

**GUJARAT HIGH COURT**

**Hon'ble Judges: Akil Kureshi and Sonia Gokani JJ.**

Jaiprakash Associates Limited Versus State Of Gujarat

SPECIAL CIVIL APPLICATION No. 11278 of 2010 ; \*J.Date :- APRIL 15, 2011

- [CONSTITUTION OF INDIA](#) Article - [14](#), [16](#), [226](#)
- [EVIDENCE ACT, 1872](#) Section - [115](#)
- SALES TAX INCENTIVES SCHEME, 2001

**Constitution of India - Art. 14, 16 - Evidence Act, 1872 - S. 115 - Sales Tax Incentives Scheme, 2001 - benefit of Scheme 2001 - sought by way of promissory estoppel - by pleading that though factory could not start commercial production within validity period of scheme, however, scheme was extended by State Government vide its Resolution - on the contrary, M.O.U. not showing any finding that any unequivocal promise was given to provide for all necessary facilities or to provide for infrastructural facilities to enable petitioner to complete project and to commence its commercial production - effect of - held, petition contained no foundation for claiming any benefit of principle of promissory estoppel - general offer or desire of Government to extend necessary help cannot be considered as 'unequivocal/firm' promise to attract promissory estoppel.**

**Constitution of India - Art. 226 - writ of mandamus - condition precedent for issuance of - existence of legal right in petitioner and corresponding legal duty on State Government - Sales Tax Incentives Scheme, 2001 which was framed on account of massive earthquake - for claiming benefit of said Scheme, it providing time limit for start commercial production within said valid period - held, petitioner failing to commence production within prescribed period cannot claim benefit of scheme 2001 - mandamus cannot be issued against State Government - petition dismissed.**

**Imp.Para:** [ [21](#) ] [ [22](#) ] [ [23](#) ] [ [30](#) ] [ [31](#) ] [ [35](#) ]

**Cases Referred To :**

1. A.P Aggarwal V/s. Government Of Nct Of Delhi & Anr., 2001 1 SCC 600

2. Commissioner Of Police, Bombay V/s. Gordhandas Bhanji, AIR 1952 SCC 16
3. Express Hotels Private Limited V/s. State Of Gujarat., SCA No.4977 of 2006
4. Hitech Electrothermics & Hydropower Limited & Ors. V/s. State Of Kerala & Anr., 2003 2 SCC 716
5. Kachrual Bhagirath Agrawal & Ors. V/s. State Of Maharashtra & Ors., 2005 9 SCC 36
6. Kerala State Electricity Board V/s. Hitech Electrothermics & Hydropower Limited & Ors., 2005 6 SCC 651
7. State Of Bihar & Anr. V/s. Kalyanpur Cement Limited, 2010 3 SCC 274

**Cases Relied on :**

1. A.P Steel Rerolling Mills Limited V/s. State Of Kerala & Anr., 2007 2 SCC 725
2. Bakul Cashew Co. & Ors. V/s. Sales Tax Officer, Quilon & Anr., 1986 2 SCC 365
3. Bannari Amman Sugars Limited V/s. Commercial Tax Officer & Ors., 2005 1 SCC 625
4. Dhampur Sugar Mills Limited V/s. State Of U.P & Ors., 2007 8 SCC 338
5. Director Of Settlements, A.P & Ors. V:s . M.R Apparao & Anr., 2002 4 SCC 638
6. Southern Ispat Limited V/s. State Of Kerala & Ors., 2004 4 SCC 68
7. State Of Haryana & Anr. V/s. Mahabir Vegetable Oils Private Limited, 2011 3 SCC 778

**Equivalent Citation(s):**

2012 (1) GLR 108 : 2011 GLHEL\_HC 226486

**JUDGMENT :-**

**AKIL KURESHI, J.**

**1** The petitioner is before this Court praying for quashing an Order dated 18th May 2010 passed by the Committee for Resolution of Disputes declining the request of the petitioner to grant tax exemptions under the scheme formulated by the State Government under its Resolution dated 9th November 2001. The petitioner has also challenged the communication dated 14th March 2011 of the State Government rejecting such a request. By way of consequential direction, the petitioner has prayed for a mandamus to the respondents to extend the benefit of the said Incentive Scheme of 2001, after condoning delay in commencement of commercial production by the petitioner. In the alternative, the petitioner has prayed that the date of commencement of commercial production under the Incentive Scheme of 2001 be extended.

**2** The petition arises in the following factual background :-

The present petitioner-Jaiprakash Associates Limited, sometime in the year 2006, had taken over one Gujarat Anjan Cement Company Limited ["GACL" for short]. The said GACL had desired to set-up a cement factory in the village Vayor in Abdassa Taluka of Kutch District in the year 1999. It appears that the said region being a backward region, there were certain sales tax benefits available even at that time to the companies setting up such industrial plants. In the year 1999, to set-up a cement factory, the GACL applied for "No Objection Certificate" as required to the Ministry of Forest & Environment ["MOEF" for short]. It is the case of the petitioner that the application dated 13th August 1999 was forwarded by the State Government to the MOEF in October 1999. It was on 23rd May 2000, the MOEF responded to the request stating that the Supreme Court has restrained the Government from permitting any mining operation around certain regions without prior order from the Court. GACL, therefore, approached the Apex Court by filing an interim application. By an Order dated 18th April 2001, the Apex Court permitted the application of GACL for NOC to be considered in accordance with law.

**3** On 26th January 2001, the State of Gujarat and in particular, Kutch District, was affected by a devastating earthquake. In order to attract investment and to re-start the industrial development which had suddenly got stalled on account of massive earthquake, the State Government vide its Order dated 9th November 2001 framed the Sales Tax Incentive Scheme [hereinafter referred to as, "the Scheme of 2001"]. To the detailed provisions of such Scheme, a reference would be made at the later stage. Suffice to note that the Scheme was brought into effect from 31st July 2001 and was to remain in force till 31st October 2004. The industrial units which commenced their commercial production latest by 31st October 2004 were to be granted certain sales tax benefits.

**4** It is the case of the petitioner that due to several reasons beyond its control, it could not set-up the factory and could not commence commercial production within the validity period of the scheme. However, the Scheme was extended by the State Government vide its Resolution dated 13th September 2004 upto 31st December 2004, and for industries which were in pipeline, the date for commencement of commercial production was extended from 31st May 2005; as envisaged in the Incentive Scheme of 2001, to 31st December 2006.

**5** One more extension was granted the State Government vide its Resolution dated 7th January 2005. The Scheme itself was extended upto 31st December 2005 and for the pipeline industries, the deadline for commencement of commercial production was extended upto 31st December 2007.

**6** It is not in dispute that after the above mentioned Resolution dated 7th January 2005, there was no general extension provided by the State Government. In effect, therefore, the Scheme came to an end on 31st December 2005, and for the pipeline industries, the last date for commencing the commercial production ended on 31st December 2007.

**7** The petitioner's case is that in the year 2005, there was a Memorandum of Understanding entered into between the GACL of Sumeru Group; which is represented in the present petition and the State Government, whereby, it was agreed that there would be further substantial investment in the Cement Plant to the tune of Rs. 425 Crores. On the other hand, the State Government had assured the Sumeru Group of all necessary facilities; including providing basic infrastructure facilities like land, power, road, water supply etc.. It was indicated that the commercial production would commence by December 2005.

**8** It is, however, the case of the petitioner that the State Government did not fulfill such promises. Neither the power supply nor the water were made available. The petitioner had to set-up its own power plant and draw water by tankers. According to the petitioner, all these added to further delay in completing the project and in commencing the commercial production.

**9** The petitioner, therefore, approached the Committee constituted under the Incentive Scheme of 2001 and requested that the period spent beyond its control in setting up the factory and commencing the commercial production be ignored and the petitioner be granted benefits of the Incentive Scheme of 2001. We may notice that at one stage, the petitioner approached this Court by filing Special Civil Application No. 1574 of 2010. However, such petition was disposed of by an Order dated 25th February 2010 permitting the petitioner to pursue the issues before the respondents.

**10** The Committee, by impugned Order dated 18th May 2010, rejected the request of the petitioner on following grounds :-

"[1] The Company has not fulfilled all the criteria of pipe line case under the government resolution 9/11/2001. The most important criteria mentioned in government resolution clearly indicates that the pipe line units have to start production on or before 31/12/2007. As per the submission of the company, the unit has gone into production from 26/3/2009 nearly 15 months after the last eligible date for the same had lapsed.

[2] There is no provision under the scheme to extend the date of production in any circumstances.

[3] The state level committee has no powers or authority to relax the criteria of the government resolution.

[4] The applicant's plea to consider the case in line with Essar Oil Limited [a case under 1995-2000 Scheme] is not relevant at this stage as the SLP filed by the state government is pending before the Honourable Supreme Court of India.

[5] The signing of MOUs with GOG does not automatically mean that government is responsible to provide all the facilities. It is the responsibility of company to obtain clearance / permissions from various government departments."

**11** Since the contention of the petitioner was that not the Committee but the State Government is authorized to decide the request of the petitioner, a separate further order was passed by the State Government on 14th March 2011 which has also been produced on record and challenged in this petition by way of an amendment. The State Government rejected the prayer of the petitioner on the following grounds :-

"[1] The State Government has perused the representation dated 25/2/2008, addressed to the Industries Commissioner and dated 19/3/2010, addressed to the State Level Committee.

[2] As per the Scheme, the unit has to start commercial production before 31/12/2005, however, the units which could not start production on or before 31.12.2005, the Government has extended the scheme upto 31/12/2007 which fulfills certain conditions as a pipeline case. This Unit has started commercial production on 26/3/2009 which is after the lapse of 15 months from the extended period of pipeline case i.e. 31/12/2007.

[3] It is not the policy of the State Government to extend the incentive scheme on a case to case basis.

[4] The State Government has never extended the benefit to any individual unit after the completion of the Scheme."

**12** On the basis of above background, Counsel for the parties have made detailed submissions for final disposal of the petition. Mr. K.S Nanavati, learned Sr. counsel contended that the project got delayed due to reasons beyond the control of the petitioner. At all stages, there was delay in getting the infrastructure facilities, clearances and permissions. Such period, which was consumed by the State authorities should be discarded from consideration for commencement of the commercial production, as provided in the Incentive Scheme of 2001.

**13** Counsel further submitted that in the M.O.U dated 5th February 2005, certain promises were made by the State Government of providing necessary

facilities and infrastructure, such as, road, electricity, etc. These promises were not fulfilled. Water and Electricity were never made available. Counsel, therefore, submitted that even on the principles of promissory estoppel, the petitioner's request should be accepted. It was contended that but for the promise made by the State in the above MOU, the petitioner would not have made sizeable further investment in the project to the tune of Rs. 425 Crores.

**14** Counsel further submitted that the Committee as well as the State Government erred in rejecting the application of the petitioner on invalid grounds. He contended that the Committee did not examine the case of the petitioner on merit, simply stating that there is no provision in the scheme to extend the date of commercial production under any case. On the other hand, he pointed out that even the State Government had not considered the case of the petitioner on merits, only citing the Government policy of not extending the benefits on individual cases. He contended that under the Scheme, Government has power to extend the benefits in individual cases also. Such powers were not exercised on invalid reasons. Directions should, therefore, be given to exercise such powers.

**15** In support of his contentions, Counsel relied on the following decisions :-

[1] In case of Kachrual Bhagirath Agrawal & Ors. V/s. State of Maharashtra & Ors., reported in 2005 (9) SCC 36, wherein, the Apex Court, in context of the power of the Magistrate under Section 133 of the Criminal Procedure Code for removal of nuisance observed that, "...All power is a trust - that we are accountable for its exercise - that, from the people, and for the people, all springs and all must exists."

[2] In case of A.P Aggarwal V/s. Government of NCT of Delhi & Anr., reported in 2001 (1) SCC 600, wherein, the Apex Court observed that even if the instructions contained in the office memorandum are discretionary and not mandatory, such discretion is coupled with the duty to act in a manner which will promote the object for which the power is conferred.

[3] In case of Hitech Electrothermics & Hydropower Limited & Ors. V/s. State of Kerala & Anr., reported in 2003 (2) SCC 716, wherein, finding that though the industry had made all other arrangements to start production yet there was inaction on the part of the Electricity Board in providing power to the industry, the Apex Court having regard to the circumstances of the case and bearing in mind the industrial policy of the Government, granted relief of concessional tariff or the power for a period of three years instead of five years; as indicated in the policy, to meet with the ends of justice. Counsel pointed out that the said decision was sought to be reviewed by the Kerala State Electricity Board. The Apex Court, however, in the case of Kerala State Electricity Board V/s.

Hitech Electrothermics & Hydropower Limited & Ors., reported in 2005 (6) SCC 651, dismissed the review application.

[4] In case of A.P Steel Rerolling Mills Limited V/s. State of Kerala & Anr., reported in 2007 (2) SCC 725, wherein the Apex Court in paragraph 34 of the judgment, observed that, "..A question as to whether, in a given situation, an entrepreneur was entitled to the benefit under an exemption notification or not, thus, would depend upon the fact of each case. A bare perusal of the notification dated 6-2-1992 issued by the first respondent would show that the purport and object thereof was to grant benefit of a concessional power tariff which came into force on and from 1-1-1992. The phraseology used in the said notification postulates that the benefit was to be granted in regard to the "enhanced power tariff". Thus, where the new units had started production between 1-1-1992 and 31-12-1996, such exemption was available to the entrepreneurs." We may however also notice that in paragraph 35, the Apex Court made further observations, which are relevant for our purpose. The said observations read as follows :-

"35. Evidently, except in a situation as might have been existing in Hitech Electrothermics [Supra] that any application filed by the entrepreneur had not been processed within a reasonable time, in which case benefit might not be denied on equitable ground; in cases where there has been a substantial failure on the part of the industrial unit to obtain such benefit owing to acts of omission and commission on its part, in our opinion, no such benefit can be given."

[5] In case of Express Hotels Private Limited V/s. State of Gujarat., [SCA No. 4977 of 2006] the Court finding that there was a considerable delay on the part of the State Authorities, the project could not be implemented within time, held that there was no justification on the part of the authorities to reduce the period of eligibility by exemption. Eventually, finding that the petitioner had incurred certain expenses and has made huge investment acting on the basis of the assurance given by the respondent-authorities, the Court directed granting of full benefit of exemption/remission of electricity duty to the petitioner for the entire period in question.

[6] In case of State of Bihar & Anr. V/s. Kalyanpur Cement Limited [(2010) 3 SCC 274], wherein, the Apex Court discussed the law on doctrine of promissory estoppel. In the facts of the case, the Apex Court held that the State Government could not be allowed to rely on its own lapses in implementing its policy.

**16** Counsel also relied on Division Bench judgment dated 22nd April 2008 in Special Civil Application No. 24233 of 2007 wherein, the benefit of an incentive

scheme was extended in case of the petitioner when it was found that due to Court proceedings, production could not commence within the time envisaged under the Scheme.

**17** On the other hand learned Advocate General appearing for the State opposed the petition contending that the petitioner could not commence commercial production within the extended period under the Scheme. The entire project took more than 10 years in setting up. The State and its authorities were not responsible for delay in any manner. The progress of the project itself was slow from the beginning. The petitioner has not given any reasonable explanation for gross delays on its part.

**18** Learned Advocate General further contended that the State policy was not to extend the benefits on individual basis. It was contended that no case of application of principles of promissory estoppel is made out. Such case has to be pleaded and established before the Court. It was further contended that the Scheme was envisaged to encourage and speed up industrial investments in Kutch region which had suffered heavily on account of devastating earthquake. If the industrial units did not commence commercial production within reasonable period, the entire purpose would frustrate. Reliance was placed on following decisions of the Apex Court :-

[1] In case of Director of Settlements, A.P & Ors. V/s . M.R Apparao & Anr., reported in [(2002) 4 SCC 638], wherein, the Apex Court in context of the High Court's power for issuance of mandamus under Article 226 of the Constitution, observed as under:-

"17. Coming to the third question, which is more important from the point of consideration of the High Court's power for issuance of mandamus, it appears that the Constitution empowers the High Court to issue writs, directions or orders in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the rights conferred by Part III and for any other purpose under Article 226 of the Constitution of India. It is, therefore, essentially, a power upon the High Court for issuance of high prerogative writs for enforcement of fundamental rights as well as non- fundamental or ordinary legal rights, which may come within the expression "for any other purpose". The powers of the High Courts under Article 226 though are discretionary and no limits can be placed upon their discretion, they must be exercised along the recognized lines and subject to certain self-imposed limitations. The expression "for any other purpose" in Article 226, makes the jurisdiction of the High Courts more extensive but yet the Courts must exercise the same with certain restraints and within some parameters. One of the conditions for exercising power under Article 226 for issuance of a mandamus is that the Court must come to the conclusion that the aggrieved person has a legal right, which entitles

him to any of the rights and that such right has been infringed. In other words, existence of a legal right of a citizen and performance of any corresponding legal duty by the State or any public authority, could be enforced by issuance of a writs of mandamus. "Mandamus" means a command. It differs from the writs of prohibition or certiorari in its demand for some activity on the part of the body or person to whom it is addressed. Mandamus is a command issued to direct any person, corporation, inferior courts or Government, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of public duty. A mandamus is available against any public authority including administrative and local bodies, and it would lie to any person who is under a duty imposed by a statute or by the common law to do a particular act. In order to obtain a writ or order in the nature of mandamus, legal duty by the party against whom the mandamus is sought and such right must be subsisting on the date of the petition [Kalyan Singh V/s. State of U.P]. The duty that may be enjoined by mandamus may be one imposed by the Constitution, a statute, common law or by rules or orders having the force of law."

[2] In case of Dhampur Sugar Mills Limited V/s. State of U.P & Ors., reported in [(2007) 8 SCC 338], the Apex Court discussed the doctrine of power coupled with duty.

[3] In case of Commissioner of Police, Bombay V/s. Gordhandas Bhanji, reported in AIR 1952 SCC 16, wherein also, in the context of seemingly discretionary power of the Commissioner of Police to grant or refuse the license for erection of a building for the purposes of public amusement, the doctrine of power coupled with duty came up for consideration of the Apex Court.

[4] In case of A.P. Steel Re-rolling Mill Limited V/s. State of Kerala & Ors., reported in [(2007) 2 SCC 725], wherein, the Apex Court observed as under :-

"35. Evidently, except in a situation as might have been existing in Hitech Electrothermics that any application filed by the entrepreneur had not been processed within a reasonable time, in which case benefit might not be denied on equitable ground; in case where there has been a substantial failure on the part of the industrial unit to obtain such benefit owing to acts of omission and commission on its part, in our opinion, no such benefit can be given."

[5] In case of Bannari Amman Sugars Limited V/s. Commercial Tax Officer & Ors., reported in [(2005) 1 SCC 625], the Apex Court in paragraph 19 of the judgment, observed as under :-

"19. In order to invoke the doctrine of promissory estoppel clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and bald expressions without any supporting material to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press into aid the doctrine. The courts are bound to consider all aspects including the results sought to be achieved and the public good at large, because while considering the applicability of the doctrine, the courts have to do equity and the fundamental principles of equity must for ever be present in the mind of the Court."

[6] In case of Southern Ispat Limited V/s. State of Kerala & Ors., reported in [(2004) 4 SCC 68], wherein, the Apex Court confirmed the view of the Division Bench which had held that the petitioner was not entitled to duty exemptions on the ground that commercial production had not started within the time framed.

[7] In case of Bakul Cashew Co. & Ors. V/s. Sales Tax Officer, Quilon & Anr., reported in [(1986) 2 SCC 365], wherein, in the context of doctrine of promissory estoppel, the Apex Court observed that. "...In cases of this nature the evidence of representation should be clear and unambiguous. It 'must be certain to every intent'. The statements that are made by ministers at such meetings, such as, 'let us see', 'we shall consider the question of granting of exemption sympathetically', 'we shall get the matter examined'. 'you have a good case for exemption' etc., even if true, cannot form the basis for a plea of estoppel."

**19** From the material on record as well as contentions raised by the counsel for the parties, we find that essentially, two issues arise for our consideration. First question is whether on the principles of promissory estoppel, the petitioner is entitled to extension of time for commencement of commercial production, to enable the petitioner to avail of the exemptions flowing from Notification of the State Government. Second question is whether the respondents committed an error in not accepting the request of the petitioner for extension of time, looking to what the petitioner terms as, "causes beyond its control which delayed the commencement of commercial production."

**20** Taking up the question of promissory estoppel first, the law on the issue is no longer res integra. By series of judgments, it is now well settled that to be able to press in service the principle of promissory estoppel, the petitioner must clearly plead the same on record supported with necessary facts. In a recent decision, the Apex Court in the case of State of Haryana & Anr. V/s. Mahabir Vegetable Oils Private Limited [(2011) 3 SCC 778] observed as under :-

"25. The doctrine of promissory estoppel is an equitable remedy and has to be moulded depending on the facts of each case and not straitjacketed into pigeonholes. In other words, there cannot be any hard-and-fast rule for applying the doctrine of promissory estoppel but the doctrine has to evolve and expand itself so as to do justice between the parties and ensure equity between the parties ie., both the promisor and the promisee.

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27. xx xx xx

28. An exemption is nothing but a freedom from an obligation which an assessee is otherwise liable to discharge. In a fiscal statute, an exemption has been held to be a concession granted by the State so that the beneficiaries of such concession are not required to pay the tax or the duty they are otherwise liable to pay under such statute. The beneficiary of a concession has no legally enforceable right against the Government to grant a concession except to enjoy the benefits of the concession during the period of its grant. The right of exemption or concession is a right that can be taken away under the very power in exercise of which the exemption was granted."

**21** In the present case, we find that in the petition itself initially filed and even after its amendments, contained no foundation for claiming any benefit of promissory estoppel. It is true that in the further affidavit dated 23rd September 2010, the petitioner did contend that the Government held out certain promises to provide infrastructural facilities for establishment of industries. It is also stated that in view of extremely slow progress and impediments at the State Government level and total lack of infrastructural facilities in the areas like power, roads, water etc., the petitioner would have given up the project but for the solemn promise held out by the State Government to provide these facilities by signing MOU on 12th February 2005.

**22** We have perused the said MOU. We do not find that any unequivocal promise was given to provide for all necessary facilities or to provide for infrastructural facilities to enable the petitioner to complete the project and to commence its commercial production.

**23** In fact, what is stated in the MOU is that the petitioner desired to make substantial investments in a cement plant at village-Mohadi, Taluka-Lakhpat of District-Kutch and the Government would facilitate the group to obtain necessary permissions/registrations from the concerned departments of the State and Central Government and would also help to avail incentives under the various schemes announced by the State/Central Government. It is also stated that the State Government would also assist in providing basic

infrastructural facilities like land, power, road, water supply etc. and in obtaining statutory approvals. Such statement in the MOU needs to be seen in the entire background of the facts of the case. We have noticed that same project in question was envisaged way back in the year 1999. The progress was not satisfactory. Earthquake then, had not taken place. Exemption Notification was nowhere in sight. Many years later, the petitioner took over the cement project from the erstwhile Company-Gujarat Anjan Cement Limited and the Government offered to extend its help and cooperation. It cannot be stated that the Government made any promise to provide necessary facilities to enable the petitioner to set-up a project so as to enable the petitioner to avail of the exemption notification. There is nothing on the record not atleast in the MOU to suggest that but for such a promise from the Government, the petitioner would not have made further investments. The MOU only records the Government's desire to extend necessary help in the petitioner setting up such a factory. Such general offer of the Government cannot be considered a firm promise on the basis of which the petitioner can claim to have changed its position so as to press in service, the principles of promissory estoppel.

**24** Coming to the question of correctness or otherwise of the Government decision, we find that the Advisory Committee as well as the Government both examined the case of the petitioner for extension of time limit provided under the Exemption Notification. The Committee has, as already noted, declined to interfere primarily on the ground that there is no provision in the Scheme to extend the date of commercial production and mere signing of MOU with the Government does not mean that the Government is responsible for providing all the facilities.

On the other hand, when the Government considered the request of the petitioner, it was prompted to turn down the same on various grounds viz., that as per the Scheme, the commercial production had to start before 31st December 2005, or within the extended time till 31st December 2007; and ultimately, the production could start only on 26th March 2009 ie., after the lapse of 15 months from the extended period, for pipe-line cases. Further, that it is not the State policy to extend the Scheme on case to case basis and no such extension has been granted in individual cases.

**25** As already noted, the main thrust of the argument of the petitioner was that the Government had the power to extend the deadline in appropriate cases. When the Government did not exercise such a power in the case of the petitioner, the same would amount to refusal to exercise discretion vested in the authority which would give rise to a justiciable cause.

**26** We, however, find that the petitioner's project was envisaged way back in the year 1999. At that time, though the local backward area exemptions were available, the earthquake in Kutch region had not yet taken place, the

Government scheme post-earthquake giving exemptions to encourage investment in the region did not exist. However, even after the post earthquake exemption notifications were issued, for long many years, the petitioner could not set-up the plant and could not commence the commercial production. In the meantime, the scheme was extended twice - in both cases the extension, general in nature and special extensions were available to pipeline cases ie., those industries which had already started taking certain initial steps as envisaged in the extensions itself. The petitioner could not complete the project and start commercial production even within the extended and further extended time meant for pipeline cases.

**27** We have perused the Scheme, as it was initially envisaged. Preamble to the Notification reads as follow :-

"The economic activities in the district of Kutch came to a standstill on account of devastating earthquake in the State on 26th January 2001. New employment opportunities could be created if new investment takes place. The Government is committed to attracting industries in the district to make the industrial and economic environment live. Government of India have announced excise duty exemption for new industries to promote large scale investment in the district, along with which the State Government has also decided to announce the scheme of sales tax incentives. Since the scheme is aimed at making the economic environment of Kutch district live, it has been decided to confine the same only to Kutch district."

**28** Reference to some of the provisions of the Scheme need to be made. Clause-2 of the Scheme provides for "Operative Period of the Scheme" and states that, "the Scheme shall come into force from 31.07.2001 and shall remain in force till 31.10.2004". The term, "Commercial Production" defined in clause 3.3 to mean that the date of commercial production means the date of first sale bill. Clause 4 pertains to "Sales Tax Incentives". Clause 4.2 thereof provides for Sales Tax Exemptions. Clause-7 pertains to the procedure for claiming exemptions, and reads as under :-

"7.0 Procedure

[a] In order to avail of the incentives that the unit will have to apply in the prescribed format and obtain registration from District Industries Center/Industries Commissioner before going into production. On the basis of this registration, unit will be able to avail of sales tax incentives for 120 days.

[b] After commencement of commercial production, the unit will have to apply in the prescribed format within a period of 120 days from the date of commencement of production. Alongwith the application, details of

fixed capital assets installed up to the date of commencement of commercial production will have to be furnished.

[c] In the case of the unit applying later than 120 days from the date of commencement of commercial production, such period will be considered as the period of delay and the amount of eligible incentives will be reduced in proportion and the eligibility period will be reduced to the extent of delay. However, the units will have the option to avail of the benefit either from the date of commencement of commercial production or from the date of application.

[d] If the project of the unit is not completed, the Industries Commissioner/General Manager, District Industries Center shall issue provisional eligibility upto 25% of the eligible amount after considering installation of fixed assets.

[e] On completion of the project, the industrial unit shall have to furnish all the details to Industries Commissioner/General Manager, District Industries Center. The fixed assets will be inspected at the location."

**29** Clause 8 provides for various conditions for claiming the exemptions. Sub-clause [c] thereto provides that the industrial unit shall have to continue production upto the period of eligibility. However, if the unit does not remain in continuous production on account of the reasons beyond the control of the management, the unit shall present its case before the State Level Committee as an individual case on which the Committee can take decision to waive the period of discontinuation of production based on the representation made. Clause 9 pertains to the State Level Committee and provides that such Committee will resolve the issues of interpretation, dispute or quarrel under the Scheme.

**30** From the various provisions made in the Scheme, it can be seen that the exemption notification was issued since the economic activities in the District of Kutch had come to a standstill on account of the devastating earthquake. The State Government, therefore, to create new employment opportunities, desired that new investments should take place in the said region. The Central Government had announced excise duty exemption for new industries to promote large scale investment in the district. The State had also decided to announce sales tax incentives. It was also provided that since the Scheme is aimed at making the economic environment of Kutch district live, the same is confined to the District alone.

**31** From the above, it can be seen that if the industries were allowed to linger the project for an unlimited time, the entire purpose for which the Scheme was framed, would frustrate. The central idea of granting sizeable sales tax exemption was to rehabilitate the district by offering fresh inflow of industries

to create new employment opportunities. We may recall that the policy decision for granting exemptions from the State taxes was taken after devastating earthquake on 26th day of January 2001 which caused extensive damage in various parts of the State, particularly in the Kutch District. To ensure that industrial activities which had, on account of such devastating earthquake come to a standstill in the District be revived, the State Government framed its industrial policy to grant special exemptions to those industries which set up their manufacturing activities in the Kutch District. It is not difficult to envisage that such industries would support peripheral other activities such as development of infrastructure and other related industries. Such schemes would necessarily require a time frame. Exemptions would obviously be available to those industries which set-up their manufacturing activities within the time envisaged under such schemes. If such time limit is ignored or diluted, the entire purpose for which the tax exemptions came to be granted would frustrate. The benefit, which would flow from setting up of such industries in the remote areas or areas badly affected by the earthquake would not materialize. The time limit set-up in the Notification in question, therefore, has to be viewed from this angle.

**32** We further find that though the deadline of the Scheme was extended twice by the State Government, it was general in nature. Within such extensions also, further extensions were granted to pipeline cases.

**33** The petitioner, for one reason or the other, could not commence the commercial production for nearly 10 years from inception. Various reasons have been cited such as - non availability of water and electricity; bad road condition, non-availability of environmental clearance and other permissions and so on. However, if one looks closer into the averments on record, it can be seen that there is a large gap in the petitioner's application to the Ministry of Forests & Environment, Central Government and follow-up applications. Be that as it may, we find that for nearly 10 years, the petitioner could not commence its commercial production.

**34** It is by now well settled that to issue a writ of mandamus, there must be existence of a legal right in the petitioner and corresponding legal duty on the respondent. It is also well settled that writ of mandamus is not a writ of course, or a writ of right, but is, as a rule, a discretionary remedy. Existence of a legal right in the petitioner and corresponding legal duty on the respondent are the conditions precedent for issuing mandamus. In other words, it is often stated that mandamus is employed to enforce a duty, the performance of which is mandatory or imperative and not optional or discretionary with the authority concerned.

**35** We also find that previously, the Scheme was extended twice. The same was general and not in individual cases. Under the circumstances, when we find that the Government refused to extend the benefits of the Scheme in favour of

the petitioner, being an individual case, we do not see any reason to grant any mandamus. It is not even the case of the petitioner that any individual extensions were granted by the State.

For the reasons aforesated, writ petition stands dismissed.