

(2007) 07 CAL CK 0056

In the Calcutta High Court

Case No : APO No. 33 of 2007, APOT No. 76 of 2007, G.A. No. 425 of 2007 and
W.P. No. 1694 of 2004

Brahmanand Himghar Ltd. and Another

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 20-07-2007

Acts Referred:

Citation : (2008) 3 CHN 110

Hon'ble Judges : Rudrendra Nath Banerjee, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Samit Talukdar, Susanta Kumar Bose, Ashok Kumar Basu and R.L. Gaggar, for the Appellant; Shyamal Ganguli and Mihir Kundu, for the Respondent

Final Decision : Allowed

Judgement

Rudrendra Nath Banerjee, J.—This mandamus appeal is directed against the order dated 28th December, 2006 passed by a learned Single Judge of this Court in W.P. No. 1694 of 2004 thereby dismissing the writ petition filed by the appellants.

2. The appellants' case before the learned Single Judge was that the appellant No. 1 is a small-scale cold storage project, which started its business on and from 01.03.2000. Pursuant to the National Policy to withdraw sales tax related incentive, the State Government started a new incentive scheme with effect from 1st January, 2000 (to be referred as scheme of 2000) in supersession of the West Bengal Incentive Scheme of 1999. The said new scheme of 2000 was published in the Official Gazette of 14th February, 2001; the duration of the scheme being five years and the same would be available till 31st December, 2004. Under the provisions of the scheme of 1999 and 2000, the nature of the business carried on by the appellant No. 1 was not enlisted in the "negative list" annexed to those schemes and consequently, it was entitled to various subsidies and benefits for running and setting up such business. The appellant No. 1, accordingly, on 6th August, 2002 filed an application in prescribed form before

the Department of Cottage and Small Scale Industries, West Bengal for getting benefits under the Scheme of 2000. Such application was refused by the department on the ground that the said cold storage was not eligible for such subsidy under the scheme of 2000 in view of the amended para 17A of the Scheme of 2000 as per notification dated 12th December, 2001.

3. It may be mentioned here that the Government of West Bengal, Commerce and Industries Department, issued the said notification with a view to extending some incentives in the service related activities of Food Processing sectors development of post harvest infrastructure for fruits, vegetables and flowers for promotion of industries in these sectors in the State not covered by the West Bengal Incentive Scheme, 2000 and accordingly, added Clause No. 17A to the Scheme of 2000 mentioning that the industry of cold storages along with some others would be entitled to such incentives.

4. The appellant No. 1 filed the writ application challenging such refusal of benefits covered under the Scheme of 2000 on the ground inter alia that such subsequent notification dated 12.12.2001 was ultra vires and that the cold storage unit not having been included in the negative lists appended to the schemes of 1999 and 2000, cannot be denied incentive benefits under the scheme.

5. A learned Single Judge of this Court, by the impugned order dated 28th December, 2006, observed that there was no scope to interpret the provision of the scheme of 2000 for finding out whether a cold storage was covered by the original scheme. It was further observed that the schemes was principally applicable to new units or industries and the cold storage of the appellant No. 1 did not come within the scheme of 1999 and 2000. The learned Single Judge further held that the expression "new unit" was defined to mean an industrial unit established and commissioned by the entrepreneur for the manufacture of goods in the State for the first time on or after January 1, 2000 and the appellant No. 1, being not within the category of such new unit, was not entitled to the benefits of the scheme and accordingly, the writ petition was dismissed.

6. The writ petitioners as appellants have filed this appeal challenging the order of the learned Single Judge on the ground that the business of the appellant No. 1 being not enlisted in the "negative list" annexed to the schemes of 1999 and 2000 and the subsequent notification dated 12.12.2001 inserting Clause 17(A) to the scheme of 2000 being unnecessary at least so far the business of the appellants is concerned, such facts do not stand on the way of appellants in getting such benefits granted by the scheme. To understand the position of law let us have a glance to the background and history of the notification of the scheme of 2000.

7. For rendering some benefits to various large, medium and small-scale industries, the West Bengal Government has been issuing repeated notifications from time to time from 1989 onwards. For our consideration, it will be necessary

to concentrate our attention towards the West Bengal Incentive Schemes issued in 1993, 1999 and 2000 each repealing the earlier one. The incentive scheme of 1993 repealing the scheme of 1989 was issued for rendering benefits to the large and medium scale projects in the State set up, to be set up and also for expansion projects of the existing units after the 1st April, 1993 in the Private Sector, Co-operative Sector, Joint Sector as also companies owned and managed by the State Government. Under the said scheme of 1993, the appellant No. 1 being a Small Scale Industry was not entitled to any such benefit. Furthermore, it was provided under paragraph 5.2 of the said scheme of 1993, that the scheme should not be applicable to industries listed in the "negative list". The annexure 1 attached to such scheme is the negative list of industries bearing the classification of industries like cold storage appearing under item No. 2 therein. Accordingly, there was no question of rendering any benefits, concessions, or subsidies to the appellant No. 1 under the 1993 scheme, nor did the appellants claim such benefit.

8. The Incentive Scheme of 1999 repealing the scheme of 1993 appears to have come into force by the notification issued by the Commerce and Industries Departments Notification No. 188-C1/C dated 30.03.1993 to approve and sanction the incentive scheme for large, medium and small-scale industrial units. The said scheme was to remain valid for a period of 5 years ending on 31st March, 2004. In the said scheme, the term "unit" has been defined under paragraph 3/VII as "any industrial project in large and medium scale excluding those mentioned in the negative list or any ancillary and Cottage and Small-Scale Industrial undertaking including Industrial Co-operatives, Tiny and Small-Scale Services and Business (Provisionally/temporarily/Permanently/finally) undertaking registered under the District Industries Center of the Directorate of Cottage and Small Scale Industries as well as Public/Joint Sector undertaking under the administrative control of the Cottage and Small Scale Industries Department". The term "unit" under the said scheme is also extended to any tourism unit as mentioned therein.

9. Paragraph 3/XIX of the said scheme of 1999, also defines "eligible unit", as is relevant for this case, meaning a unit in the large/medium/small-scale industrial sector having registration certificate issued by the "Directorate of Industries and eligibility certificate from the WBIDC or registration certificate issued by the District Industries Sector, as the case may be.

10. The said scheme of 1999 also defines "new unit" under paragraph 3/XIV thereby meaning "an industrial unit in the large/medium/small-scale industries having invested in fixed capital assets which is established and commissioned by the entrepreneur for manufacturing of goods in West Bengal for the first time on or after the 1st April, 1999 and is registered with Directorate of Industries/Directorate of Cottage and Small Scale Industries/Directorate of Tourism, as the case may be".

11. Paragraph 4 of the said scheme of 1999 also speaks of it's applicability in

general to all large/medium Cottage and Small-Scale Projects to be set up and also other expansion projects of existing units on or after 1st April, 1999.

12. Paragraph 5 of the said 1999 scheme speaks of its non-applicability to industrial/tourism projects to which incentives had been sanctioned or registered under any previous scheme. Paragraph 5.2 provides that such scheme shall not be applicable to industries listed in the "negative list" of industries. The Annexure 1 to the said scheme is the "negative list" of industries, which conspicuously does not include cold storage like the "negative list" of 1993 scheme.

13. The scheme of 2000 repeals the scheme of 1999 and was published in the Calcutta Gazette dated 14th February, 2001. Such scheme was issued in supersession of the earlier scheme of 1999 with a view to approve and sanction a new incentive scheme for large/medium/and small-scale industrial units. The term "unit" in the said scheme of 2000 has been defined by reproducing the self-same definition as appears in the paragraph 3/VIII of the scheme of 1999, and it includes small-scale service and business undertakings. The definition of the term "new unit" appears in Clause XI of para 3 of the scheme of 2000 is the exact reproduction of the said term as in para 3/XIV of the scheme of 1999 mentioned above excepting the date of starting manufacturing of goods on or after 1st January, 2000 in the place of 1st April, 1999. The term eligible unit is the exact reproduction of the definition of such term in the scheme of 1999.

14. Paragraph 4 of the scheme of 2000, like the scheme of 1999 speaks of general applicability to all large/medium/Cottage and Small-Scale projects. The scheme of 2000 also is not applicable to the industries listed in the "negative list" of industries, which is the Annexure 1 to such scheme, and such negative list does not include the industry of cold storages.

15. Undisputedly, the appellant No. 1 started its operation from March 1, 2000, that is, after January 1, 2000 when the incentive scheme of 2000 came into force.

16. The judgment of learned Single Judge is on the basis that such scheme of 2000 was meant for extending the benefits principally to the "new units" as a fined in the scheme or industries with special provision for giving incentives to expansion of existing industries. According to learned Single Judge such "new units" meant the units for manufacturing of goods to which the cold storage has got nothing to do. Accordingly, the appellant No. 1 having the business of running the cold storage would not get the benefit out of the original scheme of 2000.

17. Now the Clause 6.1.2 of the scheme of 2000 provides for incentives to any industrial unit provided such small-scale industry is registered under the district industries center. The term "new unit", as mentioned in the judgment of learned Single Judge also includes a small-scale sector like the one owned by the appellant No. 1. Neither the term "eligible unit" nor the term of "general applicability of the scheme of 2000" excludes small-scale projects like the cold

storage. Thus, it cannot be said that the "new units" as defined in Clause XIV in the scheme of 2000 is the only applicable units to get the benefits of the scheme of 1999 or 2000. The spirit of the provision of the scheme of 1999 and 2000 is not that only the "new units" as defined therein will get the benefit. Rather the rational view of the applicability of the scheme is in favour of all the units large/medium/small-scale sector industries set up after January 1, 2000, provided those are not excluded by the negative list. This view is further fortified by the definition of "unit", which includes small-scale industrial undertaking and business undertaking too.

18. The learned Single Judge was further of the view that the cold storage having nothing to do with manufacture of the goods, the same cannot come within the scope of the Scheme. Now, had that been so, there was no necessity of bringing "cold storages" in the negative list of industries in the scheme of 1993. Thus, to give a meaningful interpretation of the scheme and the term of "negative list" the most rational and positive interpretation is that the scheme of 2000 is applicable to "units" defined under Clause (3)/VII of the scheme.

19. The learned Single Judge in support of the reasons has observed that the "negative list" was prepared for removing doubt. But if we turn towards the Clause 5.2 of the scheme of 2000, we find that to show the non-applicability of the scheme it has been specifically provided that the scheme shall not be applicable to the industries which find place in the negative list. There is no scope of interpreting such "negative list" as brought into existence for removal of doubts. Rather, in our view, the correct interpretation of the "negative list" is the list of industries mentioned therein although coming under the purview of the terms "units" or "eligible units" will not come within the applicability of the scheme. The "negative list" has been used not as an explanatory one but as a prohibitory one.

It is not unnoticed that the learned Single Judge has observed that there being no definition Clause of the term "new units" in the scheme of 1993 the cold storage was mentioned in the negative list. It is true, that there is no definition of the term new units" in the said scheme of 1993 but the scheme clearly indicated, as per Clause 4, that it was applicable to all large and medium scale projects in the State set up or ought to be set up and also expansion of existing units after 1st April, 1993. Thus, the said scheme did not apply to any small-scale project like the one owned by the appellant. The Clause 5.2 of the scheme specifically provided that the scheme was not applicable to industries listed in the "negative list". Such "negative list" annexed to the scheme enlisted the industry of cold storages under item No. 2. Had the Government contemplated to extend benefits of both the schemes of 1999 and 2000 to the "new units" only, the negative lists would not have listed other industries like nursing home, amusement park etc. which has no connection with the manufacture of goods, as required for being such "new units".

20. Thus, it is clear that the negative list in the scheme of 1993 like that of 1999

and 2000 was necessary not to include certain industries mentioned in such negative list, although those had fallen within the category of "units" and "eligible units". The contention that since the scheme of 1993 did not contain the definition of "new units" it was necessary to enlist cold storage in the negative list to exclude such type of business from the benefit of the scheme, does not stand. The negative list attached to the scheme of 1993 mentioned not only the cold storages but also the cinemas, nursing home, hospitals, clinics etc. which has got no connection with manufacture of goods. Had the negative list been prepared for removal of doubts, such negative list would not enlist thermal plants for generation of electricity, distribution of electricity which might fall under the purview of the term "units". The same conclusion can be drawn in respect of negative list attached to scheme of 1999 and 2000.

21. Thus, the harmonious construction of schemes demands that the negative lists were prepared not for removal of doubt, but to express the Government's policy to exclude certain units from the benefits rendered by the incentive schemes from time to time, although such industries otherwise would come within the purview of "units" or "eligible units" under all these schemes.

22. When the first of such negative lists contained cold storages but the subsequent negative lists did not enlist such cold storage, the real interpretation will be that the Government did not like to extend the concessions or benefits to such cold storages for a particular period that is from the year 1993 to 1998 and that the Government subsequently changed its policy to include the business of cold storage within the purview of such schemes and from the year 1999 to 2004 and for that reason the business of cold storage has not been included in the negative list of 1999 and 2000.

23. The learned Advocate for the opposite party has contended that the application in the prescribed form having been submitted on 06.08.2002, that is, after the notification dated 12.12.2001 by which a new Clause 17A to the scheme of 2000 was incorporated, the same indicated that the appellant No. 1 was entitled to such subsidy from the date of such notification. It is true that the preamble of such notification speaks that such industries were not covered by the scheme of 2000. But such notification appears to have been against the spirit of both scheme of 1999 and 2000. It has already been discussed that such cold storages were within the cover of incentive scheme of 1999 and 2000. Accordingly, such notification cannot be and should not be relied upon to hold that the cold storages were not covered under the original scheme of 2000 and accordingly, such notification should be treated to be a superfluous one for the purpose of cold storage industry.

24. The learned Advocate for the appellants has cited decision reported in MRF Ltd., Kottayam Vs. Assistant Commissioner (Assessment) Sales Tax and Others, . The ratio of such decision appears to lend support to the contention of the learned Advocate for the appellants that by such subsequent notification the accrued right of the appellant No. 1 to have the benefit of the scheme cannot be

snatched away. In the said decision, the MRP Company was given some exemption to payment of sales tax and other benefits and concessions under a particular scheme of the Government of Kerala. The MRF accordingly made a huge investment in the State of Kerala under a promise held to it that it would be granted exemption from payment of sales tax for a period of seven years. But ultimately by subsequent notification the State Government sought for withdrawing such exemptions and the Hon"ble Supreme Court held that such subsequent provisions of notifications shall always be prospective in operation unless the express thing renders it otherwise making it effective with retrospective effect.

25. At paragraph 30 of the said decision it was observed by the Supreme Court that the "High Court in its judgment has recorded a finding that the notification being statutory no plea of estoppel will lie against statutory notification. This finding of the High Court is erroneous. The doctrine of promissory estoppel has been repeatedly applied by this Court to statutory notifications...."

26. ...The learned Advocate for the petitioner has also cited decision reported in 2006(3) SC 544 (Mahabir Vegetable Oils Pvt. Ltd. and Anr. v. State of Haryana) in support of his contention. In the said case, the State of Haryana announced an industrial policy for the period 1.4.1988 to 31.3.1997 wherein industrial incentive by way of sales tax exemption was to be given for the industries set up in backward areas of the State and subsequently the State enacted the Haryana General Sales Tax Act, 1973 resulting retrospective effect of sales tax exemption to certain industries. Thereafter the State shifted back and attempted to withdraw such exemption to the petitioner company and the Supreme Court did not permit such withdrawal of exemption provision with retrospective effect.

27. Thus, considering all such aspects, we are of the view that the subsequent amendment dated 12.12.2002 by the State inserting Clause No. 17A to the scheme of 2000 should be ignored at least for the purpose of giving benefit to the cold storage industry and the refusal of the State to render benefits to the appellant No. 1 upon its application dated 06.08.2002 with effect from 01.03.2000 is illegal and is quashed accordingly. The respondents shall pay such benefits to the appellant No. 1 under the original West Bengal Incentive Scheme of 2000 upon the application dated 6.08.2002 of the appellant No. 1 within two months from the date of this judgment from the date of starting its business.

28. The appeal is accordingly allowed. The impugned judgment dated 28th September, 2006 passed by learned Single Judge in W.P. No. 1694 of 2004 of this Court is set aside. The writ application is accordingly allowed in the light of the observations made above.

29. There shall be no order as to costs.

30. Urgent xerox copy of this judgment be supplied to the parties, if reapplied for.
Bhaskar Bhattacharya, J.

I agree.