SUPREME COURT OF INDIA

Manuelsons Hotels Private Limited

Vs.

State of Kerala & Ors.

C.A.No.2480 of 2008

(A.K.Sikri and R.F.Nariman,JJ.,)

11.05.2016

JUDGMENT

R.F.Nariman.J.,

1. On 11th July, 1986, the State Government, by a Government Order (G.O.), accepted the recommendations of the Government of India suggesting that tourism be declared an "industry". The fallout of this G.O. was that this would enable those engaged in tourism promotional activities to become automatically eligible for concessions / incentives as applicable to the industrial sector from time to time. Apart from various other concessions that were granted, exemption from Building Tax levied by the Revenue Department was one such concession. It was stated in the said G.O. that action to amend the Kerala Building Tax Act, 1975 will be taken separately. The G.O. went on to state that persons eligible for such concessions will, among others, be classified hotels i.e. from 1 to 5 stars. A Committee was set up consisting of three government officers to oversee the aforesaid scheme.

2. Vide a letter dated 25th March, 1987, the Government of India approved the hotel project of the appellants, being a 55 double room 3 star hotel project to be set up in the city of Calicut.

3. Pursuant to the aforesaid G.O. dated 11th July, 1986 and the aforesaid approval, the appellants began constructing the hotel building, which was completed in the year 1991. Notice for filing returns under the Kerala Buildings Tax Act was issued to the appellants on 5th September, 1988. The appellants replied that they relied upon the G.O. dated 11th July, 1986 and stated that they were under no obligation to furnish any return under the said Act as they were exempt from payment of building tax.

4. In pursuance of the said G.O. dated 11th July, 1986, the Kerala Buildings Tax Amendment Act of 1990 was passed with effect from 6th November, 1990. The Objects and Reasons for said amendment act read as follows:

"**STATEMENT OF OBJECTS AND REASONS**

The Government has declared tourism as an ^industry with a view to develop tourism in the State and announce various concessions to tourism related activities as per GO (P) 224/86/GAD dated 11.07.1986. One of the concessions declared by Government was to exempt the buildings constructed in relation to tourism from the provisions of the Kerala Building Tax Act, 1975. For achieving the above said purpose the Kerala Building Tax Act, 1975 has to be amended suitably and the Government have decided to amend the Kerala Building Tax Act 1975 for the purpose. As the above proposal had to be given effect to immediately and as the Legislative assembly was not in session the Kerala Building Tax (Amendment) Ordinance, 1990 (Ordinance No.8 of 1990) was promulgated by the Governor of Kerala on the 2nd day of November, 1990, and published in the Kerala Gazette Extraordinary dated 6th day of November, 1990.

The Bill seeks to replace the said ordinance by an Act of Legislature. (Published in KG Ex No.1159 dt 7.12.1990)"

5. In pursuance of the said object, Section 3A was added, which reads as under:

"3A.(1) Power to make exemption:- The Government may, if they consider it necessary so to do for the promotion of tourism, by notification in the Gazette make exemption from the payment of building tax under the Act in respect of any building or buildings the construction of which is completed during such period and in such areas as may be specified in the notification and having such specifications as may be prescribed in the rules in this behalf."

Also, to effectuate the said exemption provision, Rule 14A was added in the Kerala Buildings Tax Rules, 1974 as under:

"Rule 14A

(1) The exemption contemplated in Section 3A of the Kerala Building Tax Act, 1975 shall be applicable to the buildings having the following specifications in such Tourism sector and the construction of which is completed during such period as may be specified in the notifications:-

"(i) Classified hotels (1 to 5 stars)

(ii) Motels(which conform to the specification of the Department of Tourism of Kerala/ Central Government)

(iii) Restaurants (approved by Classification committee of the Government of India)

(iv) Amusement parks and research centres approved by the Government.

(v) Ropeways at tourist centres.

(vi) Construction of structures like Koothambalam/Auditorium etc by schools/institutions teaching Kalaripayattu and traditional art forms of Kerala.
(vii) Institutions teaching surfing, sking, gliding, trekking and similar activities which will promote tourism;

(viii) Ayurvedic centres with tourism potential;

(ix) Exclusive handicrafts with emporia (approved by the State/Central Department of Tourism)

(2) The area so notified shall be approved Tourist Centres and such other locations certified by a Committee consisting of Secretary to Government,
Tourism Department, Secretary to Government Taxes Department and Director, Department of Tourism.

(3) The period of exemption shall be 10 years or such shorter period in respect of specific areas as may be notified in the Gazette based on the recommendation of the Committee."

6. By a Writ Petition filed in 1989, the appellants challenged the notice dated 5th September, 1988. This resulted in a judgment of the Kerala High Court dated 30th August, 1995 by which the appellants were relegated to the Committee set up under the 1986 G.O. to pursue their claim. Till final orders were passed by the Committee, the judgment stated that the respondents would not take any coercive steps to recover any building tax assessed on the building constructed by the appellants.

7. By a letter dated 6th February, 1997, the exemption promised by the G.O. of 1986 was denied to the appellants stating that as Section 3A had been omitted w.e.f. 1st March, 1993, the power to grant exemption had itself gone and, therefore, no such exemption could be given to the appellants.

8. Pursuant to the aforesaid letter dated 6th February, 1997, a notice dated 28th April, 1997 was issued by the authorities asking the appellants to submit the necessary statutory return under the Kerala Buildings Tax Act. This notice was, in turn, challenged in O.P. No. 9601 of 1997, which culminated in a judgment dated 20th July, 1998. Vide this judgment, the High Court allowed the original petition and directed the Committee to consider the matter afresh in the light of the judgment of the Supreme Court in M*/S Motilal Padampat Sugar Mills v. State Of Uttar Pradesh & Ors*[1]*., and Shrijee Sales Corporation & Anr. v. Union of India*[2]*,*

9. Vide an order dated 4th February, 1999, the authorities once again rejected the appellant's application for exemption from property tax. This order was challenged in Writ Petition No. 9820 of 1999 which has led to the impugned judgment dated 5th December, 2006. The High Court essentially rejected the aforesaid Writ Petition on two grounds. First, it stated that as

no exemption Notification had, in fact, been issued under Section 3A when it was in existence in the statute book, no claim for exemption from payment of building tax would be allowed. It further held that the mere promise to amend the law does not hold out a promise of exemption from payment of building tax. And finally, the High Court held that the question of now exempting the appellants from building tax would not arise as Section 3A itself had been omitted w.e.f. 1st March, 1993.

10. Shri V. Giri, learned Senior Advocate appearing on behalf of the appellants before us, has argued that the High Court has failed to consider various Supreme Court judgments on promissory estoppel in their true perspective. In his submission, the aforesaid judgment clearly led to the conclusion that when the Government holds out a promise which has been acted upon, except in cases of overriding public interest, which has not been claimed in the facts of the present case, the Government cannot resile from the said promise and must be held to be bound thereby. He added that there was no necessity for the Government to be directed to actually issue a Notification under Section 3A as that would only be a ministerial act which would be regarded as having been performed if Government was to be held to its promise. According to the learned counsel, therefore, a reading of the judgments of this Court would necessarily lead to granting of relief to his client.

11. Shri Radhakrishnan, learned senior counsel appearing on behalf of the respondents, countered these submissions and supported the impugned judgment of the High Court. According to Shri Radhakrishnan, a mandamus cannot be issued to the executive to frame or amend the law. In any event, according to the learned counsel, Section 3A having been deleted w.e.f. 1st March, 1993, it is clear that no relief can be granted to the appellants as on date.

12. Having heard the learned counsel for both the sides, we are of the view that it will first be necessary to examine the doctrine of promissory estoppel as laid down in *M/S Motilal Padampat Sugar Mills,(Supra)* and as followed in *State of Punjab v. Nestle India Ltd.*[3],

13. In the M/S Motilal Padampat Sugar Mills case, the appellant before this Court was primarily engaged in the business of manufacture and sale of sugar. An assurance was given by the State Government in that case that new Vanaspati units in the State which go into commercial production by 30th September,1970 would be given partial concession in sales tax for a period of three years. The appellant having set up such Vanaspati unit thereafter went into the production of Vanaspati on 2nd July, 1970 and sought exemption. The Government apparently turned around and rescinded its earlier decision of January, 1970 in August 1970, by which time the factory of the appellant had gone into commercial production. A Writ Petition was filed in the High Court of Allahabad asking for a writ directing the State Government to exempt the sales of Vanaspati manufacturer from sales tax for a period of three years commencing 2nd July, 1970 as per the promise held out. This plea fell upon deaf ears in the High Court, as a result of which the petitioner in that case appealed to the Supreme Court. After discussing the authorities in detail, this Court held:

"The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution. It is elementary that in a republic governed by the rule of law, no one, howsoever high or low, is above the law. Everyone is subject to the law as fully and completely as any other and the Government is no exception. It is indeed the pride of constitutional democracy and rule of law that the Government stands on the same footing as a private individual so far as the obligation of the law is concerned: the former is equally bound as the latter. It is indeed difficult to see on what principle can a Government, committed to the rule of law, claim immunity from the doctrine of promissory estoppel. Can the Government say that it is under no obligation to act in a manner that is fair and just or that it is not bound by considerations of "honesty and good faith"? Why should the Government not be held to a high "standard of rectangular rectitude while dealing with its citizens"? There was a time when the doctrine of executive necessity was regarded as sufficient justification for the Government to repudiate even its contractual obligations; but, let it be said to the eternal glory of this Court, this doctrine was emphatically negatived in the Indo-Afghan Agencies case and the supremacy of the rule of law was established. It was laid down by this Court that the Government cannot claim to be immune from the applicability of the rule of promissory estoppel and repudiate a promise made by it on the ground that such promise may fetter its future executive action. If the Government does not want its freedom of executive action to be hampered or restricted, the Government need not make a promise knowing or intending that it would be acted on by the promisee and the promisee would alter his position relying upon it. But if the Government makes such a promise and the promisee acts in reliance upon it and alters his position, there is no reason why the Government should not be compelled to make good such promise like any other private individual. The law cannot acquire legitimacy and gain social acceptance unless it accords with the moral values of the society and the constant endeavour of the Courts and the legislature, must, therefore, be to close the gap between law and morality and bring about as near an approximation between the two as possible. The doctrine of promissory estoppel is a significant judicial contribution in that direction. But it is necessary to point out that since the doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires. If it can be shown by the Government that having regard to the facts as they have transpired, it would be inequitable to hold the Government to the promise made by it, the Court would not raise an equity in favour of the promisee and enforce the promise against the Government. The doctrine of promissory estoppel would be displaced in such a case because, on the facts, equity would not require that the Government should be held bound by the promise made by it. When the Government is able to show that in view of the facts as have transpired since the

making of the promise, public interest would be prejudiced if the Government were required to carry out the promise, the Court would have to balance the public interest in the Government carrying out a promise made to a citizen which has induced the citizen to act upon it and alter his position and the public interest likely to suffer if the promise were required to be carried out by the Government and determine which way the equity lies. It would not be enough for the Government just to say that public interest requires that the Government should not be compelled to carry out the promise or that the public interest would suffer if the Government were required to honour it. The Government cannot, as Shah, J., pointed out in the Indo-Afghan Agencies case, claim to be exempt from the liability to carry out the promise "on some indefinite and undisclosed ground of necessity or expediency", nor can the Government claim to be the sole Judge of its liability and repudiate it "on an ex parte appraisement of the circumstances". If the Government wants to resist the liability, it will have to disclose to the Court what are the facts and circumstances on account of which the Government claims to be exempt from the liability and it would be for the Court to decide whether those facts and circumstances are such as to render it inequitable to enforce the liability against the Government. Mere claim of change of policy would not be sufficient to exonerate the Government from the liability: the Government would have to show what precisely is the changed policy and also its reason and justification so that the Court can judge for itself which way the public interest lies and what the equity of the case demands. It is only if the Court is satisfied, on proper and adequate material placed by the Government, that overriding public interest requires that the Government should not be held bound by the promise but should be free to act unfettered by it, that the Court would refuse to enforce the promise against the Government. The Court would not act on the mere ipse dixit of the Government, for it is the Court which has to decide and not the Government whether the Government should be held exempt from liability. This is the essence of the rule of law. The burden would be upon the Government to show that the public interest in the Government acting otherwise than in accordance with the promise is so overwhelming that it would be inequitable to hold the Government bound by the promise and the Court would insist on a highly rigorous standard of proof in the discharge of this burden. But even where there is no such overriding public interest, it may still be competent to the Government to resile from the promise "on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position" provided of course it is possible for the promisee to restore status quo ante. If, however, the promisee cannot resume his position, the promise would become final and irrevocable. Vide *Emmanuel Avodeji Ajaye v. Briscoe*[4] [pp. 682 - 685]

14. The Court further went on to hold that it was not necessary for the petitioner to show that it had suffered any detriment, and it was enough that the petitioner had relied upon the promise or representation held out, and altered its position relying upon such assurance. Importantly, the Court held:

> "Of course, it may be pointed out that if the U.P. Sales Tax Act, 1948 did not contain a provision enabling the Government to grant exemption, it would not be possible to enforce the representation against the Government, because the Government cannot be compelled to act contrary to the statute, but since Section 4 of the U.P. Sales Tax Act, 1948 confers power on the Government to grant exemption from sales tax, the Government can legitimately be held bound by its promise to exempt the appellant from payment of sales tax. It is true that taxation is a sovereign or governmental function, but, for reasons which we have already discussed, no distinction can be made between the exercise of a sovereign or governmental function and a trading or business activity of the Government, so far as the doctrine of promissory estoppel is concerned. Whatever be the nature of the function which the Government is discharging, the Government is subject to the rule of promissory estoppel and if the essential ingredients of this rule are satisfied, the Government can be compelled to carry out the promise made by it. We are, therefore, of the view that in the present case the Government was bound to exempt the appellant from payment of sales tax in respect of sales of vanaspati effected by it in the State of Uttar Pradesh for a period of three years from the date of commencement of the production and was not entitled to recover such sales tax from the appellant." [pp. 696 - 697]

15. Having so held, the Court then went on to hold that since the Government is bound to exempt the appellant from payment of sales tax for a period of three years w.e.f. 2nd July, 1970, being the date of commencement of the production of Vanaspati, the appellant would not be liable to pay any sales tax, subject only to the State's claim to retain any part of such amount under any provision of law. In the absence of such claim, the State would have to refund the amount of sales tax collected by it from the appellant with interest thereon.

16. It is important to notice that the necessary exemption Notification in Motilal Padampat's case had not been issued under Section 4 of the U.P. Sales Tax Act, 1948. Yet, this Court held that sales tax for the period in question could not be recovered. This was done presumably because promissory estoppel is itself an equitable doctrine. One of the maxims of equity is that one must regard as done that which ought to be done. In this view of the matter, it is obvious that the High Court judgment is incorrect when it holds that as no exemption Notification was, in fact, issued by the Government under Section 3A, the petitioner would have to be denied relief. This judgment has been followed repeatedly and has been applied to give the benefit of sales tax exemption in similar circumstances in *Pournami Oil Mills & Ors. v. State of Kerala & Anr.*[5], at Paras 7 and 8.

17. The same result would obtain on a reading of a more recent judgment of this Court reported in *State of Punjab v. Nestle India Ltd.*[3],. On the facts of that case, for the period from 1.4.1996 to 4.6.1997, purchase tax on milk was to be abolished by the State Government. An announcement to this effect was given wide publicity in several newspapers in the State and a speech was given to the aforesaid effect by the Finance Minister of the State while presenting the budget for the year 1996-1997. That was further translated into a memorandum of the financial Commissioner, dated 26.4.1996, which was addressed to the Excise and Taxation Commissioner of the State. When a meeting was held on 27th June,

1996 by the Chief Minister and the Finance Minister with the Excise and Taxation Commissioner and various Financial a financial notification would be issued "in a day or two". For the first time, on 4th June, 1998, the Council of Ministers decided that the decision to abolish purchase tax on milk was not accepted and, consequently, the authorities issued notice to the respondents requiring them to pay purchase tax on milk for the year 1996-1997.

18. In this background, the High Court held that the State Government was bound by its promise and representation to abolish purchase tax. According to the High Court, the absence of a financial notification was no more than a ministerial act which remained to be performed. As the respondents had acted on the representation made, they could not be asked to pay purchase tax for the year 1996-1997. The Writ Petition was allowed and the demand notice of tax for the aforesaid year was struck down.

19. This Court, after adverting to Section 30 of the Punjab General Sales Tax Act, 1948, which gave the State Government the power to exempt from purchase tax, by notification, any of the goods mentioned in the Schedule, recapitulated the entire law of promissory estoppel in great detail. It referred to *M/S Motilal Padampat Sugar Mills, (Supra)*and other judgments, and finally held:

> "The appellant has been unable to establish any overriding public interest which would make it inequitable to enforce the estoppel against the State Government. The representation was made by the highest authorities including the Finance Minister in his Budget speech after considering the financial implications of the grant of the exemption to milk. It was found that the overall benefit to the State's economy and the public would be greater if the exemption were allowed. The respondents have passed on the benefit of that exemption by providing various facilities and concessions for the upliftment of the milk producers. This has not been denied. It would, in the circumstances, be inequitable to allow the State Government now to resile from its decision to exempt milk and demand the purchase tax with retrospective effect from 1-4-1996 so that the respondents cannot in any event readjust the expenditure already made. The High Court was also right when it held that the operation of the estoppel would come to an end with the 1997 decision of the Cabinet. In the case before us, the power in the State Government to grant exemption under the Act is coupled with the word "may" — signifying the discretionary nature of the power. We are of the view that the State Government's refusal to exercise its discretion to issue the necessary notification "abolishing" or exempting the tax on milk was not reasonably exercised for the same reasons that we have upheld the plea of promissory estoppel raised by the respondents. We, therefore, have no hesitation in affirming the decision of the High Court and dismissing the appeals without costs." [paras 47 - 48]

20. A perusal of this judgment would also show that relief was not denied on the ground that no exemption notification was, in fact, issued under Section 30 of the Punjab General Sales Tax Act, 1948. In fact, this Court emphasized the discretionary nature of the power to grant exemption. This Court held that the State Government's refusal to exercise its discretion to issue the necessary notification abolishing or exempting tax on milk was not reasonably

exercised inasmuch as it was bound by the doctrine of promissory estoppel to do so. And the finding of the High Court that such Notification would only be a ministerial act which had to be performed was, therefore, upheld by this Court. This judgment has been recently applied and followed in *Devi Multiplex & Ors. v. State of Gujarat & Ors.*[6], at Para 20.

21. In fact, we must never forget that the doctrine of promissory estoppel is a doctrine whose foundation is that an unconscionable departure by one party from the subject matter of an assumption which may be of fact or law, present or future, and which has been adopted by the other party as the basis of some course of conduct, act or omission, should not be allowed to pass muster. And the relief to be given in cases involving the doctrine of promissory estoppels contains a degree of flexibility which would ultimately render justice to the aggrieved party. The entire basis of this doctrine has been well put in a judgment of the Australian High Court 170 C.L.R. 394, by Deane,J. in the following words:

> "1. While the ordinary operation of estoppel by conduct is between parties to litigation, it is a doctrine of substantive law the factual ingredients of which fall to be pleaded and resolved like other factual issues in a case. The persons who may be bound by or who may take the benefit of such an estoppel extend beyond the immediate parties to it, to their privies, whether by blood, by estate or by contract. That being so, an estoppel by conduct can be the origin of primary rights of property and of contract.
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> 2. The central principle of the doctrine is that the law will not permit an unconscionable - or, more accurately, unconscientious - departure by one party from the subject matter of an assumption which has been adopted by the other party as the basis of some relationship, course of conduct, act or omission which would operate to that other party's detriment if the assumption be not adhered to for the purposes of the litigation.
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> 3. Since an estoppel will not arise unless the party claiming the benefit of it has adopted the assumption as the basis of action or inaction and thereby placed himself in a position of significant disadvantage if departure from the assumption be permitted, the resolution of an issue of estoppel by conduct will involve an examination of the relevant belief, actions and position of that party.
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> 4. The question whether such a departure would be unconscionable relates to the conduct of the allegedly estopped party in all the circumstances. That party must have played such a part in the adoption of, or persistence in, the assumption that he would be guilty of unjust and oppressive conduct if he were now to depart from it. The cases indicate four main, but not exhaustive, categories in which an affirmative answer to that question may be justified, namely, where that party: (a) has induced the assumption by express or implied representation; (b) has entered into contractual or other material relations with the other party on the conventional basis of the assumption; (c) has exercised against the other party rights which would exist only if the assumption were correct; (d) knew that the other party laboured under the

assumption and refrained from correcting him when it was his duty in conscience to do so. Ultimately, however, the question whether departure from the assumption would be unconscionable must be resolved not by reference to some preconceived formula framed to serve as a universal yardstick but by reference to all the circumstances of the case, including the reasonableness of the conduct of the other party in acting upon the assumption and the nature and extent of the detriment which he would sustain by acting upon the assumption if departure from the assumed state of affairs were permitted. In cases falling within category (a), a critical consideration will commonly be that the allegedly estopped party knew or intended or clearly ought to have known that the other party would be induced by his conduct to adopt, and act on the basis of, the assumption. Particularly in cases falling within category (b), actual belief in the correctness of the fact or state of affairs assumed may not be necessary. Obviously, the facts of a particular case may be such that it falls within more than one of the above categories.

5. The assumption may be of fact or law, present or future. That is to say it may be about the present or future existence of a fact or state of affairs (including the state of the law or the existence of a legal right, interest or relationship or the content of future conduct).

6. The doctrine should be seen as a unified one which operates consistently in both law and equity. In that regard, "equitable estoppel" should not be seen as a separate or distinct doctrine which operates only in equity or as restricted to certain defined categories (e.g. acquiescence, encouragement, promissory estoppel or proprietary estoppel).

7. Estoppel by conduct does not of itself constitute an independent cause of action. The assumed fact or state of affairs (which one party is estopped from denying) may be relied upon defensively or it may be used aggressively as the factual foundation of an action arising under ordinary principles with the entitlement to ultimate relief being determined on the basis of the existence of that fact or state of affairs. In some cases, the estoppel may operate to fashion an assumed state of affairs which will found relief (under ordinary principles) which gives effect to the assumption itself (e.g. where the defendant in an action for a declaration of trust is estopped from denying the existence of the trust).

8. The recognition of estoppel by conduct as a doctrine operating consistently in law and equity and the prevalence of equity in a Judicature Act system combine to give the whole doctrine a degree of flexibility which it might lack if it were an exclusively common law doctrine. In particular, the prima facie entitlement to relief based upon the assumed state of affairs will be qualified in a case where such relief would exceed what could be justified by the requirements of good conscience and would be unjust to the estopped party. In such a case, relief framed on the basis of the assumed state of affairs represents the outer limits within which the relief appropriate to do justice between the parties should be framed."

22. The above statement, based on various earlier English authorities, correctly encapsulates the law of promissory estoppel with one difference - under our law, as has been seen hereinabove, promissory estoppel can be the basis of an independent cause of action in which detriment does not need to be proved. It is enough that a party has acted upon the representation made. The importance of the Australian case is only to reiterate two fundamental concepts relating to the doctrine of promissory estoppel - one, that the central principle of the doctrine is that the law will not permit an unconscionable departure by one party from the subject matter of an assumption which has been adopted by the other party as the basis of a course of conduct which would affect the other party if the assumption be not adhered to. The assumption may be of fact or law, present or future. And two, that the relief that may be given on the facts of a given case is flexible enough to remedy injustice wherever it is found. And this would include the relief of acting on the basis that a future assumption either as to fact or law will be deemed to have taken place so as to afford relief to the wronged party.

23. In the circumstances, the High Court judgment when it holds that no notification was, in fact, issued under Section 3A of the Kerala Buildings Tax Act, 1975, (which would be sufficient to deny the appellants relief) is, therefore, clearly incorrect in law.

24. However, some of the judgments of this Court have held that a Writ of Mandamus cannot be issued to the executive to frame rules or regulations which are in the nature of subordinate legislation. (See: *State of Jammu & Kashmir v. A.R. Zakki & Ors*[7]. at paragraphs 10 and 15, and *State of Uttar Pradesh and Ors. v. Mahindra and Mahindra Limited* [8] at 81). This is for the reason that a court would then trespass into forbidden territory, as our Constitution recognizes a broad division of powers between legislative and judicial activity.

25. However, though the power to grant exemption under a statutory provision may amount to subordinate legislation in a given case, but being in the domain of exercise of discretionary power, is subject to the same tests in administrative law, as is executive or administrative action, as to its validity - one of these tests being the well-known Wednesbury principle under which a court may strike down an abuse of such discretionary power on grounds that irrelevant circumstances have been taken into account or relevant circumstances have not been taken into account (for example). This is clearly exemplified *in Indian Express Newspapers (Bombay) Private Limited and others v. Union of India and others, (1985) 1 SCC 641.*

26. In that case, by a notification dated 15.7.1977 issued under Section 25(1) of the Customs Act, a total exemption from customs duty was granted on imported newsprint. On 1.3.1981, the said Notification was superseded by the issue of a fresh notification which exempted customs duty beyond 15%. The second notification was the subject matter of challenge in the aforesaid judgment in this Court. In an instructive passage in the judgment under Heading V entitled "Are the impugned notifications issued under Section 25 of the Customs Act, 1962 beyond the reach of Administrative Law?" this Court proceeded by assuming that the power to grant exemption under Section 25 of the Customs Act is a legislative power and a

notification issued by the Government thereunder would amount to a piece of subordinate legislation. Despite this being so, this Court held:

> "That subordinate legislation cannot be questioned on the ground of violation of principles of natural justice on which administrative action may be questioned has been held by this Court in *Tulsipur Sugar Co. Ltd. v. Notified Area Committee, Tulsipur*[9] *Rameshchandra Kachardas Porwal v. State of Maharashtra*[10] *and in Bates v. Lord Hailsham of St. Marylebone*[11] .A distinction must be made between delegation of a legislative function in the case of which the question of reasonableness cannot be enquired into and the investment by statute to exercise particular discretionary powers. In the latter case the question may be considered on all grounds on which administrative action may be questioned, such as, non-application of mind, taking irrelevant matters into consideration, failure to take relevant matters into consideration, etc, etc. On the facts and circumstances of a case, a subordinate legislation may be struck down as arbitrary or contrary to statute if it fails to take into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or, say, the Constitution. This can only be done on the ground that it does not conform to the statutory or constitutional requirements or that it offends Article 14 or Article 19(1)(a) of the Constitution. It cannot, no doubt, be done merely on the ground that it is not reasonable or that it has not taken into account relevant circumstances which the Court considers relevant." [para 78]

27. Shri Radhakrishnan pressed into service *Kasinka Trading and another v. Union of India and another*[12], This was a case in which PVC resins were exempted from basic import duty by a notification dated 15.3.1979. The said notification was in force up to and inclusive of 31.3.1981. However, before expiry of the time fixed in the notification, a notification withdrawing such exemption, dated 16.10.1980, was issued. The petitioners in that case invoked the doctrine of promissory estoppel. This Court held that no representation had been made on facts, and that it could not be said that a notification could not be rescinded or modified before the date of expiry even if the Government is satisfied that it was necessary in the public interest to rescind it.

28. This case is clearly distinguishable in that it was held (see paragraphs 22 and 27) that no incentive to set up any industry to use PVC resins had been made, and secondly, it was found necessary in public interest to rescind or withdraw such notification. On the facts of the present case, it is clear that a clear representation/promise had been made pursuant to which the State actually amended the Kerala Building Tax Act, 1975 by inserting Section 3A. And equally, there is no claim in the present case that there is any change in circumstance because of overriding public interest so that the doctrine of promissory estoppel cannot be said to apply.

29. Shri Radhakrishnan also referred to a judgment of this Court in Shree Si*dhbali Steels Limited and others v. State of Uttar Pradesh and others*[13]. On the facts in that case, a new industrial policy dated 30.4.1990 was declared by the State Government assuring the grant of

33.33% hill development rebate on the total amount of electricity bills to new entrepreneurs for a period of 5 years. This period was extended by another period of 5 years to be made available to new industrial units set up till 31.3.1997. Vide notifications dated 18.61998 and 25.1.1999, uniform tariffs of electricity were introduced by which the rebate so given was reduced to 17%. Post 2000, vide a notification dated 7.8.2000, a new tariff was announced which completely withdrew the hill development rebate. A challenge to the aforesaid notifications was turned down by this Court. This Court was concerned with an earlier decision reported in *U.P. Power Corporation Limited v. Sant Steels and Alloys (P) Ltd.*[14], which took a very restrictive view of Section 49 of the Electricity Supply Act of 1948, stating that any notification issued thereunder can only be revoked or modified if express provision was made for such revocation under Section 49 itself. Further, such revocation could take place under the General Clauses Act only if such withdrawal was in larger public interest, or if legislation was enacted by the legislature authorizing the Government to withdraw the benefit granted by the notification. The larger Bench overruled the Sant Steels case stating that its view of Section 49 of the Electricity Supply Act was plainly incorrect, and that Sections 14 and 21 of the General Clauses Act made it clear that a notification issued under Section 49 could be exercised from time to time, including the power to revoke such notification.

30. However, when it came to the applicability of the doctrine of promissory estoppel, this Court relied upon the observations made in *State of Rajasthan and another v. J.K. Udaipur Udyog Ltd. and another*[15], and *Arvind Industries and others v. State of Gujarat and others*[16],

31. From the State of Rajasthan case, para 25 was quoted by this Court in order to arrive at a conclusion that the recipient of an exemption granted by a fiscal statute would have no legally enforceable right against the Government inasmuch as such right 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. What was missed from that case was the very next paragraph which states as follows:-

> "In this case the Scheme being notified under the power in the State Government to grant exemptions both under Section 15 of the RST Act and Section 8(5) of the CST Act in the public interest, the State Government was competent to modify or revoke the grant for the same reason. Thus what is granted can be withdrawn unless the Government is precluded from doing so on the ground of promissory estoppel, which principle is itself subject to considerations of equity and public interest. (See STO v. Shree Durga Oil Mills). The vesting of a defeasible right is therefore, a contradiction in terms. There being no indefeasible right to the continued grant of an exemption (absent the exception of promissory estoppel), the question of the respondent Companies having an indefeasible right to any facet of such exemption such as the rate, period, etc. does not arise." (at Para 26)

32. The aforesaid paragraph 26 has been noticed by this Court in *Mahabir Vegetable Oils (P) Ltd. and another v. State of Haryana and others*[17], (see paragraphs 34 and 35). It is clear, therefore, that the reliance by this Court in the Shree Sidhbali Steels Ltd. case upon the

aforesaid judgment when it comes to non application of the principle of promissory estoppel to exemptions granted under statute would be wholly inappropriate.

33. Similarly, the Arvind Industries case is again a judgment in which it is clear that the doctrine of promissory estoppel could have no application because the appellant in that case was not able to show that any definite promise was made by or on behalf of the Government and that the appellant had acted upon such promise. (see paragraph 9)

34. It is clear, therefore, that Shree Sidhbali Steels Limited was a case which was concerned only with whether a benefit given by a statutory notification can be withdrawn by the Government by another statutory notification in the public interest if circumstances change - (see paragraphs 30 and 42). Such is not the case before us. On the facts before us, a notification which ought to have been issued under Section 3A after it was introduced pursuant to a promise made was not issued at all. And change in circumstances leading to overriding public interest displacing the doctrine of promissory estoppel is absent in the facts of the present case. We are, thus, satisfied that the aforesaid judgment can have no application whatsoever to the facts of the present case.

35. Shri Radhakrishnan then referred us to *Excise Commissioner, U.P. v. Ram Kumar*[18], at para 19, for the proposition that it is now well settled by a catena of decisions that there can be no question of estoppel against the Government in the exercise of its legislative, sovereign, or executive powers.

36. This very passage was referred to in M/S Motilal Padampat Sugar Mills and was explained thus:

> "The next decision to which we must refer is that in *Excise Commissioner U.P. Allahabad v. Ram Kumar [(1976) 3 SCC 540: 1976 SCC (Tax) 360 : 1976 Supp SCR 532]* . This was also a decision on which strong reliance was placed on behalf of the State. It is true that, in this case, the Court observed that "it is now well settled by a catena of decisions that there can be no question of estoppel against the Government in the exercise of its legislative, sovereign or executive powers," but for reasons which we shall presently state, we do not think this observation can persuade us to take a different view of the law than that enunciated in the Indo-Afghan Agencies case. ... It will thus be seen from the decisions relied upon in the judgment that the Court could not possibly have intended to lay down an absolute proposition that there can be no promissory estoppel against the Government in the exercise of its governmental, public or executive powers. That would have been in complete contradiction of the decisions of this Court in the Indo-Afghan Agencies case, Century Spinning and Manufacturing Co. case and Turner Morrison case and we find it difficult to believe that the Court could have ever intended to lay down any such proposition without expressly referring to these earlier decisions and overruling them. We are, therefore, of the opinion that the observation made by the Court in Ram Kumar case does not militate against the view we are taking on the basis of the

decisions in the Indo-Afghan Agencies case, Century Spinning & Manufacturing Co. case and Turner Morrison case in regard to the
applicability of the doctrine of promissory estoppel against the Government." [SCR at pp. 689, 691]

37. Shri Radhakrishnan then referred us to the judgment in *Sharma Transport v. Govt. of A.P.*[19], *at paragraph 24, and Bannari Amman Sugars Ltd. v. CTO*[20], at paragraph 20, for the proposition that promissory estoppel must yield to overriding public interest. There can be no quarrel with this proposition except that, as has been pointed out above, this case does not contain any such overriding public interest.

38. Shri Radhakrishnan also referred us to Avinder Singh v. State of Punjab, (1979) 1 SCC 137, at paragraphs 11 and 17, for the proposition that the legislature cannot delegate its essential legislative functions. We are at a loss to understand how this authority would at all apply to the facts of the present case as it is not the State's stand that there is any excessive delegation of legislative power in the present case.

39. In the present case, it is clear that no Writ of Mandamus is being issued to the executive to frame a body of rules or regulations which would be subordinate legislation in the nature of primary legislation (being general rules of conduct which would apply to those bound by them). On the facts of the present case, a discretionary power has to be exercised on facts under Section 3A of the Kerala Buildings Tax Act, 1975. 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 and Nestle (supra). 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 Buildings 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 3A was, in fact, enacted by the Kerala legislature by suitably amending the Kerala Buildings Tax Act, 1975 on 6.9.1990 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 6.9.1990 to 1.3.1993, the power to grant exemption from building tax was statutorily conferred by Section 3A on the Government. And we have seen that the statement of objects and reasons for introducing Section 3A expressly states that the said Section was introduced in order to fulfill 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 3A 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 Government to get away without

fulfilling its promise. It is also an admitted fact that no other consideration of overwhelming public interest exists in order that the Government be justified in resiling from its promise. The relief that must therefore be moulded on the facts of the present case is that for the period that Section 3A was in force, no building tax is payable by the appellants. However, for the period post 1.3.1993, no statutory provision for the grant of exemption being available, it is clear that no relief can be given to the appellants as the doctrine of promissory estoppel must yield when it is found that it would be contrary to statute to grant such relief. To the extent indicated above, therefore, we are of the view that no building tax can be levied or collected from the appellants in the facts of the present case. Consequently, we allow the appeal to the extent indicated above and set aside the judgment of the High Court.

Judgment Referred.

[1]*(1979) 2 SCR 0641*
[2]*(1997) 3 SCC 0398*
[3]*(2004) 6 SCC 0465*
[4]*(1964) 3 All ER 0556: (1964) 1 WLR 1326*
[5]*(1986) Supp. SCC 0728*
[6]*(2015) 9 SCC 0132*
[7]*(1992) Supp. (1) SCC 0548*
[8]*(2011) 13 SCC 0077*
[9]*AIR 1980 SC 0882: (1980) 2 SCR 1111 : (1980) 2 SCC 0295*
[10]*(1981) 2 SCC 0722: AIR 1981 SC 1127 : (1981) 2 SCR 0866*
[11]*(1972) 1 WLR 1373 : (1972) 1 A11 ER 1019 (Ch D)] .*
[12]*(1995) 1 SCC 0274*
[13]*(2011) 3 SCC 0193*
[14]*(2008) 2 SCC 0777*
[15]*(2004) 7 SCC 0673*
[16]*(1995) 6 SCC 0053*
[17]*(2006) 3 SCC 0620*
[18]*(1976) 3 SCC 0540*
[19]*(2002) 2 SCC 0188*
[20]*(2005) 1 SCC 0625*