

CASE NO.:
Appeal (civil) 7994 of 2003

PETITIONER:
State of Jharkhand & Ors.

RESPONDENT:
Ambay Cements & Anr,

DATE OF JUDGMENT: 17/11/2004

BENCH:
S.N. Variava, Dr. AR. Lakshmanan & S.H. Kapadia

JUDGMENT:
J U D G M E N T

Dr. AR. Lakshmanan, J.

This appeal is preferred by the State of Jharkhand through the Commissioner of Commercial Taxes, Ranchi, Jharkhand and five others against the final judgment and order dated 15.1.2003 passed by the Division Bench of the High Court of Jharkhand at Ranchi in Writ Petition (T)No.5712 of 2002 allowing and remitting back the same to the Joint Commissioner of Commercial Taxes(Admn.), Dhanbad Division, Dhanbad for passing a fresh order in view of the observations and directions made in the judgment. The short facts are as follows:

The erstwhile Government of Bihar came out with an Industrial Policy 1995 providing certain incentives to the newly set up industrial units in the small scale sector.

Clause 16.1 and Clause 16.2 of the said Industrial Policy provided for exemption from Sales Tax on purchase of raw material and exemption of Sales Tax on sale of finished products. The Commercial Taxes Department of the State Government issued statutory Notifications for implementation of the said Industrial Policy vide S.O.478/479 dated 22.12.1995. The said Industrial Policy was amended vide Notification No.5680 dated 27.8.1997 for providing certain reliefs to the pipeline industries. The Industrial Policy 1995 was amended with a view to provide extension of time limit for the date of start of commercial production in case of pipe line industries where substantial investment capital has been made subject to the condition that such pipe line industrial unit shall seek prior permission of the State Government in the Industries Department before 31.8.2000 and commercial production shall be started within five years from the date of obtaining such prior permission. On 2.3.2000, the Commercial Taxes Department issued Notification No. S.O. 57 and 58 dated 2.3.2000 pursuant to the above amendment in the Industrial Policy 1995. As per the Industrial Policy 1995 and Notifications issued for the implementation of the Industrial Policy 1995, that is, S.O. 478 and S.O. 479 dated 22.12.1995 newly set up small scale industries were entitled to tax free purchase of raw material as also tax free sale of finished products provided that the date of start of such industries were between 1.9.1995 and 31.8.2000. The statutory Notifications S.O. 57 and S.O. 58 dated 2.3.2000 amended the Notification Nos. S.O. 478 and S.O. 479 dated 22.12.1995 accordingly to provide for prior permission of the Industries Department which will have to be obtained by the pipe line industrial unit before 31.8.2000 for availing of the tax incentive under Notification Nos. S.O. 478 and S.O. 479 of 22.12.1995.

It is seen from S.O. 478 and S.O. 479, as amended vide S.O. 57 and S.O. 58 dated 2.3.2000 that industrial units having obtained registration from Industries Department/Industrial Area Development authority/Director of Industries or having obtained from competent Authority of the Government of India Registration Certificate/Letter of Intent etc., and desirous of availing tax incentive benefit under Industrial Policy 1995 will also obtain prior permission of the State Government in the Industries Department before 31.8.2000.

The respondent herein \026 M/s Ambey Cements, a small scale industry has obtained temporary Registration Certificate from the General Manager, District

Industries Centre, Dhanbad dated 5.5.2000 applied before the Joint Commissioner of Commercial Taxes(Admn.) for grant of exemption. The joint Commissioner vide his order dated 26.8.2000 granted the same with a condition that it will obtain prior permission from the State Government in the Industries Department. The Joint Commissioner, after examining the application for issue of the eligibility certificate, rejected the application on the ground that the respondent did not obtain the prior permission from the Industries Department in accordance with the provisions laid down in the statutory Notification Nos. S.O. 57 and S.O. 58 dated 2.3.2000. The respondent unit, on 2.4.2001, applied for the eligibility certificate under the provisions of S.O. 478 and S.O. 479 dated 22.12.1995 read with S.O. 57 and S.O. 58 dated 2.3.2000 issued under the provisions of Industrial Policy 1995 on 2.4.2001 without obtaining the prior permission of the State Government in the Industries Department. The Joint Commissioner, by order dated 11.9.2000 rejected the application filed by the respondent for exemption from payment of sales tax on purchase of raw materials and exemption from payment of sales tax on sale of finished products under the provisions of the concerned Notifications. The Joint Commissioner rejected the application on the ground that no prior permission from the Department of Industries has been issued.

Aggrieved by the order passed by the Joint Commissioner, the respondent filed a writ petition before the High Court of Jharkhand which was opposed by the appellant herein by filing a counter affidavit wherein it was contended that the statutory Notifications were not complied with by the respondent herein. However, the High Court allowed the writ petition, inter alia, and directed the authorities concerned that the temporary Registration Certificate issued by the General Manager, District Industry Centre can be treated as prior permission of the State Government as contemplated under the Notification issued for the purpose.

Being aggrieved by the order passed in the writ petition, the State of Jharkhand preferred S.L.P.(C) No. 10169/2003 before this Court. The order of the High Court was also stayed by this Court on 10.7.2003. Leave was granted on 22.9.2003 and the special leave petition was renumbered as Civil appeal No. 7994 of 2003.

We heard Mr. A Saran, learned Additional Solicitor General, appearing for the appellants and Mr. Gopichand Bharukha, learned senior counsel, appearing for respondent No.1.

Before proceeding further, it is useful to reproduce paragraphs 10 and 11 of the judgment passed by the High Court which read thus:

"10. It could not be explained before us as to how and on that consideration, a temporary registration Certificate is granted or can be rejected. It could not be explained either as to how and on that considerations, the said prior permission is granted or rejected. In other words, it could not be explained to us as to what is the difference between the temporary registration Certificate granted by the Industries Department of the Government for setting up a new industrial unit and a prior permission granted by the State Government (Industries Department), as contemplated in the said notification, as aforesaid. One has also to keep in mind the object and purpose of the said Industrial Policy and the incentives granted thereunder which should not be frustrated on mere technicalities. We are left with no alternative than to hold that the temporary registration Certification (Annexure-5) can be treated as prior permission of the State Government (Industries Department) as contemplated under the aforesaid notification.

11. In the result, the matter is remitted back to the Respondent No.3 Joint Commissioner of Commercial Taxes (Admn.), Dhanbad Division, Dhanbad for passing a fresh order in view of the observations and directions made herein above within a period of two months from the date of receipt of a copy of this order."

Learned Additional Solicitor General appearing for the appellants submitted that the High Court erred in allowing the writ petition filed by respondent No.1 and directing the grant of exemption in favour of the same overlooking the fact that respondent No.1 had admittedly not complied with the statutory conditions prescribed under the Notifications issued by the State Government in terms of the Industrial Policy 1995 for

such grant. According to him, the conditions prescribed by the Authorities for grant of exemption are mandatory and that the High Court directed the grant of exemption in favour of the respondent overlooking the statutory provisions prescribed more so, in the absence of any challenge to the validity of such conditions. It was further submitted that non-compliance of the provisions laid down in the statutory provisions would disentitle the respondent from grant of exemption.

Mr. Gopichand Bharukha, learned senior counsel, appearing for respondent No.1, submitted that the Temporary Registration Certificate granted by the Industries Department of the State Government is in fact a prior permission as contemplated under the aforesaid Notifications and there is nothing to show in the said Notifications that a separate prior permission was required for being eligible to the incentives/exemption granted under the said Notifications. He would further submit that the Department of Industries, government of Bihar came up with Industrial Policy granting various incentives to such an industry including the exemption of sales tax with a view to accelerate the growth of industries in the State. This policy enunciated by the Bihar State was duly adopted by the State of Jharkhand and the Notifications issued pursuant thereto.

Mr. Bharukha invited our attention to the Registration Certificate issued by the General Manager, District Industries Center for production of Cement. This Certificate shows that it was valid for five years. As per the Registration Certificate, the respondent is entitled to get exemption as the same is nothing but a prior permission of the State Government granted prior to 3.8.2000. He invited our attention to the relevant portion of the said Notification which is reproduced hereunder:

"1. In place of the present entries of Clause 1 (a) of the aforesaid notification the following entries should be substituted:-

1A. By a new Industrial unit is meant such unit in which the production work has commenced between 1st September 1995 and 31st August, 2000 and which has got sanction letter/advertisement letter/letter of intent/Registration Certificate from Industrial Department/Industrial Area Development Authority/Director of Industries and Competent Officer of the Government of India:

But all such units in which 500 crores or more capital will be invested for expansion then they shall be considered as new units for the purpose of this Notification;

But it is also that for the purpose of this Notification all those units shall be considered as new units which has commenced production within 5 years after taking prior permission from the Industry Department of the State Government before 31st August, 2000 even if those units which commence production after 31st August, 2000."

Mr. Bharukha further submitted that the respondent has set up its establishment in the year 2000 and started its commercial production from 2.4.2001 and the permanent Registration Certificate to respondent No.1 was issued on 30.4.2001 wherein it was stated that the respondent has started its production on 2.4.2001. Accordingly, after the commercial production had started, the respondent applied for exemption certificate on the requisite application form for granting sales tax exemption on purchasing raw materials and on sales of finished goods on 2.4.2001. Mr. Bharukha also submitted that on the respondent filing an application for exemption before the Deputy Commissioner of Commercial Taxes, the said Deputy Commissioner taking into consideration all the relevant document had recommended the case of the respondent to the Joint Commissioner of Commercial Taxes (Admn.) and the said order was also based on the inspection made in the respondent's premises and after checking of the documents by the Assistant Commissioner of Commercial Taxes and that from the perusal of the order passed by the Deputy Commissioner of Commercial Taxes, it is evident that he has considered the second proviso to S.O 58 dated 2.3.2000 and stated that by way of prior permission, the General Manager, District Industries Center, Dhanhad has issued a temporary Registration Certification issued under the provisions of the Industrial Policy. In support of his contentions, Mr. Bharukha relied on three rulings of this Court in the case of Bajaj Tempo Ltd., Bombay vs.

Commissioner of Income Tax, Bombay City-III, Bombay, (1992) 3 SCC 78, Commissioner of Sales Tax vs. Industrial Coal Enterprises, (1999) 2 SCC 607 and State of Bihar & Ors. vs. Suprabhat Steel Ltd. & Ors., (1999) 1 SCC 31. We have perused the pleadings and the annexures filed along with the appeal and also the judgment passed by the High Court.

The facts of this case are not in dispute. The only dispute is as to whether the temporary Registration Certificate can be treated as prior permission from the State Government (Industries Department) for the purpose of the Notification. As already noticed, learned Additional Solicitor General appearing for the appellant submitted that a separate prior permission was required to be eligible for the purpose of the Notification in question. On the other hand, learned counsel for the respondent submitted that the prior permission contemplated in the said Notification is for setting up an industry which was granted vide Annexure 5 filed in the writ petition.

In the above background, the following questions of law would arise for consideration in this appeal:

- 1) Whether the conditions prescribed by the Authorities for grant of exemption are mandatory for availing the same?
- 2) Whether the High Court can in exercise of writ jurisdiction can direct grant of exemption contrary to the terms thereof and overlooking the statutory conditions prescribed for such grant in the absence of any challenge to the validity of such conditions?

The Industrial Promotion Policy 1995 (S.O. 478/479 dated 22.12.1995) was issued by the State Government in exercise of powers conferred under Clause (b) of sub-section(3) of Section 7 of the Bihar Finance Act, 1981 (Bihar Act No.5 of 1981) by which the Governor of Bihar granted exemption to those new industrial units which start production between the period 1st September, 1995 to 31st August, 2000 who have obtained the Registration Certificate from the competent Authority under the aforesaid Act and the tax exemption certificate after making information in Form T.E. (Purchase II) and with this Notification from levy of sales tax payable on purchase direct raw material required manufacturing of goods under the terms and conditions noted in the said policy. The "New Industrial Unit" is defined under Clause 1(a) of the Act. Under S.O. 479 dated 22.12.1995, the Governor granted exemption to those new units/started function in between the period from 1st September, 1995 to 31st August, 2000 and obtained Registration Certificate from the competent authority under the aforesaid Act. By S.O. 479 dated 2nd March, 2000, a Notification was issued in exercise of the power conferred in sub-section 3(b) of Section 7 of the Bihar Finance Act, 1981 (Bihar Act No.5 of 1981) incorporating certain amendments in the previous Notification S.O. 479 dated 22nd December, 1995 issued by the Department of Commercial Taxes. Under Clause 1(a), New Industrial Unit has been defined to mean such a new unit where production has been started between 1st September, 1995 and 31st August, 2000 which has obtained a letter of permission/memo of acceptance letter/letter of authority/registration certificate from the Department of Industries/Authority of Industrial

Development Area/Director of Industries or from a competent Authority of the Government of India. The proviso to the said clause provides that the Industrial Unit which has obtained prior permission before 31st August, 2000 from the State Government (Industry Department) and has started production within five years from the date of permission shall also be treated as new Unit under this Notification even though they have started production after 31st August, 2000. Clause 2 of the amended Notification provides as follows:

"For the purpose of prior approval of the Govt. in regard to small units, prior approval of the General Manager, District Industrial Centre or Managing Director, Industrial Area Development Authority and Circle, Incharge of commercial Taxes shall also have to be obtained. In regard to medium and large industries, prior approval shall be granted by committee headed by Commissioner of Commercial tax which consisted of the Director, Industries and Director, Technical Development as members. The prior approval shall be issued by the official of the Industry Department if the Committee does not communicate its decision within 60 days from the date of application. An application may be filed before Commissioner, Industrial Development who shall communicate his decision within 60 days after consultation with Commissioner, Commercial Taxes."

Consequent on the application made by the respondent herein, provisional registration of small scale industrial unit was allotted to the respondent Unit which shall be valid for a period of five years from the date of the issue of the said registration. The

Joint Commissioner, Commercial Taxes on 26.8.2000 passed the following order :
"Appearance filed. Prior permission is being given on the condition that production will be commenced soon. Besides, prior permission of the Industries Department shall be taken.

Sd/-
Sh. J.N. Pandey,
Joint Commissioner, Commercial
Taxes (Admn.) Dhanbad Division,
Dhanbad.

Memo No. 959/Dhanbad dated 26th August, 2000."

On 11.9.2000, the Joint Commissioner, Commercial Taxes in the concluding portion of his order stated as under:

"Prior permission from the Industries Department has not been taken by the Industrial unit. Their contention is that it is provisionally registered as a Small Scale Industrial Unit in the Industries Department and afterwards permanently registered. This should be considered as permission letter prior to the registration certificate. Prior permission and registration in the Industries Department are two different aspects. Keeping this point in view the Department of Commercial Taxes at the time of according prior permission on dated 19.08.2000 had also imposed a condition that Proprietor of the Unit shall also get prior permission from the Industries Department. But in this regard there is no document on record. Therefore, recommendation sent from the Division is not approved."

We have carefully considered the rival submissions made by the respective counsel appearing on either side. In our opinion, the certificate issued by the Industries Department cannot be considered as prior permission within the meaning of the amended definition of new industrial unit. It will be manifest from the said notifications that in addition to the temporary registration, a separate prior permission of the Industries Department before 31.8.2000 is an important condition precedent for any unit to become eligible to be deemed as new industrial unit for the purpose of exemption. It is wholly misconceived for the respondent herein to suggest that the temporary registration certificate issued by the Industries Department should be construed as prior permission within the meaning of the amended definition of new industrial unit vide S.O. 478/479 dated 22.12.1995. From the reading of the statutory Notification, it will be manifest that a separate prior permission of the Industries Department before 31.8.2000 is an important condition precedent for any unit to become eligible for the purpose of exemption. It is an admitted position in this case that the respondent has not obtained the prior permission of the State Government in the Industries Department before 31.8.2000 and as such the Industrial unit of the respondent cannot be deemed to be a new industrial unit eligible for tax exemption under S.O. 478 & 479 dated 22.12.1995 read with S.O. 57 & 58 dated 2.3.2000. In our opinion, the application for exemption of the respondent has been rightly rejected by the authorities concerned for non-fulfillment of the statutory obligation on the part of the respondent by not obtaining prior permission of the State Government.

In our view, the condition prescribed by the authorities for grant of exemption are mandatory for availing the exemption and the High Court exercising jurisdiction under Article 226 of the Constitution cannot direct the grant of exemption in favour of the respondent overlooking the statutory conditions prescribed for such grant and that too in the absence of any challenge to the validity of such condition. The observations made by the High Court that the grant of temporary registration certificate in favour of respondent No.1 was sufficient and the same was equivalent to prior permission as prescribed under the Notifications is not correct. We are of the opinion that the High Court has failed to appreciate the provisions laid down in the statutory Notifications S.O. 57 and S.O. 58 dated 2.3.2000 which expressly provide for obtaining prior permission separately. Non-compliance thereof would

disentitle the respondent from grant of exemption.

It is a matter of fact that the respondent has set up its establishment in the year 2000 and started its commercial production from 2.4.2001 only. It is seen from the Bihar Industrial Policy Resolution, 1995 and the statutory Notification issued by the Commercial Tax Department, the new industrial units was defined as those industrial units which went into production between 1.9.1995 and 31.8.2000 and which have been granted license/memorandum/letter of intent or registration certificate from the competent industries Department or Industrial Area Development Authority or Directorate of Industry or competent authority of the Government of India. As already noticed, the statutory notifications were amended retrospectively vide S.O. 57 and 58 dated 2.3.2000. It will thus be seen from the aforesaid amended Notifications that three conditions are stipulated for pipeline industries to be treated as new industrial units for the purposes of exemption under S.O. 478 & 479 which read as follows:

"(I) Industrial unit should obtain registration certificate from the competent Authority of the Industries Department.

(II) It should also have obtained prior permission from the State Government in the Industries Department before 31st August, 2000.

(III) Industrial unit should commence production within 5 years from the date of obtaining prior permission."

We have already noticed that the respondent has applied for exemption and the Department granted permission to the respondent with a condition that the prior permission from the Industries Department should be obtained within the stipulated time. However, the respondent has deliberately ignored the direction of the Department to meet the statutory binding obligation. It is an admitted position in the writ petition that

the respondent has not obtained the prior permission of the State Government before 31.8.2000 and as such the Industrial Unit of the respondent cannot be deemed to be a new Industrial Unit eligible for tax exemption under the Notifications dated 22.12.1995 read with Notifications dated 2.3.2000.

Mr. Bharukha further submitted that in taxing statutes, provision of concessional rate of tax should be liberally construed and in respect of the above submission, he cited the judgment of this Court in Commissioner of Sales Tax vs. Industrial Coal Enterprises (Supra) and in the case of Bajaj Tempo Ltd., Bombay vs. Commissioner of Income Tax, Bombay City-III, Bombay (Supra). We are unable to countenance the above submission. In our view, the provisions of exemption clause should be strictly construed and if the condition under which the exemption was granted stood change on account of any subsequent event the exemption would not operate.

In our view, an exception or an exempting provision in a taxing statute should be construed strictly and it is not open to the Court to ignore the conditions prescribed in the Industrial Policy and the exemption Notifications.

In our view, the failure to comply with the requirements renders the writ petition filed by the respondent liable to be dismissed. While mandatory rule must be strictly observed, substantial compliance might suffice in the case of a directory rule.

Whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of the interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation that where a statute is penal in character, it must be strictly construed and followed. Since the requirement, in the instant case, of obtaining prior permission is mandatory, therefore, non-compliance of the same must result in canceling the concession made in favour of the grantee-the respondent herein.

For the foregoing reasons, we hold that the High Court has erred in allowing the writ petition filed by the respondent herein and directing the grant of exemption in favour of the respondent. We, therefore, have no hesitation in setting aside the judgment and order passed by the High Court and allowing this appeal.

The appeal is allowed. There shall be no order as to costs.

JUDIS