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IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) Nos. 29253 of 2020 and 12435 of 2019

M/s. Ultratech Cement Limited & another .... ***Petitioners***

Dr. A.M. Singhvi, Senior Advocate
with Mr. B.P. Das, Advocate

-versus-

State of Odisha and others .... ***Opposite Parties***

Mr. P.K. Muduli, Additional Government Advocate

CORAM:
THE CHIEF JUSTICE
JUSTICE A.K. MOHAPATRA

JUDGMENT
4th January, 2022

Dr. S. Muralidhar, CJ.

1. M/s. Ultratech Cement Limited (Petitioner No.1) and its Senior Vice-President (Petitioner No.2) have in this writ petition under Article 226 of the Constitution of India sought the quashing of a resolution dated 18th August 2020 issued by the Industries Department, Government of Odisha (Opposite Party No.2) in relation to the amendment to the Industrial Policy Resolution 2007 (IPR 2007) as being unconstitutional and illegal. The principal ground of such challenge is that the said amendment to the heading of paragraph-18.4 of the IPR 2007 has been made effective retrospectively from 1st July 2017 with a view to preventing Petitioner No.1 from availing the State Goods and

Service Tax (SGST) reimbursement, as contemplated in paragraph-18.4 of IPR 2007.

Background facts

2. The background facts are that Petitioner No.1 is stated to be operating cement manufacturing units in various States in India including a cement manufacturing unit in Jharsuguda District in Odisha. According to the Petitioners, the said unit is a state-of-the-art cement manufacturing industrial unit which, *inter alia,* utilizes intermediate products (clinker) and waste products (fly ash) generated by other industrial undertakings along with gypsum as a raw material to manufacture high quality cement.

3. It is stated that the cement manufacturing process undertaken by Petitioner No.1 is a controlled manufacturing process resulting in high value addition, employment generation and revenue augmentation. It is stated that the said manufacturing process requires substantial investment in high-end plant and machinery, monitoring and regulation through sophisticated electrical, mechanical and instrumentation systems by qualified technical personnel.

IPR 2007

4. On 2nd March 2007, the Industries Department, Government of Odisha published the IPR 2007 with a view to reinforcing and expanding the policy framework for industrial promotion and investment facilitation "including creation of an enabling

environment". Paragraph 1.7 of IPR 2007 spelt out the strategy of the State Government, *inter alia,* promoting investments "in new cement plants based on blast furnace slag and fly ash, which would be available in abundance due to the large number of steel and power plants coming up in the State".

5. Paragraph-4 of the IPR 2007 spelt out the general policy framework whereby the State was to pursue a multi-pronged approach for industrial promotion. Efforts were to be made "to incentivise investment in thrust and priority sectors with a view to maximizing the triple objectives of value addition, employment generation and revenue augmentation". In paragraph-4.4, certain "thrust sectors" were identified for providing "tailor made incentive packages" and "additional incentive for the pioneer industries in these sectors". Paragraph-19 of the Annexure-I to the IPR 2007 spelt out what industries qualified as being in the "thrust sector". This included agro processing, automobiles, auto components, textile, apparel, ancillary and downstream industries. Industrial units operating the said categories were required to meet specified minimum capital investment and employment generation criteria. For instance, Rs.10crores minimum capital investment and a direct employment generation of 100 persons was specified for a "downstream industry" in order to avail incentives meant for the "thrust sector". Paragraph-2 of Annexure-I of the IPR 2007 defined "downstream industry" to mean an industrial undertaking which is engaged or proposed to

be engaged in value addition of the intermediate or final produce or waste product of one or more industrial undertakings.

6. By a resolution dated 3rd March 2015, the definition of "downstream industry" was amended by the Industries Department prospectively to include a minimum threshold requirement of utilization of 50% of intermediate/final produce/waste products of industrial undertakings for qualification as a downstream industry.

7. According to the Petitioners, Petitioner No.1 utilizes raw materials which are either intermediate products (clinker) or waste products (fly ash) of other industrial undertakings in the proportion of approximately 96% by weight, with the raw material gypsum constituting the remaining approximately 4% by weight. Thus, Petitioner No.1 qualified as a downstream industry even according to the amended definition.

8. It is contended that IPR 2007 contemplated that existing cement manufacturing units which undertook expansion of installed capacity and satisfied the prescribed criteria for downstream "thrust sector" industrial units were entitled and eligible to avail financial incentives under IPR 2007 including Value Added Tax (VAT) reimbursement.

9. Paragraph-14 of the IPR 2007 provided for the eligibility criteria for availing "financial and other support measures" which

stated that existing industrial units which take up expansion/modernization/diversification will be eligible for specific incentives as specified.

10. Paragraph 18.4 of IPR 2007 provided for "VAT Reimbursement". As per paragraph 18.4 (iii), new industrial units of the thrust sector were eligible for reimbursement of 75% of VAT paid for a period of 10 years from the date of starting commercial production. The quantum of such VAT reimbursement which could be availed was capped at 200% of the fixed capital investment subject to the condition that VAT reimbursement shall be applicable only to the net tax paid, after adjustment of input tax credit against the output tax liability. Under paragraph 18.4 (iv) "existing industrial units taking up expansion/ modernization/ diversification as defined in this IPR shall be eligible for reimbursement of VAT paid to the extent applicable to the industrial category as defined in sub paragraph-18.4 (i) to (iii) above subject to the condition that it shall be applicable only on increased commercial production over and above the existing installed capacity provided that the VAT reimbursement shall be applicable only to the net tax paid, after adjustment of input tax credit against the output tax liability."

Facts pertaining to Petitioner No.1

11. Reverting to the facts of the present case, Petitioner No.1 had an existing industrial unit for manufacturing Pozzolana Portland Cement (PPC) at Jharsuguda, Odisha with an installed capacity of

1.00 million tons per annum (MTPA). This unit commenced its commercial production on 14th September, 1993.

12. Petitioner No.1 proposed to expand its installed capacity from 1 to 3 MTPA in 2011. It is stated that it decided to do so relying on the assurances and promises held out in IPR 2007 as noted hereinbefore. It sought permissions from the State authorities for the proposed expansion. On 9th September 2011, the State Level Single Window Clearance Authority (SLSWCA) headed by the Chief Secretary, Government of Odisha, granted permission to Petitioner No.1 for expansion of its production capacity at its Jharsuguda cement manufacturing unit from 1 to 3 MTPA.

13. The Petitioners state that from 2011 onwards, Petitioner No.1 committed significant investments, resources and manpower and expanded its installed capacity from 1 to 2.6 MTPA. After successful expansion as aforesaid by 2013, Petitioner No.1 had two cement production units referred as Line 1 and Line 2 cement plants. As already noticed, it was utilizing the raw materials as the intermediate products (clinker) and waste products (fly ash) generated by other industrial undertakings in the proportion of 96% by weight and gypsum constituting the remaining 4%. Petitioner No.1 is stated to have made an investment of more than Rs.350 crores towards the above expansion of its installed capacity including a fixed capital investment of Rs.183.75 crores resulting in an employment generation for 126 persons. It is stated

that, over 500 persons are currently engaged in its Jharsuguda unit.

14. Commercial production of the expanded unit commenced on 15th October 2013 within three years from the date of the first fixed capital investment as required under the IPR 2007. A commercial production certificate issued by the Director of Industries on 10th December 2014 specifying the above commercial production date is enclosed as Annexure-5 to the petition.

15. The Petitioners point out that there are 51 categories of industrial units listed out in the "negative list" (Annexure-II) appended to the IPR including "grinding and mixing units" listed at Sl No.51. These are not entitled to avail the financial incentives since they are small units with non-recurring and low capital investment. That downstream industrial units under the "thrust sector" would not come within the "negative list" was clarified at the 1st meeting of the Empowered Committee held on 4th December 2014. It was clarified that the negative list only applied to the small industrial units which did not involve any value addition and not to cement manufacturing units like Petitioner No.1.

16. Reliance is also placed by the Petitioners on the observation of the second meeting of the Empowered Committee held on 22nd

August 2015 wherein, specific to the case on hand it was observed as under:

> "The Director of Industries has clarified that the manufacturing of cement using clinker and fly ash/ blast furnace slag as raw material is an activity with high value addition and utilizing high value of plant and machinery. The negative list does not intend to debar such industry from availing incentives under IPR. The [Empowered] Committee decided to accept the clarification submitted by the D.I., Odisha and allowed to extend the benefit under IPR-2007 to such units."

17. It is stated that a joint inspection was conducted by the Director of Industries and a State Level Nodal Agency IPICOL in 2016. IPICOL issued an eligibility certificate on 3rd May 2016 in the prescribed Form-E under IPR 2007 in favour of Petitioner No.1. Thereafter, the Director of Industries (Opposite Party No.3) issued a certificate of verification dated 30th July 2016 certifying that Petitioner No.1 satisfied the criteria in relation to capital investment and employment generation for qualifying as a "thrust sector" industrial unit under IPR 2007. The certificate specifically noted that the Jharsuguda cement manufacturing unit of Petitioner No.1 "was not included in the activities enlisted at Sl.3 of Annexure-II of IPR 2007". Opposite Party No.3 then on 1st September 2016 issued the "certificate of thrust sector" certifying that Petitioner No.1's cement manufacturing unit fulfills the eligibility criteria as a thrust sector industy and "…..may be eligible to avail incentives/ concessions as applicable to the thrust sector industries under the provisions of IPR 2007…...".

18. This was followed by Opposite Party No.3 issuing a sanction order on 6th June 2017 for disbursement of a sum of Rs.6,06,75,000/- in favour of Petitioner No.1 towards VAT reimbursement for the period 15th October 2013 to 31st March 2014. It is stated that despite repeated requests, the Opposite Parties failed to disburse the sanctioned amount towards VAT reimbursement in favour of Petitioner No.1. Reference is made to the representations dated 27th March 2018, 15th May 2018 and 17th May 2018 made by Petitioner No.1 to the Opposite Parties for this purpose.

19. On 6th October 2018, Opposite Party No.3 issued an order cancelling the sanction order dated 6th June 2017 purportedly on the basis of decision taken at a meeting held on 5th September 2018 under the Chairmanship of the Chief Secretary, Odisha which purportedly decided that the Jharsuguda unit of Petitioner No.1 was "……a standalone cement grinding unit and attracts Sl No.51 of Annexure II of the Negative List under IPR-2007. Accordingly, it will not be eligible for VAT reimbursement under IPR-2007."

Proceedings in this Court

20. The Petitioners then filed W.P.(C) No.12435 of 2019 in this Court questioning the aforementioned order dated 6th October, 2018 as being arbitrary and illegal. On 23rd July 2019, this Court admitted the writ petition directing that the payment of tax by Petitioner No.1 towards VAT/SGST would be subject to the

outcome of the writ petition and in case Petitioner No.1 succeeded in the writ petition, the amount so deposited by it would be refunded to it along with interest.

21. By a letter dated 22nd May 2019, the Opposite Parties rejected the claims of Petitioner No.1 for VAT and SGST reimbursement for the financial year (FY) 2017-18. Further, the Opposite Parties refused to accept the reimbursement claims lodged by Petitioner No.1 for the current FY 2019-20 compelling it to send it by courier. Thereafter, on 18th August 2020, a resolution was passed by the Opposite Parties retrospectively amending paragraph 18.4 of IPR 2007, with effect from 1st July 2017 ostensibly to incorporate changes to the provisions necessitated on account of introduction of the Goods and Services Tax regime (GST) and make provisions for reimbursement of the state component of GST i.e. the SGST to eligible industries, instead of VAT reimbursement as originally envisaged.

22. The Petitioners pointed out that while the erstwhile un-amended heading of paragraph 18.4 of the IPR was simply titled "VAT reimbursement", the amended heading of paragraph 18.4 IPR 2007 reads as under:

> "Net SGST Reimbursement for Industrial units which were receiving net VAT Reimbursement except for cement manufacturing/grinding units and Blast Furnace Slag based units w.e.f. 01.07.2017."

23. Consequently, the second writ petition i.e. W.P.(C) No.29253 of 2020 was filed in which notice was issued on 23rd November

2020 by this Court. It was ordered that the impugned resolution dated 18th August 2020 "shall remain subject to the outcome of the writ petition."

Stand of the Opposite Parties

24. A counter affidavit has been filed on behalf of Opposite Party Nos.1 to 4 in W.P.(C) No.12435 of 2019 where it is, *inter alia,* contended that at the High-Level Committee meeting under the Chairmanship of the Chief Secretary, it was decided that the activity of Petitioner No.1 fell under the Sl. No.51 of Annexure-II of the negative list of IPR 2007. It is stated that Petitioner No.1 manufactures cement using clinker, gypsum and fly ash. Initially, clinker and gypsum are mixed and grinded and then fly ash mixed in further processing stage produces the final product, i.e., cement. The letter dated 18th February 2019 of Opposite Party No.3 is itself put forth as giving the reasons for cancellation of the sanction order. According to the Opposite Parties, "the benefits are extended to the units after proper appreciation of all relevant factors as per the provisions laid down in IPR 2007 and concerned operational guidelines basing on the claim and eligibility of the applicant unit."

25. It must be noted here that in W.P.(C) No.29253 of 2020, a specific averment was made in paragraph-3NN that during the 4th meeting of the Empowered Committee held on 5th September 2017, the Opposite Parties had decided that another cement manufacturing unit, M/s. Kapilash Cement Manufacturing Works

(KCMW) similarly situated as Petitioner No.1 was eligible and entitled to avail incentives under IPR 2007 as a "Thrust Sector Industry" and did not fall within the scope of "grinding and mixing unit" specified at Sl. No.51 of the negative list. In reply to this, it is sought to be contended by the Opposite Parties that under paragraph-29 of the IPR 2007, the implementation of the policy was to be periodically reviewed by a High-Level Clearance Authority (HLCA) "for necessary facilitation and mid-course correction, wherever necessary".

26. A copy of the minutes of the meeting held on 5th September 2018 under the Chairmanship the Chief Secretary has been enclosed with the counter affidavit filed in W.P.(C) No.29253 of 2020 as Annexure-D/3. A perusal of the said minutes shows that the case of KCMW was specifically taken up for consideration and a comparison of KCMW with Petitioner No.1 was made. The justification given for treating KCMW differently is stated as under:

> "The committee went through the background information in respect of both cement manufacturing units i.e. KCMW, Cuttack & Ultratech Cement Ltd., Jharsuguda.
>
> The committee noted that KCMW, a unit of OCL India Ltd. has been granted Thrust Sector certificate under IPR 2007 after due examination by Govt. in Industries Department and vetting by Law Department & the same was communicated vide their letter No.7410 dated 25th May 2010. Later, queries made by the Finance Department were complied after a joint inspection of the unit was conducted by officials of DI & CCT.

> Thereafter, FD concurrence was obtained to extend VAT reimbursement in favour of KCMW as a separate unit but part of integrated facility of OCL for manufacturing cement.
>
> In view of the above, the committee observed that VAT reimbursement in favour of M/s Kapilash Cement Manufacturing Works, Cuttack will continue until June 30, 2017.
>
> As regards, the VAT reimbursement in favour of M/s Ultratech Cement Ltd, Jharsuguda, the committee observed that it is a standalone cement grinding unit and attracts Sl No.51 of the Annexure-2 of the negative list under IPR 2007. Accordingly, it will not be eligible for VAT reimbursement under IPR 2007.
>
> The Industries Department was advised to proceed with the amendment of IPR-2007 and IPR-2015 after getting due concurrence of Finance Department on Cabinet Memorandum."

Additional affidavit of the Opposite Parties

27. Specific to one of the main contentions in the petitions about the case attracting the doctrine of promissory estoppel, the Opposite Parties filed an additional affidavit on 2nd December 2021 seeking to justify the decision to retrospectively withdraw the VAT reimbursement facility to Petitioner No.1 by amending the heading of paragraph-18.4 of the IPR 2007.

28. It is stated in paragraph-2 of the additional affidavit that "Para-30(a) of IPR-2007 enables the State Government to amend any provision of the Policy at any time. Power is there to suitably replace/modify/amend the provisions of IPR-2007. Therefore,

after introduction of GST, the State Government after taking into consideration several factors took a conscious decision to replace the provisions regarding VAT and Entry Tax by way of amendment and there is no illegality involved in the same."

29. It was further stated that "taking a large cement manufacturing unit as a base, it is observed that State Government has to pay @ Rs.51.46 crores/MMTPA tentatively towards reimbursement of SGST under the IPR-2007. Further, looking into the Cement Plants already started production and the Cement Manufacturing Units in pipeline, it is estimated that State Government has to sacrifice tentatively up to Rs.918 crores net SGST per annum i.e. for 17.85 MMTPA from the FY 17-18 onwards. Looking into the financial burden on State exchequer, Government of Odisha has decided to stop the incentives for Cement Plants as a whole and there is no illegality involved in the same. Government has made an expenditure of Rs.134.28/- Crore, Rs.174.85/- Crore and Rs.165.68 Crore for the years 2017-18, 2018-19 & 2019-20 respectively towards reimbursement of VAT only for Cement Manufacturing Units. A conscious decision has been taken in respect of all the Cement Manufacturing Units of the State and not in respect of the Petitioner-Unit only."

30. It is accordingly sought to be contended that the principle of promissory estoppel has no application and that "the State Government has never made any promise to the Petitioners regarding reimbursement of SGST."

31. The affidavit further seeks to explain that "the large unit" taken as a base was OCL India Limited, and on that basis, the above calculations have been arrived at.

Submissions on behalf of the Petitioners

32. Dr. A.M. Singhvi, learned Senior Advocate appearing on behalf of the Petitioners submitted as under:

(i) Petitioner No.1 had acted upon the representations, promises and assurances held out in IPR 2007 including, *inter alia,* the promise of post production incentives in the form of VAT/ SGST reimbursement as set out in paragraph 18.4 of IPR 2007. Acting on the said representations, Petitioner No.1 made significant fixed capital investments of Rs.183.75 crores and successfully expanded its installed capacity from 1 MTPA to 2.6 MTPA. It commenced commercial production with effect from 15th October 2013 and was issued all the certificates referred to hereinbefore. It was, therefore, not open to the State to deny the vested right and entitlement to Petitioner No.1 on a completely untenable and irrational basis. The impugned decisions were contrary to the doctrines of promissory estoppel and legitimate expectation. Reliance is placed on the decisions in ***MRF Limited, Kottayam v. Asst. Commissioner (Assessment) Sales Tax (2006) 8 SCC 702***; ***State of U.P. v. Birla Corporation Ltd., 2019 SCC Online SC 1569***; ***Manuelsons Hotels Pvt. Ltd. v. State of Kerala (2016) 6 SCC 766***; ***State of Punjab v. Nestle India (2004) 6 SCC 465;***

Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P. (1979) 2 SCC 409 and ***KM Refineries & Infraspace Ltd. v. State of Maharashtra, 2020 (1) Mh.L.J. 904.***

(ii) Cement manufacturing industry was one of the eight core industries which contributed to industrial growth, employment generation and revenue augmentation. Exclusion of such an industry from availing post production incentives designed to promote industrial growth within the State of Odisha under IPR 2007 was *ex facie* contrary to the objectives of IPR 2007.

(iii) There was no stipulation in IPR 2007 that all raw materials used for manufacturing of cement must also be manufactured at the unit itself and cannot be procured from outside the State. Therefore, to categorize the unit of Petitioner No.1 as a "standalone cement grinding unit" falling in the negative list at Sl No.51, was misconceived. A bare perusal of the negative list would make it evident that industrial units specified therein required "low capital investment" and resulted in "low value addition, lower employment generation and lesser revenue augmentation of the State". Therefore, the cancellation of the VAT reimbursement of the Petitioners was completely illegal and arbitrary.

(iv) An examination of the figures of VAT reimbursement made by the State Government, as stated in its additional affidavit dated 2nd December 2021, revealed that there was an admission by the

State Government that VAT reimbursement had in fact been granted to the cement manufacturing units similarly situated as that of Petitioner No.1. Relying on the decision in ***State of U.P. v. Birla Corporation Limited*** (*supra*), it is submitted that revenue loss cannot be invoked as supervening public interest to deny the promised incentives to industrial units which have a vested and accrued right and have satisfied all the prescribed criteria.

(v) The vested right of the Petitioners cannot be taken away by way of a retrospective amendment that too only by amending the heading of paragraph 18.4 of the IPR 2007 without any changes to be substantive provision thereof. Petitioner No.1 was entitled to the post production incentives as a 'thrust sector downstream industrial unit'. The entire manufacturing process and quality parameters of cement cannot be achieved by merely "mixing and grinding of raw materials", it has to be achieved by using high end plant and machinery. In this context, a detailed note on the cement manufacturing process adopted by Petitioner No.1 has been placed on record.

(vi) There was no rational basis for subjecting Petitioner No.1 to discriminatory treatment vis-à-vis an identical cement manufacturing unit like KCMW. There was no explanation offered for subjecting only cement manufacturing/grinding units and blast furnace slag-based units for denial of SGST reimbursement.

Submissions on behalf of the Opposite Parties

33. Mr. P.K. Muduli, learned Additional Government Advocate, appearing for the State on the other hand largely relied on the contentions already urged on behalf of the Opposite Parties in the counter affidavit filed in W.P.(C) No.12435 of 2019 and the second writ petition i.e. W.P.(C) No.29253 of 2020 as well as the additional affidavits filed to contend that the State is well within its rights to review the policy and amend it from time to time. He maintained that there was no vested right in the Petitioners to avail the incentives and that the amendment was in the larger public interest. It must be mentioned here that State has also filed a reply to the rejoinder where the above averments have been reiterated.

34. Mr. Muduli, learned Additional Government Advocate placed reliance on the following decisions to urge that the doctrine of promissory estoppel would not be attracted in the facts and circumstances of the case:

(i) ***Sales Tax Officer v. Shree Durga Oil Mills (1998) 1 SCC 572*** (paragraph-1, 2, 6, 9, 10 & 12 to 24)

(ii) ***Bannari Amman Sugars Ltd. v. Commercial Tax Officer (2005) 1 SCC 625*** (paragraphs-19 to 21)

35. In support of his contention that a policy decision would not be amenable to judicial review, Mr. Muduli relied upon the following decisions:

(i) ***Ugar Sugar Works Ltd v. Delhi Administration (2001) 3 SCC 635*** (paragraphs-1 and 18);

(ii) ***Federation of Railway Officers Association v. Union of India (2003) 4 SCC 289*** (paragraph-12);

(iii) ***Arun Kumar Agrawal v. Union of India (2013) 7 SCC 1*** (paragraphs-42 to 53)

36. Relying on the decision in ***R.C. Tobacco v. Union of India (2005) 7 SCC 725,*** Mr. Muduli contended that an exemption can be revoked or rescinded with retrospective effect.

Analysis and reasons

37. The above submissions have been considered. At the outset, it must be noted that the State authorities are not denying that the Petitioner No.1 was in fact issued the eligibility certificate dated 3rd May 2016 under IPR 2007 by IPICOL after a "joint inspection of the Petitioners' Jharsuguda unit by Opposite Party No.3." There is no denial that subsequently there was a certificate of verification issued on 30th July 2016 stating that the Jharsuguda unit of Petitioner No.1 "was not included in the activity enlisted at Sl No.3 of Annexure-II of IPR 2007.

38. There is also no denial that a certificate acknowledging that the unit of PetitonerNo.1 was in the ‘thrust sector’ was issued on 1st September 2016, again by Opposite Party No.3. Therefore, it is plain that a detailed verification was undertaken of the activity of Petitioner No.1 and particularly its manufacturing process. To now contend, as is sought to be done by the Opposite Parties in the reply to the rejoinder, that since Petitioner No.1 was sourcing clinker from the cement units at Chhattisgarh, fly ash from certain units in Sambalpur and gypsum was imported from Iran, all that Petitioner No.1's unit was doing was to mix these at its unit for production of cement is completely contrary to what admittedly is very elaborate and sophisticated process of manufacture undertaken at its high-end state-of-the-art unit. All that the Opposite Parties have done in response to the averment regarding the elaborate manufacturing process using high-end technology is to merely state that it is "incorrect and denied herewith". At no point in time, prior to the impugned cancellation orders, the Opposite Parties came to the conclusion that Petitioner No.1 unit was only undertaking the activity of "mixing and grinding".

39. There is merit in the contention of the Petitioners that the 'negative list" attached to the IPR 2007 was actually meant to cover units such as flour mills, confectionaries, brick grinding, book binding, etc. It was intended to identify small units for the purposes of assisting them to avail loans and working capital. It was not meant to exclude ‘thrust sector’ units like Petitioner No.1. There is no denial by the Opposite Parties that Petitioner

No.1 was in fact recognized as a downstream thrust sector industrial unit. Clauses 2 and 11 of the IPR 2007 defines "downstream industry" and industrial unit as under:

> "2. 'Downstream Industry' means an Industrial undertaking, which is engaged or proposed to be engaged in value addition of the intermediate or final produce or waste product of one or more industrial undertakings.
>
> 11. 'Industrial Unit' means any industrial undertaking located inside the State and engaged in any manufacturing or servicing activity as detailed in the Schedule appended to this policy."

40. In terms of Clause-1 (a) of the Schedule appended to IPR 2007, an industry listed in the 1st Schedule of the Industries Development and Regulation (IDR) Act, 1951 is recognized as an industrial unit for the purposes of IPR 2007. Manufacturing and production of cement (which is what is produced by Petitioner No.1 at its Jharsuguda Unit) is listed at Sl. No.35 of the 1st Schedule to the IDR Act. The Opposite Parties also do not dispute the fact that Petitioner No.1's unit fulfils the "triple objectives" of the IPR 2007, viz, (i) value addition; (ii) employment generation and (iii) revenue augmentation.

41. Thirdly, there is merit in the contention of the Petitioners that there is no justification given by the Opposite Parties as to why only cement manufacturing/grinding units and blast furnace slag-based units have been chosen for denial of SGST reimbursement and that too with retrospective effect, if in fact the idea was to

revisit the incentive under IPR 2007 as a result of introduction of the GST regime. It will be recalled that the GST regime was introduced in the country with effect from 1st July 2017 whereas the retrospective amendment was made more than three years later on 18th August 2020 and that too only for cement manufacturing/grinding units and blast furnace slag-based units. In the absence of a convincing justification provided, a move directed at only a few thrust sector industries for denial of SGST reimbursement can only be termed irrational, arbitrary and discriminatory.

42. For reasons explained hereafter, the Court is of the view that the Petitioners have made out a case for striking down of the impugned decisions of the Opposite Parties on the ground of promissory estoppel.

43. The Court would first like to take up for discussion the decision of the Supreme Court of India in ***MRF Limited v. Assistant Commissioner (Assessment) Sales Tax*** (*supra*), which in the considered view of this Court is squarely applicable to the present case. The facts in the said decision were as follows:

> (a) MRF Ltd. ('MRF') made investment of Rs. 80 Crores towards expansion of its existing industrial unit in Kerala, on the basis of promises held out by State of Kerala. These included exemption from payment of sales tax for a period of 7 years.

(b) MRF commenced commercial production at expanded unit with effect from 31st December, 1996. The state government issued in favour of MRF, an Eligibility Certificate dated 10th November, 1997 after inspection and verification of its manufacturing process. Having found MRF eligible for sales tax exemption, the State Government issued an Exemption Order dated 30th June, 1998 granting tax exemption for 7 years i.e., from 30th December, 1996 to 29th December, 2003.

(c) Vide SRO 38/98 dated 15th January, 1998 (2nd Notification), certain processes were excluded from the scope of 'manufacture' for the purposes of 1st Notification, and thereafter vide SRO 1092/99 dated 31st December, 1999 (3rd Notification), the tax exemption under 1st Notification was withdrawn altogether with effect from 1st January, 2000.

(d) In 2001, the Assistant Commissioner proposed to impose penalty on MRF from availing purchase tax exemption, on the premise that tax exemption granted under 1st Notification had been withdrawn under 2nd & 3rd Notifications. MRF challenged said action before Kerala High Court, which dismissed the writ petition. Thereafter, MRF appealed to Supreme Court.

43.1. It was held by the Supreme Court in the said decision as under:

"32. State and its instrumentalities ……can be made subject to the equitable doctrine of promissory estoppel in cases where because of their representation the party claiming estoppel has changed its position and if such an estoppel does not fly in the face of any statutory prohibition, absence of power and authority of the promisor and is otherwise not opposed to public interest, and also when equity in favour of the promisee does not outweigh equity in favour of the promisor entitling the latter to legally get out of the promise."

"34. …..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….."

"39. ….MRF made a huge investment in the State of Kerala under a promise held to it that it would be granted exemption from payment of sales tax for a period of seven years. It was granted the eligibility certificate. The exemption order had also been passed. It is not open to or permissible for the State Government to seek to deprive MRF of the benefit of tax exemption in respect of its substantial investment in expansion in respect of compound rubber when the State Government had enjoyed the benefit from the investment made by the MRF in the form of industrial development in the State, contribution to labour and employment and also a huge benefit to the State exchequer……The impugned action on the part of the State Government is highly unfair, unreasonable, arbitrary and, therefore, the same is violative of Article 14 of the Constitution of India. The action of the State cannot be permitted to operate if it is arbitrary or unreasonable……Equity that arises in favour of a party as a result of a representation

made by the State is founded on the basic concept of "justice and fair play". The attempt to take away the said benefit of exemption with effect from 15.1.1998 and thereby deprive MRF of the benefit of exemption for more than 5 years out of a total period of 7 years, in our opinion, is highly arbitrary, unjust and unreasonable and deserves to be quashed. In any event, the State Government has no power to make a retrospective amendment to SRO No.1729/93 affecting rights already accrued to MRF thereunder."

43.2. Finally in the said decision, the Supreme Court held as under:

"43. ….Amendment notification SRO 38/98 (2nd Notification) has to be read so as not to take away or disturb any manufacture's pre-existing accrued right of exemption for a period of 7 years…..' under 1st Notification

"45. [The] State Govt. is restrained from initiating any proceedings against MRF contrary to or inconsistent with Eligibility Certificate & Exemption Order issued in terms of 1st Notification."

44. In the case on hand, without cancelling the eligibility certificate and thrust sector certificate, the Opposite Parties have recalled the sanction order by the impugned cancellation order dated 6th October, 2018. Admittedly, the Opposite Parties recognized expanded cement manufacturing unit of Petitioner No.1 as eligible for the production incentives as a "downstream industrial unit" under the "thrust sector". Opposite Parties do not deny that Petitioner No.1 fulfils the triple test under the IPR 2007 and has made an eligible fixed capital investment of Rs.183.75 crores. There can be no doubt that there is a vested accrued and

crystallized right in favour of Petitioner No.1 in terms of paragraph 18.4 of IPR 2007 to avail the incentives. That is why the sanction order dated 6th June 2017 was issued in the first place. No valid justification has been provided by the Opposite Parties for retrospectively cancelling the said sanction order and that too well over a year after it was issued. The reasons given for such cancellation, viz., that the Petitioners did not source its raw materials from outside is not specified as a dis-incentive or a disqualification under IPR 2007. As already pointed out, the unit of Petitioner No.1 does not fall within Sl. No.51 of the negative list at all. That list was for low capital investment units resulting in lower value addition and lesser employment generation. In the considered view of the Court, the decision in ***MRF Limited*** (*supra*) would squarely apply to the facts of the present case.

45. The excuse of financial implication does not stand scrutiny in view of the observations of the Supreme Court in ***State of U.P. v. Birla Corporation Ltd.*** (*supra*). There the facts were as under:

> (a) The State of U.P. issued a Notification dated 18th June, 1997 (1st Notification) providing tax rebates for 10 years to industrial units which utilized prescribed percentages of fly ash for manufacturing goods in notified districts. By a further Notification dated 27th February, 1998 (2nd Notification), the 1st Notification was amended and the criteria for grant of tax rebates were modified.

(b) The 1st Notification was challenged before UP High Court as *inter alia* being discriminatory. The High Court quashed and set aside the said Notification by its order dated 29th January, 2004. Thereafter by Notification dated 14th October, 2004 (3rd Notification), the 2nd Notification was rescinded by the State Government with effect from 14th October, 2004. On account of issuance of the 3rd Notification, State Government denied tax rebates even to those units which had fulfilled conditions prescribed under the 2nd Notification and commenced production prior to issuance of 3rd Notification.

(c) The 3rd Notification was challenged before the Allahabad High Court, *inter alia* by invoking the doctrine of promissory estoppel. It was contended that industrial units that had acted upon the promises made vide 2nd Notification and commenced commercial production prior to issuance of 3rd Notification had a vested right and entitlement to avail tax rebates for 10 years as envisaged under 2nd Notification. The Allahabad High Court allowed the writ petition following which the State of UP filed an appeal in the Supreme Court of India.

45.1. Dismissing the appeal, the Supreme Court in the said decision held as under:

> "23. ……the State Government or the Executive is competent to rescind the earlier notification and the doctrine of promissory estoppel can be no impediment

in that behalf. That, however, is hedged or laced with condition that the burden is upon the Government to show that it acted in furtherance to public interest in issuing such a notification otherwise than in accordance with the promise and that the public interest is so overwhelming that it would be inequitable to hold the Government bound by the promise. It is well established that the Court would not act on mere ipse dixit of the Government and must insist on a highly rigorous standard of proof in discharge of its burden by the Government. Resultantly, it is not necessary for us to dilate on the precedents pressed into service by the respondents on the application of doctrine of promissory estoppel of the State Government like any other private party or individual."

25. The power to retrospectively withdraw a rebate or concession must be expressly conferred upon the Executive, and in the absence thereof, it is not open to State to retrospectively withdraw or rescind such benefits.

27. ……all the industrial units set up after 27th February, 1998 and before 14th October, 2004 which had commenced commercial production, must continue to qualify for rebate for specified term mentioned in Notification dated 27th February, 1998, subject to fulfilling all other conditions specified therein."

29. ….it is also indisputable that the industrial units set up in furtherance of the promise or representation made in the Notification dated 27th February, 1998which had commenced commercial production in respect of specified goods before 14th October, 2004, would continue to achieve the same objective as is specified in the Notification dated 27th February, 1998. In that, the concerned manufacturing units continue to manufacture specified goods by using fly ash purchased or produced from the thermal power stations situated within the State. As long as that activity is continued until the term

specified under the notification dated 27th February, 1998, namely ten years from the date of commencement of commercial production, there is no tangible reason nor it is open to contend that the dominant purpose underlying notification dated 27th February, 1998 had ceased to exist or had become irrelevant in any manner, much less there are supervening circumstances qua such units which are so overwhelming that it would be inequitable for the State Government to be bound by the promise given in notification dated 27th February, 1998.

30. Indeed, the judgment rendered by the High Court and affirmed by this Court in interpreting the notification dated 27th February, 1998, at best, may have given rise to some logistical issues for the State including financial implications regarding future revenue loss. That ground cannot be invoked as supervening public interest in reference to the activities of the industrial units who qualify the conditions specified in notification dated 27th February, 1998 in all other respects and had commenced commercial production of the specified product before 14th October, 2004. Indubitably, an enforceable right had accrued to and crystallised in favour of such industrial units which could not be truncated or snapped unless the dominant purpose for which the notification dated 27th February, 1998 came to be issued had ceased to exist, namely generation of fly ash by the thermal power stations situated within the State and consumption of that fly ash by the industrial units established within the designated areas of the State as per the specified quantity to become entitled for rebate for the duration mentioned therein……Suffice it to observe that the argument about future revenue loss cannot be invoked against the industrial units who had already established and commenced production after 27th February, 1998 and before 14th October, 2004. For, it can be safely presumed that the policy makers were fully conscious about the so-called loss of future revenue due to rebate to those units when they had issued notification dated

> 27th February, 1998. That ground cannot be set up against the industrial units who qualify in all other respect under the notification dated 27th February, 1998 and have made substantial investment running into crores much less as being supervening public interest, as is being placated by the State in these proceedings. This is clearly an afterthought plea, which by no standards can stand the test of judicial scrutiny. It is well established that the Court is obliged to insist for a highly rigorous standard of proof in the discharge of the burden and onus upon the State to justify its action as supervening public interest."

45.2. Ultimately in the said decision it was held that the 3rd Notification dated 14th October, 2004 could have no application to the settled enforceable right accrued to industrial units which fulfilled all conditions specified in the 2nd Notification dated 27th February, 1998 and had commenced commercial production prior to issuance of 3rd Notification. It was held that the 3rd Notification cannot be construed as having retrospective or retroactive effect to whittle down the accrued rights in favour of the Respondent units which were entitled to rebate as specified in 2nd Notification dated 27th February, 1998 for a period of 10 years from commencement of commercial production.

46. In the present case, no material whatsoever has been placed on record by the Opposite Parties to establish that the impugned resolution retrospectively amending the heading to paragraph 18.4 of IPR 2007 is in public interest. On the contrary, the State government appears to have done a U-turn without justification. It has sought to reverse the earlier determination, by its authorities,

of the eligibility of the unit of Petitioner No.1 to receive the IPR 2007 incentives. As already pointed out, there was no justification in singling out cement manufacturing units for denial of the SGST reimbursement.

47. The reliance placed by the Petitioners on the decision ***Manuelsons Hotels Pvt. Ltd. v. State of Kerala*** *(supra)* also appears to be justified. The said decision was a distillation of the principle of promissory estoppel explained in the earlier decisions. The Supreme Court in the said case held as under:

> "20. There are …..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."
>
> …….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 [Associated Provincial Picture Houses Ltd. V. Wednesbury Corpn., (1948) 1 KB 223 (CA)] 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)…..'

48. The decision in ***State of Jharkhand v. Brahmputra Metallics Ltd.*** *(supra)* is also to the same effect. There, it was observed as under:

"41. …Representations by public authorities need to be held to scrupulous standards, since citizens continue to live their lives based on the trust they repose in the State. In the commercial world also, certainty and consistency are essential to planning the affairs of business. When public authorities fail to adhere to their representations without providing an adequate reason to the citizens for this failure, it violates the trust reposed by citizens in the State. The generation of a business-friendly climate for investment and trade is conditioned by the faith which can be reposed in government to fulfil the expectations which it generates…….

53. …The state must discard the colonial notion that it is a sovereign handing out doles at its will. Its policies give rise to legitimate expectations that the state will act according to what it puts forth in the public realm. In all its actions, the State is bound to act fairly, in a transparent manner. This is an elementary requirement of the guarantee against arbitrary state action which Article 14 of the Constitution adopts. A deprivation of the entitlement of private citizens and private business must be proportional to a requirement grounded in public interest.

54. Therefore, it is clear that the State had made a representation to the respondent and similarly situated industrial units under the Industrial Policy 2012. This

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

49. Turning now to the decisions relied upon by ***Mr. Muduli, in Sales Tax Officer v. Shree Durga Oil Mills*** *(supra),* certain assessment orders by the Sales Tax Officer were challenged by contending that the Petitioner had set up its industries of manufacturing groundnut oil as a small scale industry unit acting on the promises held out in the IPR dated 18th July 1979 by the Industries Department, Government of Odisha. However, the difference as far as the case is concerned is that there was no notification under Section 6 of the Orissa Sales Tax Act, 1947 granting exemption on payment of tax on purchase or sale of ground nut, mustard seeds etc during the relevant period. It was therefore contended that in the absence of such notification the Petitioner could not avail the incentives. The reasons why the Supreme Court in that case did not extend the principle of promissory estoppel have been spelt out as under:

> "13. There are several reasons why we are unable to uphold the contention based on the principle of promissory estoppel raised by the respondents in this case. No particulars have been given by the respondents

> as to when the decision was taken to set up the industry, the date when the loan was obtained from the bank, and exactly when land was purchased or the plant and machinery were acquired for setting up of the small-scale industrial unit. The I.P.R. on which reliance has been placed by the respondent was issued on 18.7.1979. A provisional registration certificate in respect of the respondent's industry was issued on 28.11.1979. The respondent has not given factual details of how in the short span of about four months, it set up its industry on the basis of the I.P.R."

50. In the present case, however, the situation is entirely different. The Opposite Parties themselves have granted the eligibility certificate and verification certificate as noted hereinbefore. In fact, the orders sanctioning the VAT reimbursement have been passed on 6th June 2017. Therefore, there is absolutely no justification in denial of the benefit of SGST reimbursement to Petitioner No.1.

51. Turning now to the decision in ***Bannari Amman Sugars Ltd. v. Commercial Tax Officer*** *(supra),* the facts there were again very different. It was noted in that case that "…..at the point of time the appellant units were set up and the commercial production started there was no assurance or promise, the doctrine of promissory estoppel had no application to the facts of the case at that stage". The case was remanded to the High Court for a fresh decision. Therefore, the said decision is also of no assistance to the Opposite Parties to avoid the liability.

52. The Court rejects the plea of the opposite Parties that it is being called upon in the present case to review a policy decision. The Court is in fact being asked to examine the reasonableness of the decision of the Opposite Parties to retrospectively take away the benefits already extended to an existing unit under IPR 2007. Consequently, none of the decisions relied upon by the Opposite Parties in the context of judicial review of policy decisions of the State have any applicability to the facts of the present case.

53. Lastly, the Court is not satisfied of the reasons given by the Opposite Parties for discriminating against Petitioner No.1 unit vis-à-vis KPCW which appears to be identically placed as Petitioner No.1. The HCLA at its meeting on 18th September, 2008 noted that KCMW was "a separate unit but part of integrated facility of OCL for manufacturing cement". In other words, KCMW was also a standalone unit. Further, nowhere does IPR 2007 state that a cement producing unit that sources raw materials from outside would be ineligible to receive the incentives.

Conclusion and directions

54. For all of the aforementioned reasons, the Court sets aside the order dated 6th October 2018 issued by the Director of Industries withdrawing the earlier order dated 6th June 2017 granting Petitioner No.1 the exemption. The Court also sets aside the resolution dated 18th August 2020 retrospectively amending IPR

2007. It is clarified that the said amendment would have only prospective effect and would not affect the entitlement of Petitioner No.1 to the incentives for the period prior to the said amendment.

55. In terms of the interim order passed by this Court on 23rd July 2019 in W.P. (C) No.12435 of 2019 to the effect that if the Petitioners succeed in the writ petition, any payment of tax would be refunded along with interest, a direction is issued to the State to refund to Petitioner No.1 within a period of four weeks the tax paid by it together with interest in terms of the applicable Rules.

56. The writ petitions are allowed in the above terms with costs of Rs.10,000/- in each writ petition which shall be paid by the Opposite Parties to Petitioner No.1 within a period of four weeks.

(Dr. S. Muralidhar)
Chief Justice

(A.K. Mohapatra)
Judge

S.K. Guin