REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8225 OF 2009

Chowgule & Company Limited …Appellant

Versus

Assistant Director General of Foreign Trade
& Others …Respondents

J U D G M E N T

M.R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 26.06.2008 passed by the High Court of Judicature of Bombay at Goa in Writ Petition No. 286/1996, by which the Division Bench of the High Court has dismissed the said writ petition by holding that the appellant shall not be entitled to the benefit of additional licence on the export of processed iron ore during the period April, 1990 to March, 1991, the exporter has preferred the present appeal.

2. The facts leading to the present appeal in a nutshell are as under:

That the appellant is engaged *inter alia* in the export of processed iron ore and is a recognised trading house. Under the Indian Foreign Trade Policy (hereinafter referred to as the 'Exim Policy') 1988-1991, there was a provision of 'additional licence' and a trading house would be eligible to 'additional licence' on the basis of the admissible exports in the preceding licensing year. Para 212 of the Exim Policy, 1988-1991 provided that in considering the eligibility of an exporter for recognition as a trading house based on Net Foreign Exchange (NFE) earnings from export of items specified in Appendix 12 shall not qualify. At the relevant time, Appendix 12 provided that export of "Minerals and ores – unprocessed" would be ineligible for considering the grant of additional licence. In the year 1990, there was a change in the Exim Policy and the Director General, Foreign Trade came out with a new policy, namely, Exim Policy, 1990-93. There was an amendment in Appendix 12 and the list of ineligible items which earlier was "Minerals and ores – unprocessed", in the new Appendix 12, it was stated to be "Minerals and ores".

2.1 It is the case on behalf of the appellant that relying upon the original Exim Policy, 1988-91 and acting upon the said policy, the appellant entered into a contract with one NKK Corporation, Japan on 7.2.1990, for export of processed iron ore, which was not an ineligible item in Appendix 12 under the Exim Policy, 1988-91. However, the

appellant actually exported the processed iron ore and realized NFE earnings of Rs.52,00,51,848/- for the year 1990-91. The export was made between the period April, 1990 to March, 1991 during the new Exim Policy, 1990-1993. The appellant applied to the Assistant Chief Controller of Imports and Exports for grant of additional licence for value of Rs.6,08,46,000/- against FOB value of export of processed iron ore amounting to Rs.52,00,51,848/- for the year 1990-91.

2.2 *Vide* letter dated 23.7.1992, the application of the appellant for grant of additional licence came to be rejected by the Assistant Chief Controller of Imports and Exports on the ground that there was no provision for grant of additional licence in the then current policy of 1992-97. In an appeal preferred by the appellant, the Joint Director General of Foreign Trade remanded the matter to the Assistant Chief Controller of Imports and Exports for a fresh adjudication. *Vide* its order dated 30.04.1993, the Assistant Chief Controller of Imports and Exports again rejected the said application by observing that the item “iron ore processed” exported by the appellant during April, 1990 to March 1991 is included in the Appendix 12 of the Exim Policy, 1990-93 and therefore the same is not eligible for additional licence during the corresponding licensing period, i.e., 1991-92.

2.3 The appellant preferred an appeal challenging the order dated 30.04.1993 before the Joint Director General of Foreign Trade, which

was rejected on 2.9.1993. The appellant preferred a second appeal before the Additional Director General of Foreign Trade. The Additional Director General of Foreign Trade by order dated 05.10.1994 rejected the second appeal for the reason that the application for additional licence was time barred. In the writ petition filed by the appellant, by order dated 13.09.1995, the High Court remitted the matter to the Additional Director General of Foreign Trade to consider the question of the appellant's eligibility for additional licence or in lieu thereof the appellant is entitled to 20% premium. After remand, the second appellate authority again dismissed the appeal on the ground that the application filed by the appellant for grant of additional licence was barred by limitation.

2.4 Aggrieved by the decision of the second appellate authority, the appellant filed a writ petition before the High Court being Writ Petition No. 286/1996. The High Court, by judgment and order dated 30.01.2001, allowed the said writ petition and quashed and set aside the order of the Additional Director General of Foreign Trade dated 12.01.1996 denying the benefit of additional licence and directed the department to pay to the appellant the premium of Rs.1,21,69,200/-. While directing so, the High Court observed and held that the appellant was eligible for the benefit under the Exim Policy during the period 1991-92 and therefore there was no justification nor any legal basis for

denying the claim on the ground of withdrawal of Policy in 1992-93 by public notice dated 29.02.1992. In sum and substance, the High Court was of the view that the subsequent change in the policy and/or withdrawal of the policy in the year 1992-93 shall not be applicable and the appellant shall not be denied the benefit of additional licence on the aforesaid ground. The judgment and order passed by the High Court in Writ Petition No. 286/1996 was the subject matter of appeal before this Court being Civil Appeal No. 5764 of 2001.

2.5 By judgment and order dated 04.04.2007, this Court set aside the order passed by the High Court and remitted the matter to the High Court by observing that the point as to whether the appellant was ineligible for grant of additional/special licence as per Appendix 12 attached to Import and Export Policy from April 1990 to March 1993 was not examined either by the High Court or by the first appellate authority and the high Court failed to consider the effect of Appendix 12 of the Policy of April 1990-March 1993. On remand, the High Court, by the impugned judgment and order, has dismissed the writ petition preferred by the appellant by observing that under the amended/new Exim Policy 1992-1993, the exported item – “processed iron ore” was an item specified in Appendix 12 and as per Appendix 12, the exported item “processed iron ore” was ineligible for the purpose of grant of benefit of additional licence.

2.6 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court, the appellant – exported has preferred the present appeal.

3. Shri Ravindra Shrivastava, learned Senior Advocate has appeared on behalf of the appellant and Shri N. Venkataraman, learned Additional Solicitor General of India has appeared on behalf of the respondents.

3.1 Shri Ravindra Shrivastava, learned counsel appearing on behalf of the appellant has vehemently submitted that the issue essentially is with regard to the appellant's claim for grant of additional licence under the Exim Policy 1998-91 based on eligible export of "processed iron ore" in the preceding years.

3.2 It is submitted that the appellant acted upon the Exim Policy 1988-91 and incurred commercial and financial commitments severely altering its position to its serious detriment. The appellant exported the "processed iron ore" in the year 1989-91.

3.3 It is submitted that as per the decision of this Court in the case of ***Union of India & Others v. Chowgule & Co. Ltd. and Others, (2003) 2 SCC 641***, the appellant was entitled to grant of additional licence, *vis-à-vis,* the export of "processed iron ore" made during the year 1989-90. It is submitted that however when the appellant was engaged in making export of "processed iron ore" in the subsequent year, there was a change in the policy before the expiry of period of three years during

which 1988-91 policy was solemnly declared to remain in force and the same came to be substituted by Exim Policy 1990-93. It is submitted that under the changed Exim Policy, in Appendix 12, “Minerals and Ores” are now declared ineligible *inter alia* for the purpose of additional licence. It is submitted that however as the appellant had already acted upon the Exim Policy 1988-91 and on 7.2.1990, it entered into an agreement with NKK Corporation, Japan and thereafter it exported “processed iron ore” worth Rs. 52 crores of foreign exchange earnings during April, 1990 to March, 1991, the appellant shall be entitled to the benefit of grant of additional licence as claimed under the Exim Policy, 1988-91.

3.4 It is further submitted that applying the *doctrine of promissory estoppel*, the appellant shall be entitled to the benefit of grant of additional licence on the export of the “processed iron ore”. It is submitted that while negotiating and agreeing for price with the importer, it factored in the price component, the incentive of additional licence which was in force at the time under the prevalent policy. It is submitted that thus, all the elements for attracting principles of *promissory estoppel* are present.

3.5 It is further submitted that in case of several others similarly situated exporters, the benefit of additional licence was granted. That the action of Director General of Foreign Trade denying the benefit of additional licence to the appellant on the export of “processed iron ore”

can be said to be discriminatory and violative of Article 14 of the Constitution of India. Heavy reliance is placed upon the decisions of this Court in the case of ***Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh, (1979) 2 SCC 409 (para 24); Union of India and Others v. Indo-Afghan Agencies Limited, (1968) 2 SCR 366 = AIR 1968 SC 718; Union of India & Another v. V.V.F. Limited, (2020) 20 SCC 57; and State of Uttar Pradesh & Another v. Birla Corporation Limited, (2020) 20 SCC 320*** on *promissory estoppel* and on the submission that no withdrawal is permissible unless it is justified.

4. Shri N. Venkataraman, learned ASG appearing on behalf of the respondents, while supporting the impugned judgment and order passed by the High Court and while supporting the orders passed by the Director General, Foreign Trade, denying the benefit of additional licence to the appellant, has vehemently submitted that the denial of the additional licence is absolutely in consonance with the Exim Policy 1990-93. It is submitted that admittedly the appellant exported the “processed iron ore” during the Exim Policy 1990-93, which was binding upon the appellant. It is submitted that the appellant actually exported the “processed iron ore” post April, 1990. It is submitted that under the Exim Policy 1990-93, as per Appendix 12, “processed iron ore” was in the excluded category and in the category of ineligible items. It is submitted

that as per the Exim Policy, the additional licences were available only on export in the preceding years of eligible items.

4.1 Now so far as the submission on behalf of the appellant on *promissory estoppel* is concerned, it is submitted that the benefit of additional licence was in the form of an incentive and the same cannot be claimed as a matter of right. It is submitted that being a policy decision, it is always open to the Department/DGFT to come out with a modified/fresh/new Exim Policy. It is submitted that therefore the principle of *promissory estoppel* shall not be applicable at all, more particularly when the incentive is withdrawn in the subsequent/new policy. It is submitted that therefore as rightly observed by the High Court, where the appellant is found to be ineligible to get the benefit of additional licence on the export made during the new Exim Policy, 1990-93, the appellant shall not be entitled to the benefit of additional licence.

4.2 Now so far as the submission on behalf of the appellant that some other similarly situated exporters are granted the benefit of additional licences is concerned, it is submitted that there cannot be any negative discrimination pleaded and claimed. It is submitted that merely because some benefits might have been given wrongly to some other persons/exporters, the appellant cannot claim parity and pray for the similar benefits. Once, it is held that the appellant is not entitled to additional licence on export of “processed iron ore”, the appellant shall

not be entitled to the benefit of additional licence as claimed, which otherwise is not entitled to on merits.

4.3 Making the above submissions, it is prayed to dismissed the present appeal.

5. We have heard learned counsel for the respective parties at length.

At the outset, it is required to be noted that the appellant is claiming the benefit of additional licence on the export of “processed iron ore” exported during the Exim Policy 1990-93. It is an admitted position that the “processed iron ore” had been exported during April, 1990 to March, 1991. It is to be noted that under the Exim Policy 1990-93, “Minerals and Iron Ore” are included in the list of ineligible items. As per Exim Policy 1988-1991, only the export of “unprocessed iron ore” was ineligible to get the benefit of additional licence. However, when the new Exim Policy 1990-93 came into existence, as observed hereinabove, the “Minerals and Iron Ore” are in the list of ineligible items – the appellant had actually exported “processed iron ore” during the period April, 1990 to March, 1991, which was under the regime of new Exim Policy 1990-93 and as observed hereinabove under the new Exim Policy 1990-93, the export of “Minerals and Iron Ore” are included in the list of ineligible items, the appellant has been denied the benefit of additional licence.

At this stage, it is required to be noted that under the Exim Policy, the benefit of additional licence which as such was in the form of an incentive is available on actual export in the preceding year and the benefit of such export for the purpose of additional licence to the FOB value shall be available in the next year. Under the Exim Policy, the benefit of additional licence shall be available only on actual export in the previous year and that too to eligible items only. Under the circumstances, when the appellant exported the "processed iron ore", i.e., during the period between April, 1990 to March, 1991, the "Minerals and Iron Ore" as per Appendix 12 were in the list of ineligible items, the appellant is rightly denied the benefit of additional licence. At this stage, it is required to be noted that the appellant had never challenged the new Exim Policy 1990-93. Therefore, in the absence of any challenge to the new Exim Policy 1990-93 under which on export of "Minerals and Iron Ore", there shall not be the benefit of additional licence, the new Exim Policy 1990-93 shall be applicable.

6. The appellant is claiming the benefit of additional licence under the Exim Policy 1988-91 on the ground of *promissory estoppel*. However, when the new Exim Policy 1990-93 is held to be applicable under which on export of 'Minerals and Iron Ore", there shall not be any benefit of additional licence, the appellant cannot be permitted to claim the benefit

of additional licence under the old Exim Policy, which was not in existence.

7. Now so far as the submission on behalf of the appellant on doctrine of *promissory estoppel* is concerned, it is required to be noted that the benefit of additional licence was in the form of an incentive. The DEFT/Union is free to change the Exim Policy and consider from time to time on which items there shall be an incentive and on which items there shall not be any incentive. To grant the benefit of an incentive is a policy decision which may be varied and/or even withdrawn. No exporter can claim the incentive as a matter of right. Under the circumstances, the doctrine of *promissory estoppel* shall not be applicable to such a policy decision with respect to incentive, more particularly when it is well within the right of DGFT/appropriate authority/Union to come out with a new Exim Policy. Under the circumstances, the submission on behalf of the appellant that as the appellant placed the order with NKK Corporation, Japan on 7.2.1990 when the Exim Policy 1988-91 was in force and therefore the appellant shall be entitled to the benefit of additional licence by applying the doctrine of *promissory estoppel* cannot be accepted. The policy and the incentive scheme are very clear. Incentive in the form of an additional licence is on actual export in the previous year. Therefore, the relevant date shall be the date on which the export is made. Under the circumstances, the decisions relied upon on behalf

of the appellants on the principle of *promissory estoppel* shall not be of any assistance to the appellant and shall not be applicable at all on the facts of the case on hand.

8. Now so far as the submission on behalf of the appellant that in case of some other similarly situated exporters, the benefit of additional licence has been granted and therefore the appellant is entitled to the benefit of additional licence on the export made between April, 1990 to March, 1991 is concerned, merely because some others are granted the benefit wrongly, the appellant cannot be permitted to pray for the similar benefits. There cannot be any negative discrimination which may perpetuate the illegality. The appellant cannot be allowed the benefit of additional licence on the ground that some others might have been granted such benefits *de hors* the scheme, which otherwise the appellant is not entitled to under the scheme. At this stage, it is required to be noted that in fact in the impugned judgment and order, the High Court has directed to hold an enquiry how the others were granted the benefit. However, unfortunately no further enquiry is held. It is very unfortunate that despite the High Court's order, no further enquiry has been conducted. Be that as it may, once it is held that the appellant is not entitled to the benefit of additional licence on export of "Minerals and Iron Ore", the matter ends there and the appellant cannot be allowed such benefit, which otherwise the appellant is held not entitled to.

9. In view of the above and for the reasons stated above, the High Court has rightly confirmed the order passed by the authority denying the benefit of additional licence to the appellant. We are in complete agreement with the view taken by the High Court. The appeal deserves to be dismissed and is accordingly dismissed. No order as to costs.

…….J.
[M.R. SHAH]

NEW DELHI;
NOVEMBER 04, 2022.

…….J.
[KRISHNA MURARI]