharge. It is a privilege granting an advantage not available to others. An exemption granted under a statutory provision in a fiscal statute has been held to be a concession granted by the State Government so that the beneficiaries of such concession are not required to pay the tax or duty they are otherwise liable to pay under such statute. The recipient of a concession has no legally enforceable right against the Government to grant of a concession except to enjoy the benefits of the concession during the period of its grant. This right to enjoy is a defeasible one in the sense that it may be taken away in exercise of the very power under which the exemption was granted. (See *Shri Bakul Oil Industries v. State of Gujarat, Kasinka Trading v. Union of India and Shrijee Sales Corpn. v. Union of India.*)”

13. On the aforesaid basis in Para 48 of the report in Shree Sidhali Steels Ltd. (supra) it was concluded as follows :

"48. From the principle enunciated in the abovementioned decision in Udaipur Udyog case there is no manner of doubt that the rebate which was granted to the petitioners, was, by definition, a freedom from an obligation which the appellants otherwise were liable to discharge. The rebate was a privilege granting an advantage which was not made available to others. The rebate granted under Section 49 of the Electricity (Supply) Act of 1948 was, therefore, a concession granted by the State Government so that the beneficiaries of such concessions were not required to pay the electricity tariff they were otherwise liable to pay under the said Act during the period of its grant. The petitioners, as recipients of a concession, accepted to enjoy the benefits of the concession during the period of its grant. This right to enjoy was a defeasible one in the sense that it was liable to be taken away or withdrawn in exercise of the very power under which the exemption was granted."

14. In the light of the above discussion and the earlier views of this Court, as set out above, it has to be held that the principle of promissory estoppel would have no application to the case of the appellants so as to entitle the appellants any right to the continuation of the concessional tariff earlier granted.

15. The appellants have urged certain other issues to persuade the court to strike down the impugned action of the respondents in withdrawing the concessional tariff, the foremost being that the industries in question had earned no profits so as to attract the withdrawal/disabling condition introduced in the Amended Schedule. In this regard it is pointed out that Kothari Industrial Corporation Ltd. had incurred losses as a whole though its caustic soda unit, to whom concessional tariff was promised and granted, may have earned a profit. The concessional tariff having been granted to the industry by the Act in question, though in respect of its caustic soda unit, the assessment of profit/loss made by the industry as a whole and not by the unit alone, cannot be said to be an arbitrary or irrational basis for determining the application of the impugned G.O. to the appellants in C.A.Nos.9748 and 9750 of 2003. Similarly in the case of the appellant National Oxygen Ltd. the refusal of the respondent to compute the issue of profit/loss by distributing the depreciation of cylinders for a period of five years instead of the first year in which the depreciation was allowed, as claimed, cannot be termed as an unjustified basis for holding the industry to be a profit making enterprise. The contention on the above score made on behalf of the appellant National Oxygen, therefore, is of no consequence. Similarly the withdrawal of the G.O. 861 dated 30.4.1982 in the year 1988 and a reversal to the situation prevailing earlier cannot invalidate the G.O. (No. 861 dated 30.4.1982) inasmuch as it is for the State and not for the court to determine what should be the policy for grant/refusal of concessional power at different points of time. These are questions that must be left to the State and not to the Courts to decide.

16. In the light of the above, even the contentions on the merits of the decision as advanced by the appellants are not tenable so as to invalidate the action(s) impugned in the present cases.

17. For the aforesaid reasons all the appeals are without any merit and are accordingly dismissed.

**Judgment Referred.**

<sup>1</sup>(2011) 3 SCC 0193

<sup>2</sup>(2004) 7 SCC 0673