(2008) 03 KAR CK 0048

In the Karnataka High Court

Case No : Writ Petition No. 1741 of 2007

Banashankari Sugars Pvt. Ltd. APPELLANT

Vs

State of Karnataka and Others RESPONDENT

Date of Decision : 26-03-2008

Acts Referred:

Industries (Development and Regulation) Act, 1951 — Section 29 (B) (1)

Citation : (2009) 1 KarLJ 141

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Advocate : Ashok Haranahalli, for Narendra, G of Guha Associates, for the Appellant; Shashidhar S. Karmadi, High Court Government Pleader for Respondent Nos. 1-3, Aravind Kumar, ASG for Respondent Nos. 4 and 5 and Udaya Holla, for Holla and Holla, for the Respondent

Final Decision : Dismissed

Judgement

Anand Byrareddy, J.—Hard the Counsel for the parties.

2. The facts of the case are as follows:-The petitioner is a Company incorporated under the Companies Act, 1956. The petitioner proposed to establish a sugar mill with a crushing capacity of 5000 TCD as well as a Co-generation Plant of 22 MW capacity in Tumkur Village of Shahapur Taluk, Gulbarga District, which is said to be a backward and under developed area. The estimated cost of the project was Rs. 49.70 crore. The petitioner had accordingly filed an application by way of an Industrial Entrepreneur Memorandum (hereinafter referred to as "IEM", for brevity) with the fourth respondent, as on 2.5.2006. This was duly acknowledged and the fourth respondent approved the proposal, though prior to 1998, the establishment of a sugar mill was permissible only under a Letter of Intent or a Licence issued by the fourth respondent. Post 1$98 the Government of India has de-licensed the sugar industry and therefore, persons interested could establish a mill without a licence but, were required to file an IBM, disclosing the details of the proposed project. It is the petitioner''s contention that a person applying

first, by way of an IBM, in respect o? an area, would be treated as a priority holder.

3. The petitioner had also forwarded a representation to the third respondent and requested for recommendation of a sugarcane command area. A similar representation was addressed to the second respondent, who is the competent authority under the Sugarcane (Control) Order, 1966 (hereinafter referred to as the "SC Order", for brevity) seeking allocation of the said cane command area. It is the petitioner''s further contention that the petitioner negotiated with land holders for acquisition of the same to an extent of 168 acres. This acquisition was to be formalised through the Karnataka Industrial Areas Development Board of Karnataka State. These negotiations were formalised with about 45 land owners by entering into sale agreements by 31.9.2006. The petitioner had spent about Rs. 25 lakh on the proposed land acquisition alone.

4. The petitioner learnt that the second respondent, who was the competent authority to reserve the cane command area under the SC Order, had by a letter dated IB.7.2008 called upon the third respondent to furnish a detailed report regarding the feasibility of establishing a sugar mill in Tumkur Village of Shahapur Taluk. The petitioner had thereafter, made yet another representation to the first respondent to expedite the process in order to enable the petitioner to establish the sugar mill and had even informed the fourth respondent by a letter dated 9.9.2006 about the progress achieved in furtherance of its proposed project as on that date.

5. It transpires that the sixth respondent by an IEK dated 29.5.2005 intimated the fourth respondent its intention to establish a sugar mill in Tumkur Village of Yadgir Taluk in Gulbarga District and also requested the first respondent, by its letter dated 27.9.2005, for permission to set up a sugar mill and also requested for reservation of cane command area in Yadgir Taluk of Gulbarga District and Devidurga Taluk of Raichur District, by a letter dated 27.9.2005.

6. It is the petitioner''s case that by sheer chance, the petitioner had, on a visit to the office of the South India Sugar Mills Association, learnt through the office-bearers of the said association, that the Government of Karnataka had, by an order dated 19.9.2006, approved a proposal of the sixth respondent to establish its sugar mill in Turakur Village of Shahapur Taluk. The petitioner was shocked at this news, since to the petitioner'' B knowledge, the sixth respondent had submitted its IEM only in respect of Turakur Village of Yadgir Taluk. It is this which is sought to be challenged in the present petition.

7. Shri Aahok Haranahalli appearing for the Counsel for the petitioner contends as follows:

That in terms of a Notification dated 11.9.1998 of the fourth respondent, in exercise of its power u/s 29(B)(1) of the Industries (Development and Regulation) Act, 1951 (hereinafter referred to as the ''1951 Act'') the sugar industry came to be de-licensed. Pursuant to such de-licensing, entrepreneurs desiring to establish a sugar mill were required to file an IEM in the format prescribed. Apparently, the sixth respondent had selected the site at Tumkur Village Yadgir Taluk of Gulbarga District, which was an ace a without any potentiality for setting up a sugar mill and having realised the mistake at a later point of time, with the apparently active, but surreptitious collusion of unscrupulous officials have obtained a change of location from Tumkur Village of Yadgir Taluk, to Tumkur Village of Shahapur Taluk in respect of which, the petitioner wag a priority holder, as already stated above. It is a matter of State policy that the first applicant would be considered first as to the feasibility of the proposed project. The petitioner''s application by way of an IEM having been filed as on 2.5.2005 and as the IEM filed by the sixth respondent on 29.5.2005 did not pertain to Tumkur Village of Shahapur Taluk, for which the petitioner had applied, the respondent-authorities having approved the project of the sixth respondent in Tumkur Village of Shahapur Taluk, notwithstanding the pending application of the petitioner without notice to the petitioner and behind its back, is illegal and contrary to the letter and spirit of the state policy, which contemplates according priority to the first applicant, to avoid unhealthy competition.

8. It is contended that the impugned order is not based on the ground specified in Clause-6 of the SC Order. On the other hand, it has been considered for extraneous reasons. The action of the respondent-authorities, which involves the grant of licence to applicants, creates an estoppel from acting arbitrarily. The authorities are required to act in a judicious manner in the circumstances of the case. There is a gross error committed by the respondents in not granting a pre-decisional hearing to the petitioner, even if the application of the sixth respondent was to be considered on priority, over-riding that of the petitioner. The impugned order is clearly violative of the SC Order. The impugned action of the respondents is hit by the Doctrine of legitimate Expectation. In that, the petitioner: having invested huge sums of money in anticipation of the sanctioning of the project, results in considerable monetary loss to the petitioner/ apart from being treated unjustly and arbitrarily.

9. It is contended that the sixth respondent being permitted to change its location while its IBM was under consideration in mid-stream, to the detriment of the petitioner, is vitiated by mala fides and is plainly illegal, as the site for establishment of the sugar mill by the sixth respondent overlaps the site applied for by the petitioner. It is emphasized that the sixth respondent has been permitted to amend the choice of location in its IEM as on 6.7.2006 whereas the petitioner''s IEM dated 9.5.2006 was already pending. Hence, the amendment even if permissible, cannot be construed as relating back to the initial submission of the IEM as on 29.7.2005, which was clearly in respect of Tumkur Village of Yadgir Taluk.

10. It is further pointed out that the State Government has appointed a State level Committee which is required to be consulted and the recommendation of

the said body is a must before approving the proposed project. In the case on hand, the approval insofar as the sixth respondent''s project is concerned, was never placed before the State Level Committee and hence, the impugned order is bad on that count as well.

11. Per contra, Sri Udaya Holla, Senior Advocate appearing for the Counsel for the sixth respondent contends as follows:

That while it is true that the sixth respondent had made an application to the fourth respondent for commencement of a sugar plant at Tumkur Village and was allotted an IBM as on 29.7.2005, there was, however, a bona fide mistake committed in mentioning the Taluka. That instead of indicating Tumkur Village of Shahapur Taluk of Gulbarga District, it was indicated as Tumkur Village of Yadigr Taluk of Gulbarga District. The respondent had after realising the mistake committed, immediately brought it to the attention of the fourth respondent and sought for an amendment. The fourth respondent issued an amended IBM in lieu of the previous IEM and corrected the Taluk indicated as Shahapur Taluk, vide acknowledgment dated 6.7.2006.

12. It is contended that the sixth respondent has submitted a Bank Guarantee for a sum of Rs. 1 crore in terms of the IEM''s stipulation. It is further contended that the first respondent by a letter dated 9.7.2006 had sought fox reservation of villages in the taluk Shahapur. The first respondent, by a letter dated 19.9.2006, reserved the cane production in 90 Villages in Gulbarga and Raichur Districts for the exclusive use and consumption in favour of the sixth respondent. Further, an additional 92 villages were allotted by a letter dated 30.12.2006 in favour of the sixth respondent. It is pointed out that the letters of the sixth respondent dated 4.8.2005 addressed to the Principal Secretary, Commerce and Industry and dated 5.8.2005 addressed to the Cane Commissioner and a further letter dated 27.9.2005 to the Secretary, Commerce and Industry, would indicate that the sixth respondent had all along proposed to set up its factory in Tumkur Village. There is yet another Letter addressed to the District Collector wherein it was indicated that the proposed sugar factory which is to come in Tumkur Village of Shahapur Taluk is located between Krishna river with one check dam to be completed in a year and there are six dams located on the Bhima river and that the ground water availability within a radius of 2kms from the river bed was excellent and that it would fulfil the cane growing requirement. The maps attached to the letter also indicated that the proposed location was Tumkur Village of Shahapur Taluk. It is contended that from material available and produced on record, it is clear that the sixth respondent has complied with all formalities and requirements in relation to the project. It has also obtained clearance through the Screening Committee on 23.12.2006 and a High Power Committee on 23.2.2007. The sixth respondent has commenced development of its infrastructure in commissioning the sugar plant, including appointment of its management personnel.

13. On, the other hand, it is contended that the writ petition is brought with a

mala fide intention by the petitioner, though the petitioner does not fulfil the eligibility criteria for grant of sanction to set up a sugar factory. It is contended that the petition is hit by delay and laches, in that, the order under challenge was passed in September 2006, while the writ petition has been filed in January 2007 and the delay is crucial. In that, the sixth respondent has expended enormous sums of money and has invested time and effort in relation to the project apart from having created third-party interests. The petitioner has also suppressed material facts.

14. It is contended that it could be pertinent to point out that the petitioner had obtained 9 IBM acknowledgements in respect of commencing sugar factories including 2 IEMB in respect of Tumkur Village of Shahapur Taluk. While not having commenced any tangible activity in respect of the proposed projects, the only intention of the petitioner in obtaining the IEMB was to block the setting up of sugar factories by genuine entrepreneurs and to hold them to ransom. The allegations made insofar as the sixth respondent is concerned are ill-founded. The acknowledgement issued as on 6.7.2006 in respect of a correction sought to be brought as against its original application dated 29.7.2005, is merely a rectification of a clerical error. The petitioner seeks to misinterpret the state of affairs and seeks to prejudice the mind of this Court by the allegations made. On the other hand, the fact that the impugned order issued by the first respondent has been widely publicized including publication in newspapers, would demonstrate that the petitioner''s intentions are Male fide and the inordinate delay in filing the writ petition is itself a bar in considering the writ petition, even if the allegations could be accepted, on the face of it.

15. It is contended that in terms of the judgment of the Supreme Court in the case of Ojas Industries (P) Ltd. Vs. Oudh Sugar Mills Ltd. and Others, , and the interpretation of Paragraph 6E of the Sugarcane Control (Amendment) Order, 2006, (hereinafter referred to as the ''2006 Order'') a failure to submit the Performance Guarantee of Rs. 1 Crore within a period of six months of the issuance of the amended order, would render the concerned person''s IBM as de-recognized. The petitioner not having given the Performance Guarantee, pursuant to the IEM, the petitioner stands de-recognized and therefore, the writ petition is liable to be dismissed.

16. The Government Pleader, in support of the statement of objections that are filed, would contend that the IEM obtained by the sixth respondent for establishment of a new sugar factory, in the opinion of the State Government, is earlier in point of time since the acknowledgement dated 6.7.2006, in lieu of the IEM obtained earlier namely, 29.7.2005 was merely a correction of a clerical error and therefore, was considered on seniority basis. While it is also stated that the representation of the petitioner which had been forwarded for necessary action, to the Director of Sugar and the Director of Sugar in turn, had called for a report from the Deputy Commissioner, Gulbarga and in the meantime, the sixth respondent having obtained a revised IEM from the Government of India, it was

brought to the attention of the Government. The State Government had called for a detailed report from the Director of sugar, who accordingly had recommended for the establishment of the proposed sugar factory in favour of the sixth respondent. There is no infirmity or arbitrary action on the part of the State Government in according sanction and it has been done with wide publicity and the petitioner not having chosen to challenge the same, in the first instance, the petition is barred by laches and therefore be dismissed.

17. By way of reply, Shri Ashok Haranahalli would contend as follows:

That the petitioner''s project report produced at Annexure-D to the writ petition leaves no doubt as to the petitioner having sought to establish its sugar plant at Tumkur Village of Shahapur Taluk. It is to be seen that the respondent by its latter dated 4.8.2005 has categorically indicated that its team of professionals have commenced activity in furtherance of its project at Tumkur Village f Yadgir Taluk. In the very same document, it is also disclosed that the respondent was fully aware of the existence of Tumkur Village of Shahapur Taluk as being distinct and different in respect of which there was no reference as regards the setting up of any mill. The said respondent''s application was being processed on that basis.

18. It is for the first time on 2.8.2006 that the respondent seems to have started claiming a change in location. It is clear that the change in location could not have been permitted in the face of an IEM having been granted, in respect of that very location, in favour of the petitioner. In any event, it could not have been done to the detriment of the petitioner, behind its back. The argument as regards the alleged compliance with the SC Order in having taken effective steps as regards the furnishing of a bank guarantee is concerned, it is pointed out that the said circumstance cannot be pleaded as a fait accompli extinguishing the claim of the petitioner.

19. On the other hand, the petitioner had approached this Court challenging the sanction for establishment of its sugar plant in terms of Annexure-C dated 19.9.2006. This Court having granted an interim order, staying the operation of Annexure-C as on 2.2.2007, the alleged "effective steps" having been taken when this Court was seized of the matter is immaterial and cannot be pleaded in support of its case. In any event, the land being unavailable to the petitioner, the question of the petitioner complying with the SC Order to take effective steps did not arise. Hence, the Counsel would pray that the petition be allowed.

20. In the light of the above contentions, it is necessary to take note of the view expressed by the apex court in Ojas Indus tries case, supra, as regards the scope and ambit of the Sugarcane Control (Amendment) Order, 2006, in addressing the rival contentions of the parties herein. In the wake of India''s policy of economic reforms, the sugar industry has been de-licensed. The Government of India has deleted the sugar industry from compulsory licensing under the 1951 Act, with effect from 31.8.1998. However, an entrepreneur

intending to establish a sugar mill was required to file an IBM in terms of a notification dated 11.9.1998 issued u/s 29-B(1) of the 1951 Act. IEM''s filed were to be in terms of the said notification and a Press Note 12 dated 31.8.1990 issued by the Government of India. However, the Government of India has on 10.12.2006 issued the 2006 Order, inter alia, laying down the affective steps which the applicant is required to take by inserting Clauses 6A to 6E. These Clauses, interalia, prescribe: (i) a restriction for setting up of two sugar factories within a radius of 15 Kilometres; (ii)the requirements for filing the IBM; (iii) a time limit to implement the IEM; (iv) consequences of non-implementation and (v) for retrospective application of the newly added clauses to the person whose IEM has already been acknowledged before amendment. Examining the scope of the said 2006 Order, the Apex Court in Ojas'' case has held:

That the conceptual difference between the "distance" certificate, the concept of "effective steps" to be taken and the question of bona fides are to be kept in view. The 2006 Order has retained the concept of "distance" for economic reasons. It stands for available quantity of sugarcane to be supplied by the farmer to the sugar mill. That insofar as the "effective steps" are concerned, that apart from the notification dated 11.9.1998, read with the Press Note dated 31.8.1998, the 2006 Order has laid down, steps like purchase of required land in the name of the mill, placement of orders for purchase of plant and machinery, opening of letter of credit with suppliers, payment of advances, commencement certificate of civil works, sanction of loans from financial institutions and any other steps prescribed by the Central Government, Further an entrepreneur genuinely interested in setting up a sugar mill has to prove his bona fides by furnishing a bank guarantee for Rs. 1 Crore, which would also be proof of his financial ability.

21. The apex court has hence opined that the Clauses 6A to 6E of the 2006 Order are clarificatory in nature. That there are certain norms mentioned in the accounting standards of the Institute of Chartered Accountants for setting up industries. They may be sugar mills, paper mills, textile mills etc., the amendment has made explicit those inbuilt norms, insofar as the sugar industry is concerned and are clarificatory. In that view of the matter, the amendment is held to be retrospective in operation. Further that by virtue of the amendment, there is a bar to set up new sugar mills for a limited period during which the earlier or priority IBM holder is required to take effective steps (and all other IBMs filed thereafter and falling within 15km., from that location should be kept in suspense and if the first IEM holder fails to take effective steps, then priority should be given to the second IEM holder and so on and so forth).

22. The dispute in the present case on hand before this Court would b? whether the petitioner who had filed an IEM on 2.5.2006 in respect of a proposed sugar mill in Tumkur Village of Shahapur Taluk, or the sixth respondent who had filed an IEM on 29.7.2005 in respect of a proposed sugar plant at Tumkur Village, yadgir Taluk and later having it corrected as Tumkur Village, Shahapur Taluk as

on 6.7.2006, should be considered as the first IEM holder of the proposed plant at Tumkur Village, Shahapur Taluk. In the opinion of the respondent - authorities, there was a bona fide mistake on the part of the sixth respondent and on the same having been corrected, it is the application of the sixth respondent as on 29.7.2005 that is prior in point of time. However, there is no indication that the petitioner was taken into confidence by the respondents while permitting the sixth respondent to amend the choice of location of its proposed plant, with retrospective effect, when the petitioner''s IEM indicated the very same location.

23. Though there was much argument as to the bona fides of the petitioner, in that, the petitioner was alleged to he a seasoned applicant whose only intention was to block genuine entrepreneurs from securing a viable location and thereafter hold those entrepreneurs to ransom as a priority holder of an IEM, this was not a finding of fact on which the IEM of the petitioner was overlooked in issuing Annexure-C in favour of the sixth respondent. But the petitioner''s contention that it remained unaware of the IEM of the sixth respondent having been approved and sanctioned is claimed in a rather vague and laconic tone, thus at paragraph-8 of the writ petition: "It is submitted that the petitioner who desired to become a member of the South India Mills Association visited their office a couple of weeks ago. It was then that the petitioner was informed by certain office bearers of the Association that the Government of Karnataka had by the impugned order, Annexure-C approved the proposal of the sixth respondent to establish its sugar mill in Tumkur Village of Shahapur Taluk instead of Tumkur Village of Yadgir Taluk."

24. In the light of the wide publicity byway of a news item published in Indian Express of September 14, 2006 as to the sanction granted to the sixth respondent, the above statement is wholly unconvincing. As an entrepreneur actively following up on its application could not be expected to be unaware of a competing applicant even if by default.

25. The further circumstance that the sixth respondent has purchased large extents of land under registered sale deeds, pursuant to the order of sanction and has furnished a bank guarantee for a sum of Rs. 1 Crore would necessarily have to be taken, into consideration in addressing the relief sought by the petitioner. The added circumstance that the mere pendency of the present writ petition did not absolve the petitioner of complying with the requirements of the 2006 Order. The petitioner did not choose to soak appropriate reliefs inform as the action of the respondents in invalidating the petitioner''s IEM for non-compliance with statutory requirements. Though there is a belated attempt on the part of the petitioner in seeking a direction to permit the petitioner to furnish a performance guarantee following the fifth respondent vide I.A. 5/07 dated 19.11.2007, this does not absolve the petitioner of proceeding with a want of diligence. The petitioner is hence disentitled to any relief in the present writ petition.

26. The petition is accordingly dismissed.