
(2019) 09 BOM CK 0141
In the Bombay High Court
Case No : Writ Petition No. 280 Of 2010

Fabrica de Gas Carbonico Pvt. Ltd.

APPELLANT

Vs

Director

RESPONDENT

Date of Decision : 17-09-2019

Acts Referred:

Constitution Of India, 1950 — Article 14

Citation : (2019) 09 BOM CK 0141

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

Bench : Division Bench

Advocate : Sudin Usgaonkar, K. Padgaonkar, D.J. Pangam, Deep Shirodkar

Final Decision : Dismissed

Judgement

M.S. Sonak, J

1. Heard Mr. Sudin Usgaonkar, Senior Advocate alongwith Mr. K. Padgaonkar, Advocate for the petitioner and Mr. D.J.Pangam, Advocate General with Mr. Deep Shirodkar, Addl. Government Advocate for the respondents.

2. The petitioner aggrieved by the decisions dated 11.04.2008 and 6.10.2008 taken by the State Level Committee in terms of the Goa State Investment Scheme, 1990 (said Scheme) prefers this petition, claiming, inter-alia, subsidy under the said Scheme which according to the petitioner has been unlawfully denied by the respondents.

3. The petitioner claims to be a small scale industry engaged in the trade and manufacture of industrial gases i.e. gaseous oxygen and for this purpose, the petitioner has set up a plant in the district of South Goa, which is a district governed under the said Scheme.

3. The petitioner applied for subsidy in terms of the said Scheme, which was considered and rejected by the State Level Committee in its 169th meeting held on 11.04.2008. The reasons for such rejection are reflected in the

communication dated 28.05.2008, and the same read as follows:-

" The Committee observed that the unit forms Group with the other unit Govind Poi Oxygen Ltd., within the definition of Para 6.2 (i). Besides their old unit in the identical name had already availed a subsidy of Rs.2,13,490/-. The SLC had therefore sanctioned a balance subsidy of Rs.1,28,495/- after deducting the subsidy already availed by these units. (Fabrica De Gas Carbonica Pvt. Ltd., & Govind Poi Oxygen Ltd.,). The request of the unit to consider the individual subsidy on basis of end products was referred to MSMED Institution (SISI) Margao, who has clarified the products to be identical. Besides, the unit does not meet the requirements of para 6.2(i) as the unit is located in the same districts. The Committee therefore maintained their earlier decision to sanction the balance subsidy to the unit i.e. Rs. 1,28,495/- sanctioned in the 166th State Level Committee meeting and rejected the request of the unit to consider their case on unit to unit basis."

5. The petitioner, aggrieved by the aforesaid rejection, made a representation, again to the State Level Committee consistent with the terms of the said Scheme. This representation was considered and rejected by the State Level Committee in its 171st meeting held on 06.10.2008. The reasons for such rejection are reflected in the communication dated 10.11.2018 and the same read as follows:

" The Committee discussed the representation/appeal application of the unit and noticed that the earlier unit working under the same name & style has availed a subsidy of Rs. 2,13,490/- in the year 1982-83 and subsequently closed down and established a new unit which is in the same name and at same location and with same Board of Directors. Further it is also learnt that M/s Govind Poy Oxygen Ltd. is a sister concern having two individuals common and has availed a subsidy of Rs.21,58,015/- through EDC. The Committee further noticed that the products manufactured by the units forming GROUP are identical/similar and therefore the Committee re-examined the case in terms of Para 6.2 of the subsidy Scheme and finally concluded with the fact that the unit does not fulfill the criteria under para 6.2(1) as the units are located in the said District. Therefore, the Committee maintained with their earlier decision and rejected the appeal application filed by the unit on 23.07.2008 and closed the case permanently".

6. Mr. Usgaonkar, learned Senior Advocate for the petitioner submits that though the grant of subsidy cannot be claimed as a matter of right, once, it is established that the petitioner fulfills the terms of eligibility, the subsidy cannot be denied by the respondents as such, denial would virtually amount arbitrariness and discrimination which is specifically prohibited by Article 14 of the the Constitution. He submits that if the petitioner fulfills the terms of eligibility and the denial of subsidy is based upon irrelevant consideration or based upon misconstruction of the terms and conditions of the scheme would be arbitrary and unconstitutional. Mr. Usgaonkar submits that the terms of the scheme clearly apply to expansion of existing industries. Therefore the reason

that previously some subsidy was claimed by setting up a factory at the same location is clearly an irrelevant consideration.

7. Mr. Usgaonkar submits that in the present case, the petitioner and the company Govind Poy Oxygen Limited have no legal nexus with one another. He points out that the two companies are governed by separate Board of Directors. One of the companies is a private limited company and the other is a public limited company. The accounts are maintained separately and the units set up by the two companies are separately licenced and registered. The units have separate sales tax registrations. The units have separate power connection and the products manufactured are different and distinct. He submits that all these factors ought to have been considered by the respondents and non consideration, vitiate the impugned decisions.

8. Mr. Usgaonkar submits that it is more than apparent that two companies are separate legal entities and therefore, cannot be regarded as sister concerns, so as to deny the subsidy to the petitioner. He relies upon Supertex Industries Ltd. And another Vs. Union of India and another, [AIR 2002 Bombay 18], and submits that merely because there may be common directors, it cannot be said that two companies are group companies so as to deny subsidy. He relies upon this decision to also point out that once the applicant fulfills the terms of eligibility, such applicant acquires a right to obtain a subsidy and the grant of subsidy no longer remains a bounty.

9. Mr. Usgaonkar points out that in the present case, the petitioner manufactures gases in contrast to the other company which manufactures medical oxygen gas, liquid oxygen gas and nitrogen gas. The percentage of the total turnover in respect of medical oxygen gas and liquid oxygen gas is 20.41 percent and 19.02 percent respectively. Besides he points out that the petitioner has placed on record a report from the Laboratory and Research Center which clearly concludes that the products which are manufactured by M/s Govind Poy Oxygen Ltd. are compositionally unidentical. He submits that in such circumstances, the respondents very clearly erred in rejecting the petitioners' claim by resorting to para 6.2. (i) of the said scheme.

10. For all the aforesaid reasons, Mr. Usgaonkar submits that the impugned decisions warrant interference and appropriate directions are required to be issued for release of subsidy to the petitioner.

11. Mr. D. J. Pangam, learned Advocate General for the State of Goa submits that subsidy cannot be claimed as a matter of right since they are state largesses. He points out that the scheme itself defines "Group" and in terms of this definition, it is very apparent that the petitioner and M/s Govind Poy Oxygen Ltd. are group companies. He submits that there is no challenge to the scheme as such and even otherwise, the object of the scheme is to ensure that subsidies are dolled out to diverse agencies and not to agencies which have nexus with one another. He submits that the general definition of company or director as obtains under

Companies Act cannot be imported in the said scheme, which has its own definitions clearly prescribed. He submits that from the rejection communication it is clear that the end products manufactured by the petitioner are identical and in any case, similar to the end products of M/s Govind Poy Oxygen Ltd. For all these reasons, he submits that there is no case made out to warrant any interference in this case.

12. The rival contentions fall for our consideration.

13. Although, it is true that the subsidies are basically matters of state largesse, it is not correct to say that no petition is maintainable to enforce the terms and conditions of the subsidy scheme. Even though grant of subsidy is State largesse that by itself does not mean that the scheme can be operated in some discriminatory or arbitrary manner. If the petitioner establishes that it fulfills the eligibility conditions prescribed under the said scheme, such petitioner can always petition the court to challenge the denial of subsidy upon irrelevant considerations or on account of arbitrariness. Therefore, the main issue to this petition is whether the denial of subsidy to the petitioner is in accord with the terms of the scheme or whether the denial is based upon some irrelevant considerations or is otherwise arbitrary and unconstitutional. In this case the terms of the scheme have not been challenged by the petitioner. The petitioner only contends that the scheme is being misinterpreted by the respondents and the correct interpretation will entitle the petitioner, the subsidy in terms of the scheme.

14. The scheme, atleast prima facie, applies not only to existing industrial units but also to expansion of the same. Therefore Mr. Usgaonkar may be right in his submission that there was no question of denial of the subsidy to the petitioner on the ground that some subsidy was already been granted on earlier occasion.

15. However, from the impugned decisions we find that the aforesaid is not the main basis for denial of subsidy to the petitioner. The denial of subsidy is basically premised upon the provisions of para 6 of the scheme which reads as follows:-

"6) Eligibility of two or more units set up by an individual/company/group/legal entity:

6.1) Where an individual/promoter/firm/company/legal entity/group, set up more than one industrial unit in the same backward district or different backward district within the State of Goa, and if such unit is engaged in a different line of end-product the State Investment Subsidy on unit wise basis for each such unit will be available provided all the following conditions are satisfied. Each such unit is separately licenced/registered.

i) There is a separate power connection, separate sales tax registration for each such units.

ii) Each such units in respect of which subsidy is claimed is not set up in a

manner, as to take manufacture of the product from intermediate stage.

iii) Accounts in respect of each such units are maintained separately and there is no artificial splitting of investment so as to be eligible for subsidy over and above the maximum limit available for the area.

6.2) Where an individual/promoter/firm/company/legal entity/group, set one or more industrial unit in the manufacture of similar and identical end-product, the State Investment Subsidy on unit wise basis for each such unit will be available provided all the following conditions are satisfied.

i) The unit in respect of which the subsidy is claimed are located in different backward districts.

ii) Each such unit is separately licenced/registered.

Iii) There is a separate power connection, separate factory licence, separate sales tax registration, separate excise licence for each such units.

iv) Accounts in respect of each unit is maintained separately and there is no artificial splitting of investment so as to be eligible for subsidy over and above the maximum limit available for the area.

c) Definition of group:Units having common proprietor/partner(s)/Director(s)/Subsidiary of existing company, shall be considered to be a group for the purpose of State Investment Subsidy.

Explanation: Even if an individual who is proprietor of one unit and partner/director in another unit(s) or even if one partner/director is common in other unit(s) it shall be covered up under the definition of a group."

16. Paragraph 6 of the said Scheme deals substantially with the issue of two or more than two units set up by an individual/ promoter/firm/company/group/legal entity. Therefore, it is obvious that the case of the Petitioner was required to be considered by the eligibility parameters set out in paragraph 6 of the said scheme. Paragraph 6.1 of the said scheme, inter alia, provides that where an individual/promoter/firm/company/legal entity/group, set up more than one industrial unit in the said backward district or a different backward district, within the State of Goa, and if such units are engaged in different line of end products, then the subsidy on unit-wise basis for each such unit be available, provided the conditions set out in sub clauses (i) to (iii) set out in the said paragraph are fulfilled.

17. Paragraph 6.2 of the said scheme, inter alia, provides that where an individual/promoter/firm/company/legal entity/group, set one or more industrial units, in the manufacture of similar and identical end-products, the subsidiarity on unit-wise basis for each such unit will be available, provided the conditions set out in sub clauses (i) to (iv) are set out in the said paragraph are fulfilled.

18. Paragraph 6, in its sub-paragraph (c), specifically provides for the definition

of the expression "group". This sub-paragraph provides that the units having common proprietor/partner(s)/ director(s)/subsidiary of existing company, shall be considered to be a "group" for the purpose of State Investment Subsidy. The explanation to this paragraph further provides that even if an individual, who is proprietor of one unit and partner/director in another unit(s) or even if one partner/director is common in other unit(s) it shall be covered up under the definition of a "group".

19. From the aforesaid, it is clear that the two companies, having even one common director, are to be regarded as a "group". In the present case, there is no dispute whatsoever that there are at least two directors in the Petitioner Company, who are also the directors in Govind Poy Oxygen Ltd. In fact, there is material on record to indicate that the Petitioner Company is substantially controlled by one family and it is the very same family, which substantially controls or has a substantial stake in Govind Poy Oxygen Ltd. Thus, taking into consideration the definition of the expression "group" in paragraph 6 of the said scheme, it is difficult to agree with contention of Mr. Usgaonkar, or to disagree with the view taken by the State Level Committee that the Petitioner Company and Govind Poy Oxygen Ltd., form a group or are part of one and the same group companies.

20. The general principles related to the Company Law or the specialized definition of the expressions like "company" or "shareholder" or "director" under the Companies Act, or under some other legislations, like the Monopolies and Restrictive Trade Practices Act 1969 (MRTP Act), will not apply to the situation of the present kind, where we are dealing with the issue of subsidy under a scheme formulated by the State Government and the said scheme defines in substantially clear terms what it means by the expression "group". In so far as implementation of the said scheme is concerned, or in so far as interpretation of clauses of the said scheme are concerned, we will have to go by the definition of the expressions provided in the said scheme itself and not look to any other legal instrument or for that matter, even legal principles, like independent corporate existence of each company, etc.

21. In case of Supertex Industries Ltd. (supra), the issue was whether two or more companies are group companies for the purpose of Central Government Subsidy Scheme, formulated by the Central Government. The Division Bench of this Court noted that the issue was governed by no less than four circulars, issued by the Central Government. One of the circulars specifically imported the definition of "group company", from the MRTP Act for determining whether the two or more companies were group companies for the purposes of Central Investment Subsidy Scheme. It is precisely in this context that the Division Bench of this Court made a prima facie observations that common directors, each having less than one per cent stake in the companies, need not render two companies as group companies. This was in the context of the definition of the expression "group companies" in the MRTP Act, which was made specifically

applicable to the Central Government Investment Subsidy Scheme. The Division Bench even then did not express any final opinion on the issue, but merely remanded the matter for reconsideration, in the light of the definition under the MRTP Act.

22. In the present case, the said Scheme makes no reference to the definition of "group companies" under the MRTP Act. The said scheme makes no reference to the provisions of the Companies Act, or any other legislation, in the context of defining the expression "group". Rather, the said scheme itself defines the expression "group" in substantially clear terms. As per this specialized definition of the expression "group" in paragraph 6(c) of the said scheme, it is more than apparent that the Petitioner Company and the Company Govind Poy Oxygen Ltd., are group companies, for the purposes of the said scheme. Therefore, the decision in *Supertex Industries Ltd.* (supra) is clearly distinguishable or otherwise, inapplicable in the facts and circumstances of the present case.

23. The circumstances referred to by Mr. Usgaonkar, i.e. the circumstances that one of the companies is a private limited company and the other public limited company, or that the two companies maintain separate accounts or that the units set up by the two companies have individual registration and licences, are really not very relevant, taking into consideration the definition of the expression "group" in paragraph 6(c) of the said scheme. Even, if Mr. Usgaonkar may be right in his contention that the two companies are distinct and different legal entities that, by itself, does not mean that the two companies are not group companies, or a part of the same group for the purposes of the said scheme.

24. The next issue is whether the two companies in the present case are engaged in a different line end products which, in other words, means whether the units established by the two companies manufacture different end products. If so, the case of the Petitioner will have to be governed by paragraph 6.1 of the said scheme.

25. The State Level Committee, on two occasions, has held that the two companies manufacture same end products and, therefore, the case of the Petitioner is not governed by paragraph 6.1, but is governed by paragraph 6.2 of the said scheme. This finding of the State Level Committee, on the issue of sameness of the end products, can be interfered with only if it is shown that such finding is perverse or contrary to the weight of the material on record, but not otherwise.

26. The material on record, indicates that the petitioner company manufactures gaseous oxygen. M/s. Govind Poy Oxygen Ltd. is also involved in manufacture of medical oxygen and liquid oxygen, no doubt, along with certain other products like acetone, nitrogen etc. It is necessary to note paragraph 6.2 of the said scheme which refers not to the manufacture of any identical end products, but refers to the manufacture of similar and identical end products. This means that even if the end products are similar, this aspect is required to be taken into

consideration and it is not necessary that the end products have to be identical in all respects.

27. Based upon the material on record, we do not think that the findings arrived at by the State Level Committee on two occasions can be said to be vitiated by any perversity, non-application of mind, or failure to take into account the relevant considerations. The State Level Committee, along with its return, has also placed on record a communication dated 22.07.2005, addressed by the Asst. Director (EI), Small Industries Service Institute, to the Director, Directorate of Industries, Trade & Commerce, Panaji. This communication certifies that there is commonality between the products manufactured by the Petitioner and by Govind Poy Oxygen Ltd. This communication certifies that the two products are similar.

28. Accordingly, we cannot say that the decision of the State Level Committee is based upon no material or is based upon taking into account any irrelevant material. The decision of the State Level Committee cannot also be regarded as outrageous in its logic or some decision which no person or the authority could have ever arrived at, if it was properly apprised both, on law, as well as in facts. In short, applying the the Wednesbury principles, we cannot say that the decision of the State Level Committee warrants interference in exercise of our powers of judicial review in such matters.

29. According to us, in such matters, the State Level Committee was not obliged to go by the reports from laboratories and research centres to determine whether the products were identical in all respects. Even the report produced by the Petitioner is quite guarded and merely observes that the two products are compositely unidentical. Accordingly to us, the said scheme has to be interpreted and operated in a reasonable and pragmatic manner. The interpretation adopted by the State Level Committee in determining whether or not the end products of the two companies are similar or not, was both reasonable, as well as pragmatic. The material on record is quite sufficient to sustain the findings recorded by the State Level Committee on more than one occasion.

30. In fact, it is necessary to note that the Petitioner in its representation to the State Level Committee had made specific reference to the Central Excise Tariff Item Code, in order to demonstrate that the Codes in respect of the end products are different. According to us, the scheme cannot be operated or interpreted by reference to the Central Excise Tariff Item Code. These Codes are prescribed for a different purpose and these Codes cannot be of much assistance in determining whether the end products are similar in the context of the said scheme. In any case, from the representation of the Petitioner itself, it is clear that the gaseous oxygen manufactured by the petitioner bears Central Excise Tariff Item Code 2804 40 90. Further, from the representation, it is clear that Govind Poy Oxygen Ltd., also manufactures liquid oxygen, which bears same Central Excise Tariff Item Code 2804 40 90. Thus, from the material placed on record by the Petitioner itself, it is apparent that there is no case made out to interfere with the

findings recorded by the State Level Committee on not less than on two occasions that the end products manufactured by the Petitioner and its group company Govind Poy Oxygen Ltd. are similar and in fact, even identical.

31. The aforesaid means that the case of the Petitioner will be governed by paragraph 6.2 of the said scheme and not paragraph 6.1 of the said scheme. Paragraph 6.2(i) of the said scheme, in terms, provides that the unit in respect of which subsidy is claimed, must be located in a different backward district, from the unit set up by the other group company. In the present case, there is no dispute that the unit of the Petitioner and the unit of the group company Govind Poy Oxygen Ltd. is set up in one and the same district i.e. District of South Goa. Clearly, therefore, the State Level Committee was entirely justified in invoking paragraph 6.2(i) of the said scheme to deny the subsidy to the Petitioner. There is no error, much less any arbitrariness or unreasonableness involved in the decision of the State Level Committee, so as to warrant interference in exercise of our powers of judicial review.

32. For the aforesaid reasons, we are satisfied that there is no arbitrariness or unreasonableness in the view taken by the State Level Committee on two occasions. Accordingly, the decision of the State Level Committee dated 11th April, 2008 and 6th October, 2008 warrant no interference.

33. We accordingly, discharge the Rule issued in this Petition and dismiss the Petition.

34. In the facts and circumstances of the present case, there shall be no order as to costs.