(2019) 09 BOM CK 0151

In the Bombay High Court

Case No : Writ Petition No. 319 Of 2011

Berger Becker Coatings Pvt. Ltd APPELLANT

Vs

State Of Goa And Anr RESPONDENT

Date of Decision : 26-09-2019

Acts Referred:

Citation : (2019) 09 BOM CK 0151

Hon'ble Judges : M.S. Sonak, J;Nutan D. Sardessai, J

Bench : Division Bench

Advocate : G.K. Sardessai, A. Carvalho, V. Sardessai

Judgement

M.S. Sonak, J

1. Heard Mr. G.K. Sardessai with Ms. A. Carvalo for the Petitioner and Mr. V. Sardessai, learned Additional Govt. Advocate for the Respondents.

2. The Petitioner has instituted the present Petition seeking following reliefs:

"a) For a declaration that the Petitioner is entitled for the subsidy under the Goa State Investment Scheme 1990; and

b) For a declaration that the inclusion of 'paints' in the list of industries ineligible of subsidy under the said scheme vide memorandum dated 7.11.97 is ultra vires the Constitution of India;

c) For a writ of mandamus, or a writ in the nature of mandamus, or any other writ, order or diction, commanding the Respondents to disburse an amount of Rs.25 lakhs to the Petitioner towards subsidy sanctioned under the said scheme.

d) Such other and further relief as this Hon'ble Court may deem fit and proper."

3. It is the case of the Petitioner that the Petitioner has set up an unit for manufacture of paints in the State of Goa. Such unit was set up by investing considerable amounts before 7.11.1997, which is a crucial date for determination of the issues raised in this Petition.

4. However, the unit of the Petitioner was not registered under the Goa State Investment Subsidy Scheme 1990 (said Scheme) with the Directorate of Industries prior to 31.8.1997, which is again a cut-off date prescribed in the Memorandum dated 7.11.1997. The Petitioner contends that before this cut-off date of 31.8.1997, the Petitioner had already obtained permissions for construction of unit, permission from the Goa State Pollution Control Board, and even clearances from the High Power Co-ordination Committee. The case of the Petitioner is that the subsidy under the said Scheme could not have been denied to the Petitioner on account of the alleged non-fulfillment of the technical or hyper-technical requirements of registration with the Directorate of Industries on or before 31.8.1997.

5. Mr. G.K. Sardessai, learned Counsel for the Petitioner submits that upon proper construction of the said Scheme, the Petitioner was very much eligible for the subsidy under the said Scheme, because the Petitioner had already obtained DGTD registration on or after 1.10.1988 for setting up the unit in the State of Goa. He submits that in any case, the requirement of registration under the said Scheme with the State Directorate of Industries was only a technical or hyper-technical requirement. He submits that this was not at a substantive condition or a substantive requirement. He submits that on the date when the Petitioner made investments or even commenced the construction of the unit, industries manufacturing "paint" were not included in Annexure I to the said Scheme, which is also referred to as a "negative list". He submits that industries manufacturing "paint" were included in the negative list only by virtue of Office Memorandum dated 7.11.1997. He points out that there is an exception carved out in respect of the applications for subsidy already pending and the units already registered on or before 31.8.1997. He submits that the requirement of an application or requirement of registration on or before 31.8.1997 is only a technical or a non-substantive requirement. He submits that what is substantive, is making investments for setting up of an unit and commencement of commercial production. He points out that without there being any commercial production, there was no question of disbursal of any subsidy, even if the same is sanctioned. He submits that since the substantive requirements were complied with by the Petitioner, there was no justification for rejection of the Petitioner's claim for subsidy. Mr. Sardessai relies upon a judgment of the Hon'ble Court in the case of Mangalore Chemicals and Fertilisers Ltd. vs. Deputy Commissioner of Commercial Taxes and ors 1992 Supp (1) SCC 21 to contend that a benefit of exemption cannot be denied on the basis of some mere technicalities and non-compliance with substantive requirements or requirements, merely of form and not substance. For all the aforesaid reasons, Mr. G.K. Sardessai submits that the reliefs applied for in this Petition may be made absolute.

6. Mr. V. Sardessai, learned Additional Government Advocate for the Respondents points out that the subsidy is not something which the Petitioner can claim as a matter of right. Issue of disbursal of subsidy depends upon fulfillment of the terms and conditions of the said Scheme. He points out that in the present case,

admittedly, the Petitioner failed to fulfill the terms and conditions of registration and, therefore, was not eligible to receive any subsidy. Mr. Sardessai points out that by the Office Memorandum dated 7.11.1997, paint industry was included in the negative list. He points out that, therefore, the Petitioner was ineligible to obtain any subsidy under the said Scheme. He points out that only some exception was created in respect of the pending applications. He points out that the Petitioner's application was not pending on or before the cut-off date. Therefore, he submits that the subsidy was rightly denied to the Petitioner. He submits that the Petitioner's case was considered not once, but on two occasions and on both the occasions, the State Level Committee concluded that the Petitioner was not deserving of any subsidy for want of fulfillment of the conditions prescribed and further in view of the fact that the paint industry was included in the negative list. He submits that there are no mala fides alleged against the Respondents. He submits that if the interpretation proposed on behalf of the Petitioner is accepted, then, the State may be obliged to provide subsidy to the industries on the negative list, merely on the ground that such industries had allegedly commenced construction of their units on or before 31.8.1997. For all these reasons, Mr. Sardessai submits that the present Petition may be dismissed.

7. The rival contentions now fall for our determination.

8. The subsidy under the said scheme, can never be claimed as a matter of right. Subsidies are basically in the nature of concessions or largesses. No doubt, merely because this is the position, the State cannot operate a subsidy scheme in a discriminatory manner or in an arbitrary manner. The question, which arises in this Petition is whether the State, in the present case, has arbitrarily or in a discriminatory manner, denied the Petitioner the subsidy?

9. The said Scheme which was formulated sometime in the year 1990, in clause 2.2 contemplates registration under the Scheme for any industry desirous of claiming subsidy under the said Scheme. Since the Petitioner industry is a medium industry, the Petitioner was required to get the same registered under the said Scheme with the State Directorate of Industries for new industries, as well as for expansion of the existing industries. The Petitioner applied only on 23.9.1998 for such registration, which is evident from the document at page 48 of the paper book. Besides, even the Petitioner's application for subsidy under the said Scheme was only made on 23.9.1998, which is again evident from the document at page 48 of the paper book.

10. Before the Petitioner applied for registration and subsidy, the original scheme of 1990 was amended by Office Memorandum dated 7.11.1997. The case of the Petitioner was, therefore, required to be considered in accordance with the Office Memorandum dated 7.11.1997.

11. The Office Memorandum dated 7.11.1997, reads thus:

"No.3/9/98-IND(Part) Vol.III

Government of Goa,

Industries Department,

Secretariat Annexe,

EDC House, Panaji.

Dated : 7.11.1997

OFFICE MEMORANDUM

The Government of Goa has decided to continue the Scheme of 25% State Capital Investment Subsidy for industrial units introduced in the Eight Five Give Year Plan during the Ninth Five Year Plan on the same pattern is followed during the Eight Five Year Plan. In addition, it is also decided to continue the following incentive schemes for industrial unit on the basis as being followed at present :-

i) To continue the Capital Investment Subsidy to maximum of Rs.25 lakhs to SSI/ medium large scale units. However, polluting units listed at annexure -I should be excluded from eligibility for subsidy. First preference would be given to SSI units as regards release of subsidy is concerned since there are always far more applications then availability of of funds in the budget. Units not eligible for subsidy at present which are at Annexure-II would continue to be not eligible.

ii) To continue the Sales Tax Exemption Scheme as existing at present.

iii) To continue the reduction in stamp duty as existing at present.

iv) To continue the price preference of 15 on purchase made by Government. However, once the unit is registered (illegible), no insistence will be made for registration with the SSIC is at present.

v) To continue 50% subsidy to generators upto a ceiling limit to 1.00 lakh subject to actual cost of the generator installed.

Government has further decided to discontinue the following existing schemes: -

a) subsidy for feasibility report.

b) Power concession tariff;

c) Subsidy on waster to SSI units.

Government has further decided that the industrial units mention in the Annexure-I shall be eligible to the subsidy under the State Investment Subsidy Scheme in addition to the units mentioned in the office memorandum No.3/9/88-IND(14)Part (Vol. II) dated 13.12.93.

However, the decision in respect of units mentioned in annexure-I shall come into force with immediate effect and it will not, whoever, apply to the applications for subsidy already registered and units already registered on or before 31.8.97 and subject to application/case will be dealt with as per instructions which were in force prior to issue o revised instruction.

By order and in the name of the

Governor of Goa

Sd/-

(G.P. Chimulkar)

Joint Secretary (Industries)"

[Emphasis supplied]

12. The Office Memorandum dated 7.11.1997, makes it clear that the polluting industries listed at annexure-I stand excluded from the eligibility for subsidy. Paint industry is specifically included in annexure-I and, therefore, any unit involved in the paint industry will stand excluded from the benefit of subsidy.

13. The Office Memorandum dated 7.11.1997, further, provides that the decision in respect of the units mentioned in Annexure-I i.e. the negative list, shall come into force with immediate effect and it will not, however, "apply to the applications for subsidy already registered and the units already registered on or before 31.8.1997."

14. The aforesaid means that under the Office Memorandum dated 7.11.1997, the Petitioner was not eligible for subsidy, because the subsidy was claimed in respect of the unit which was already placed on the negative list. However, the Petitioner might have been eligible for the subsidy, had the Petitioner applied for subsidy or obtained registration for subsidy on or before 31.8.1997. This is because in terms of the exception carved out in the O.M. dated 7.11.1997, these category of cases were to be dealt with as per the instructions which were in force prior to the issuance of O.M. dated 7.11.1997.

15. The record clearly indicates that the Petitioner had neither applied for subsidy, nor was the Petitioner's unit registered under the said subsidy scheme on or before 31.8.1997. On plain reading of the O.M. dated 7.11.1997, therefore, it is clear that the Petitioner was not eligible for any subsidy.

16. It is significant to note that the Petitioner has not challenged the O.M. dated 7.11.1997, in its entirety. In particular, there is no challenge thrown to the cut-off date of 31.8.1997. Challenge, if any, is to the inclusion of "paints" in the negative list. This challenge lacks merit. The issue of grant or otherwise of subsidy, is an issue, which is in the realm of policy. Therefore, if the State Government regards the paint industry as polluting industry for the purposes of grant of subsidy, it can hardly be said that there is any arbitrariness or unconstitutionality involved. Suffice to note that there is no challenge to the cut-off date of 31.8.1997. The record also indicates that the case of the Petitioner is not covered under the exception referred to in the O.M. dated 7.11.1997. In such circumstances, we cannot detect any illegality, much less any arbitrariness in the

decision to deny the Petitioner subsidy.

17. In the present case, we cannot say that the issue of registration or pendency of application for subsidy under the said Scheme on or before the cut-off date of 31.8.1997 was merely some technical or non-substantive requirement. The requirement was quite substantive in nature, because vide O.M. dated 7.11.1997, the State had already resolved to deny subsidy to the industries in the negative list. The Petitioner industry was already included in the negative list. Only some sort of exception was carved out in cases of pending applications or units which were already registered on or before the cut-off date of 31.8.1997. Since the Petitioner industry did not qualify to the benefit from the exemption, the subsidy was denied. In such circumstances, it cannot be said that the denial was based on some hyper-technical or non-substantive requirement, in the peculiar facts and circumstances of the present case.

18. The decision in the case of Mangalore Chemicals and Fertilisers Ltd. (supra) was in an entirely different factual context. In the said case, for availing the benefit of exemption under the statutory notice, prior permission from certain specified authority was made a condition precedent. The Apex Court noted that the application for prior permission from the specified authority was made well before the prescribed period. The application was, however, rejected for reasons which the Apex Court found were extraneous. It is in these circumstances that the Apex Court held that the permission must be deemed to have been granted even though the same was rejected for extraneous reasons. The Apex Court noted that there was really no option to the specified authority than to grant the permission. It is in this context that the Apex Court referred to the requirement of obtaining prior permission from the specified authority as a technical requirement, or a requirement of mere form and not substance. The facts in the present case offer no parallel to the facts in the case of Mangalore Chemicals and Fertilisers Ltd. (supra) where the industry, which the Petitioner was setting up, was already included in the negative list. The only exception carved out was in respect of the pending applications or cases where registration under the said scheme was already granted before the cut-off date of 31.08.1997. Since the Petitioner did not fall within the exceptions, the subsidy was denied to the Petitioner.

19. Thus construed, we see no illegality or arbitrariness involved in the denial of the subsidy to the Petitioner. We, therefore, are unable to grant to the Petitioner any relief in this Petition.

20. Rule in this Petition is, accordingly, discharged. There shall, however, be no order as to costs.

