

(2014) 10 GUJ CK 0005

In the Gujarat High Court

Case No : Special Civil Application No. 17038 of 2012

Kores (India) Limited

APPELLANT

Vs

Collector of Electricity Duty

RESPONDENT

Date of Decision : 17-10-2014

Acts Referred:

Bombay Electricity Duty Act, 1958 — Section 3, 3(2)(vii), 3(2)(vii), 3(2)(vii), 3(2)(vii)
(b)

Constitution of India, 1950 — Article 226

Citation : (2014) 10 GUJ CK 0005

Hon'ble Judges : S.R. Brahmbhatt, J

Bench : Single Bench

Advocate : A.S. Vakil, Advocate for the Appellant; P.K. Jani, Government Pleader and Premal R. Joshi, Advocate for the Respondent

Judgement

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S.R. Brahmbhatt, J.—The petitioner has filed present petition under Article 226 of the Constitution of India with the following reliefs:

(A) To quash and set aside the impugned decision dated 8.11.2012 and to grant the petitioner Company's application dated 9.1.2008;

(B) To command the Respondent No. 3-Paschim Gujarat Vij Company Limited, to refund to the petitioner Company the amount of Rs. 30,80,27,358/- paid by the petitioner Company towards Electricity Duty for the period of 5 years for which the exemption was prayed for, together with interest as such rate as this Hon'ble Court deems fit and proper;

(C) To direct the Respondents, pending the hearing and final disposal of the present Special Civil Application, to deposit with this Hon'ble Court the amount Rs. 30,80,27,358/- paid by the Petitioner Company towards Electricity Duty for the period of 5 years for which the exemption was prayed for or;

(D) In the alternative, to (C), above, direct the respondents, pending the hearing

and final disposal of the present Special Civil Application, to file an undertaking with this Hon"ble Court that in the event of the success of the Petitioner Company, the Respondents undertake to make payment of the aforesaid amount together with such rate of interest as this Hon"ble Court may award;

(E) To pass such other and further orders as this Hon"ble Court deems fit and proper in the facts and circumstances of the case;

(F) To provide for the costs of the present Special Civil Application"

Thus, what is essentially challenged is the order dated 8.11.2012 rejecting the petitioner"s application dated 9.1.2008 for exemption from payment of electricity duty.

2. The facts of the case, as could be gathered from the memo of petition, deserve to be set out as under:

3. The petitioner is the Company incorporated under the provisions of the Companies Act, 1956 in May, 1936. In the year 1979, the petitioner Company acquired a sick composite textile mills known as "Shri Amarsinhji Mills Limited" situated in Wankaner, District: Rajkot and in the year 1981-81, the petitioner Company purchased the entire assets and liability of said Mill. The petitioner started manufacturing activity for the first time in the State of Gujarat with effect from 29.6.1981, since then the petitioner is running the erstwhile composite mill, known as "Shri Amarsinhji Mills Limited, Proprietor-Kores (India) Limited". The erstwhile corporate body (Shri Amarsinhji Mills Limited) remained on paper, the name of which was subsequently changed to Shri Amarsinhji Stationary Industries Limited. The petitioner was manufacturing blended yarn and finished cloth at its composite Mills plant at Wankaner, District: Rajkot.

4. It is stated that by an agreement dated 29.6.1981, one Shri Amarsinhji Mills Limited had agreed to grant sub-lease of various pieces or parcels of land to the petitioner for a term of 51 years and 29 days commencing on 29.6.1981 and expiring on 27.7.2032 and to also sell and convey the buildings, structures and hereditaments standing on the said pieces of land to the petitioner, subject to the terms and conditions therein. By a conveyance dated 30.6.1981, the said Shri Amarsinhji Mills Limited sold, conveyed, assured and released the said buildings, structures and hereditaments standing on the said pieces or parcel of land to the petitioner at the price and on the terms and conditions contained therein. By an indenture of lease dated 30.6.1981 executed at Wankaner between Shri Amarsinhji Mills Limited and the petitioner, the lands mentioned therein were leased to the petitioner for a period of 51 years and 29 days commencing from 29.6.1981 and expiring on 27.7.2032 on the terms and conditions contained therein.

5. The Government of Gujarat vide Notification dated 15.9.2005 enacted the "Bombay Electricity Duty (Gujarat Second Amendment) Act, 2005", which came into force on 1.10.2005 and section 3(2)(vii) of the (Principal) Act was

substituted. It is the case of the petitioner that in view of the Notification dated 1.10.2005 and exemption provided to "New Industrial Undertakings", around 2006-2007, the petitioner diversified into 100% cotton knitting yarn and knitted fabrics as a new product at Survey nos. 4470, 4472 to 4481 and 4485 at village: Wankaner, District: Rajkot. The petitioner had never manufactured in the past, the said diversified product i.e. 100% cotton knotted yarn and knitted fabrics in the State of Gujarat before 31.10.2007. The old mill was running on polyester based blended synthetic yarn and processed cloth with old machineries and technology and the new unit is totally based on new technology with cotton as it is basic and only ray material and cotton yarn and knitted gray fabric as its finished output. The entire set up is new and even the power connection from respondent no. 3 of 1.8 M.W., is taken afresh.

6. The Civil construction of the spinning unit of petitioner started on 5.11.2006 and completed on 15.10.2007. The petitioner vide its application in Form-F dated 9.1.2008 applied to the respondent no. 1 CED for exemption from payment of electricity duty for its "new unit" at Wankaner. Along with said application, the petitioner gave declaration to the effect that the unit was not formed by splitting up or reconstruction of a business undertaking already in the State, nor was the unit an expansion of existing business or undertaking to the State. The declaration also stated that the unit was not formed by transfer, to a new business or undertaking of building, machinery or plant, previously used in India for any industrial purpose of the value which does not exceed 10% of the value in addition to total investment. The office of respondent no. 1 by its letter dated 22.1.2008 called for some information from the petitioner and the petitioner by letter dated 5.2.2008 supplied the same. Thereafter, the respondent no. 1 once again by letter dated 28.2.2008 called for certain information and petitioner vide letters dated 10.3.2008 and 27.3.2008 supplied the same. Thereafter again the respondent no. 1 sought further information vide letter dated 29.4.2008 and petitioner has supplied the same vide letter dated 2.5.2008. Thereafter, the respondent no. 1 vide its decision dated 18.8.2008 observed that there was not much difference in the old/new method of production and accordingly, held that petitioner did not qualify for the duty exemption certificate. Thereafter, the petitioner by its further letter dated 6.2.2009 clarified that its new project fully satisfied the criteria of "New Industrial Undertaking" as laid down under the Bombay Electricity Duty Act. Thereafter, petitioner by its letter dated 6.3.2009 provided declaration cum undertaking and power of attorney and requested the respondent no. 1 to grant the electricity duty exemption at the earliest. Thereafter, the office of respondent no. 1 vide letter dated 23.3.2009 requested the petitioner to depute a responsible and conversant officers of the petitioner on 13.4.2009 with all relevant details and records of the case, to discuss and decide the matter pertaining to the exemption from payment of electricity duty. Accordingly, the petitioner company deputed its Chief Executive Officer and discussed the matter with respondent no. 1. The petitioner has thereafter addressed detailed letter to respondent no. 1 on 8.10.2009 and accordingly, the

respondent no. 1 vide letter dated 16.11.2009 informed that it had sought clarification from the respondent no. 2 and after getting clarification, the application of petitioner be proceeded further. Thereafter petitioner vide reminder dated 25.1.2010 informed the respondent no. 1 to take decision on its application. Thereafter the respondent no. 1 vide its decision dated 27.8.2010 held that date of production is 30.10.2007 and prior thereto, the petitioner carried out production in the State of Gujarat and accordingly, petitioner cannot be considered a "new industrial undertaking" in terms of Section 3(2)(vii) of the Act and thereby rejected the petitioner's application. Thereafter, petitioner vide letter dated 14.9.2010 requested the respondent no. 1 to reconsider the application dated 9.1.2008. As the petitioner did not receive any response from the respondent no. 1, the petitioner preferred Special Civil Application No. 13708 of 2011 before this Court and this Court vide judgment and order dated 10.1.2012 was pleased to allow the Special Civil Application No. 13708 of 2011 by quashing and setting aside the decision dated 18.8.2008 and 27.8.2010 on the ground of breach of principles of natural justice and remanded the matter back to respondent no. 1 for deciding the application dated 9.1.2008 of the petitioner afresh and the respondent no. 1 was directed to complete the hearing preferable within a period of 65 days from the date of receipt of the order.

7. The respondent no. 1 thereafter by letter dated 16.2.2012 called the petitioner to file written submission and accordingly, the petitioner filed written submissions on 10.3.2012 and thereafter, the hearing took place. Thereafter, the respondent no. 1 vide order dated 8.11.2012 dismissed the petitioner's application dated 9.1.2008 for exemption. The said order is impugned in this petition. It is the case of the petitioner that petitioner has commenced its production on 30.10.2007 and till 31.10.2012, it has paid an amount of Rs. 30,80,27,358/- by way of electricity duty to respondent no. 3 and therefore, the petitioner has also applied for exemption for the same.

8. Learned counsel appearing for the petitioner submitted that the impugned order dated 8.11.2012 was contrary to the facts and evidence on record and against the principle laid down in the judgment reported in State of Gujarat and Others Vs. Saurashtra Cement and Chemical Industries Ltd., in case of State of Gujarat Vs. Saurashtra Cement and Chemicals Limited. Learned counsel for the petitioner further submitted that the real issue therefore is whether the petitioner company's new diversion and production activity of cotton yarn "was " or "was not" an expansion of the existing business or undertaking in the State. It is submitted that it was in fact not an expansion of the existing business or undertaking in the State and therefore, the petitioner would be a "new industrial undertaking" and accordingly, would be entitled to the certificate of exemption from electricity duty under the Act.

9. Learned counsel for the petitioner further submitted that the petitioner has set up a new unit for the purpose of manufacturing a new product viz., cotton hosiery yarn and knitting grey fabric and submitted that the building, plant and

machinery used for the old product viz., synthetic blended yarn are incapable of being used for the manufacture of the new product viz., cotton hosiery yarn and knitting grey fabric and same way the new building, plant and machinery used for the new product are incapable of being used for manufacturing of the old product. Learned counsel appearing for the petitioner thereafter submitted that the new undertaking is not a expansion of the existing business. The new unit is totally independent of the assets of the old existing unit and none of the assets of the old unit are being utilized in the manufacturing activities carried on by the new unit.

10. Learned counsel appearing for the petitioner submitted that the respondent no. 1 has failed to appreciate and interpret the definition of the term "new industrial undertaking" defined under Section 3 of the Act. Learned counsel appearing for the petitioner submits that the respondent no. 1 has erred in observing that only when an industrial undertaking manufactures a product for the first time in the State, it can be termed as "a new industrial undertaking" and would accordingly qualify for exemption from payment of electricity duty. Learned counsel for the petitioner further submitted that the use of word "expansion plan" undertaken by the Textile Division does not and cannot mean "expansion" as understood in "explanation (c) " contained in Section 3 of the Act. Learned counsel for the petitioner submitted that the respondent no. 1 has not assigned any reason to coming to its conclusion. Learned counsel for the petitioner further submitted that the respondent no. 1 has erred in not appreciating the ratio laid down in the judgment reported in State of Gujarat Vs. Saurashtra Cement and Chemical Industries Limited (supra), wherein the Supreme Court has laid down the test for determining whether the new industrial undertaking is a expansion of the existing business or undertaking.

11. Learned counsel appearing for the petitioner has relied on following authorities for countering arguments of respondents for not relegating the petitioner to alternative remedy and for urging that this petition be decided on merits. :

(i) 2004(13) SCC 665

(ii) 2004(3) GLR 2609

(iii) 2002 (3) GLR 2626

(iv) 2007 (2) GLR 1538

(v) 2000 (3) GLR 2403

(vi) 1979 (2) GLR 678

(vii) Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others,

12. Learned counsel appearing for the petitioner submitted that the petitioner Company is a "new industrial undertaking" and qualifies for the certificate of Exemption under the Act and the new undertaking cannot be termed as an

expansion of the existing business or undertaking and prayed that the petition be allowed.

13. Learned counsel appearing for the petitioner invited this Court's attention to decision rendered by this Court in case of Shakti Bio Science Ltd. and Another Vs. Assessment Officer, Gandhinagar and Others, and submitted that the court relying upon the decision of the Supreme Court came to the conclusion that the Unit was entitled to receive exemption certificate. The present facts indicates that the case of the petitioner is on a better footing and on that ground, he submitted that this petition is required to be allowed.

14. Shri Jani, learned Government Pleader appearing for respondent no. 1 submitted that the respondent no. 1 is specified authority to implement the Bombay Electricity Duty Act, 1958 (now Gujarat Electricity Duty Act, 1958) and Rules framed thereunder viz. Bombay Electricity Duty (Gujarat) Rules, 1986. Shri Jani, learned Government Pleader submitted that the petitioner has purchased unit of Shri Amarsinhji Mills Limited in 1980-81 and started manufacturing "synthetic blended yarn". Hence, it is already in existence (Proprietor/Kores India Limited) in Wankaner, i.e., same place where the present unit-manufacturing of "Hosiery Yarn and Knitted Fabrics" being started. Thereafter the petitioner applied for exemption of electricity duty on 9.1.2008, which was received on 11.1.2008. It is submitted that the petitioner's manufacturing activities is not for the first time in the State of Gujarat as on dated 30.10.2007 for availing the benefit of the exemption of electricity duty and therefore, the application of the petitioner was rejected as per clause 3(2)(vii) of the Act by respondent no. 1 vide letter dated 27.8.2010. Learned GP submitted that the order of respondent no. 1 is order as per definition of "new industrial undertaking" as explained under Section 3(2) (vii) of the Act. The petitioner was manufacturing "Synthetic Blended Yarn" previously and thereafter started manufacturing of "Hosiery Yarn and Knitted Fabrics". Hence, it is not a new undertaking as defined in Section 3(2)(vii) of the Act. Learned GP further submitted that the petitioner has not availed the alternative remedy available to it under Part-II, Schedule-I of the Act and therefore, on this ground also the petition is required to be dismissed. Learned GP further submitted that as per Section 3(2)(vii) in explanation the definition of the "new industrial undertaking" is given, it clarifies that it is not formed by the splitting up or the reconstruction of a business or undertaking already in existence in the State and present petitioner is already in existence in the Wankaner and therefore, any another unit of Kores India Ltd., is not entitled of electricity duty because it is in existence in the State at Wankaner. In view of the aforesaid submissions, learned GP submitted that the petition be dismissed with costs.

15. Shri Premal Joshi, learned advocate appearing for the respondent No. 3 submitted that he adopts all the submissions made by learned Government Pleader and Court may pass appropriate order.

16. The Court has heard learned counsels for the parties and perused the

documents and annexure appended to the petition. Before advertng to the rival contentions of learned counsels for the parties, it would be most appropriate to set out herein below few indisputable aspect emerging therefrom namely-

(I) The petitioner Company acquired a sick composite textile mills known as Shri Amarsinhji Mills Limited situated in Wankaner, District: Rajkot.

(II) From 29th June, 1981, the petitioner Company started its production in Gujarat.

(III) The petitioner Company was manufacturing blended yarn and finished cloth at its composite Mills plant at Wankaner, District: Rajkot.

(IV) By way of an agreement dated 29.6.1981, the Company obtained various parcels of land for 51 years and 29 days from 29.6.1981 and expiring on 27.07.2032.

(V) The Government of Gujarat vide Notification dated 15.09.2005 enacted the "Bombay Electricity Duty (Gujarat Second Amendment) Act, 2005.

(VI) Section 3 is relevant for our purpose, which reads as under:

"3(1) Subject to the provisions of sub-sections (2AA), (2AAA), (2B) and (3) there shall be levied and paid to the State Government a duty on the consumption of electricity (hereinafter in this Act referred to as "Electricity Duty) at the rate specified below:

(a)

(b)

(2) Electricity Duty shall not be leviable on the units of energy consumed,

(i)

(ia)

(ii)

(iii)

(iiia)

(iv)

(v)

(va)

(vi)

(vii) For motive power and lighting in respect of premises used by a new industrial undertaking for industrial purpose, subject to such terms and conditions as may be prescribed, for a period of five years from the date on

which such industrial undertaking begins to manufacture or produce goods for the first time:

Provided that no new industrial undertaking shall be entitled for exemption from payment of electricity duty under this clause, unless it has obtained a certificate regarding eligibility for such exemption in prescribed form by making an application therefore in such form, within such period and to such officer as may be prescribed.

Explanation: For the purpose of this clause "a new industrial undertaking" means any industrial undertaking which-

(a) is not formed by the splitting up or the reconstruction of a business or undertaking already in existence in the State; or

(b) is not formed by transfer to a new business or undertaking of a building, machinery or plant previously used in India for any industrial purpose, of such value in relation to total value of the aforesaid investments, as the State Government may, by notification in the official gazette specify; or

(c) is not an expansion of the existing business or undertaking in the State.

(2)"

(VII) As per the say of the petitioner Company, the petitioner Company diversified into 100% cotton knitting yarn and knitted fabrics as a new product at Survey Nos. 4470, 4472 to 4481 and 4485 at village: Wankaner, Taluka: Wankaner, District : Rajkot.

(VIII) It is also the say of the Company that it did not manufacture in the past the said diversified product i.e. 100% cotton knitted yarn and knitted fabrics in the State of Gujarat before 31.10.2007. The earlier production was on polyester based blended synthetic yarn and processed cloth with old machineries and technology.

(IX) The Company has also contended that new unit is totally based on new technology with cotton as its basic and only raw material and cotton yarn and knitted grey fabrics as its finished output. The entire set up is new and even the power connection from Paschim Gujarat Vij Company Limited of 1.8 M.W., is taken afresh.

(X) The construction work had started on 5.11.2006 and completed on 15.10.2007.

(XI) The Company has claimed that the total expenses incurred for the said civil construction was Rs. 495.73 lacs. The certificate dated 27.1.2007 at Annexure-5 is issued by the Consulting Engineer and the Company has claimed that the value of building, machineries and plant as on 30.9.2007 of Textile Division is Rs. 2038.59 lacs. A certificate dated 12.12.2007 at Annexure-6 to the petition is issued by the Chartered Accountant.

(XII) The Company has made an application on 9.1.2008 to the respondent No. 1-CED for exemption from payment of electricity duty for its "new unit" at Wankaner. Along therewith the requisite declaration indicating that unit is not formed by splitting up or reconstruction of a business undertaking already in the State was filed.

(XIII) The information was sought from the Company, which was supplied. However, the said application was not approved and it was held by decision dated 18.8.2008 that there was not much difference in the old/new method of production and it was stated that company did not qualify for the duty exemption certificate.

(XIV) Thereafter petitioner made various representations before the authority and it was replied as stated hereinabove.

(XV) The respondent vide its decision dated 27.8.2010 stated therein that the date of production is 30.10.2007, that even prior thereto the petitioner Company carried out production in the State of Gujarat and accordingly, the petitioner Company cannot be considered a "new industrial undertaking" in terms of Section 3(2)(vii) of the Bombay Electricity Duty Act, 1958 and thereby rejected the petitioner's application dated 9.1.2008.

(XVI) The petitioner approached this Court by way of petition being Special Civil Application No. 13708 of 2011, which came to be disposed of by this Court vide order dated 10.1.2012 on the ground that the officer, who had given an audience had been transferred and new incumbent has decided the matter without affording an opportunity and therefore, matter was remanded back to the authority to decide the case of the petitioner afresh for certificate.

(XVII) Thereafter, detailed submissions were made but the authority ultimately rejected the application vide order dated 8.11.2012.

(XVIII) The respondent has inter alia contended that the petition is not maintainable as the petitioner has not exhausted the alternative remedy available.

(XIX) It is also the say of respondent that new unit is not the "new unit" and therefore, petitioner is not entitled to exemption certificate.

(XX) This Court (Coram R.H. Shukla J) on 10.4.2013 passed the following order while admitting the matter.

"In view of the contention raised by the petitioner as to whether it is expansion or it is a new unit, which would entitle the petitioner for benefit/exemption of the electricity duty, in light of the judgment of the Hon"ble Apex Court in case of State of Gujarat and Others Vs. Saurashtra Cement and Chemical Industries Ltd., , is required to be considered. Hence, the following order is passed:

Rule, returnable on 6th May, 2013."

17. Against the aforesaid backdrop of almost indisputable aspect, the Court is to consider rival contentions of the parties based upon documents produced on record.

18. The Court proposes to address itself to the contentions raised by respondents for relegating the petitioner to alternative remedy as the respondents have taken up this contention in paras 10 and 11 of the affidavit-in-reply. It was contended that the petitioner has effective alternative remedy under Part-II, Schedule I of the Gujarat Electricity Duty Act, 1958. The said provision reads as under:

"Part-II

Where any dispute arises-

(i) whether any undertaking is an industrial undertaking or a new industrial undertaking or a service undertaking;

(ii) whether any premises are used by an industrial undertaking for residential purpose or any other purpose;

(iii) as to the item in this schedule under which any consumption of energy falls;

(iv) where energy is consumed for different purposes, as to what portion is consumed for any particular purpose; the dispute shall be referred for decision to such authority as the State Government may, by notification in the Official Gazette, specify and different authorities may be specified for different areas of the State. The authority concerned shall, after such inquiry as it deems fit, record its decision.

An appeal shall lie against such decision to the State Government within sixty days from the date of the decision.

Where no appeal is filed against a decision of the authority, the State Government may of its own motion or otherwise within one year from the date of any order passed by the authority call for an examine the record of any proceedings of the authority for the purpose of satisfying itself as to the legality or propriety of any decision or order passed, and as to the regularity of the proceedings of such authority and pass such order thereon as it thinks fit.

The decision recorded by such authority, subject to any appeal to or revision by State Government, and the order of the State Government in appeal or revision, shall be final and shall not be called in question in any court."

19. This provision clearly envisages the authority to be appointed by the State for resolving the dispute and the appeal shall lie against such decision to the State Government within sixty days from the date of the decision. Therefore, in the first instance, it was the duty caste upon respondent to point out as to whether State has appointed any authority which can go into the aspect as the respondent no. 1 i.e. Specified Authority cannot be said to be the Deciding Authority as envisaged under provisions of Part-II of Gujarat Electricity Duty Act,

1958. The Court categorically called upon the learned counsel for the State as to indicate the authority who can go into this and which has been appointed for this purpose in terms of the provisions relied upon by the counsel for relegating the petitioner to the alternative remedy. The respondent has not produced any notification published in official gazette indicating or pointing out any such authority. It is further required to be noted that even from the decision of such authority, the appeal is available to the State and the State is also entitled of its own motion from date of the order passed by the authority for calling it and examining it for its satisfaction. Therefore, plea of petitioner approaching this court without exhausting alternative statutory remedy, cannot be said to be well founded so as to merit further consideration. That apart, the decisions cited at bar on behalf of the petitioner for not relegating the petitioner to the alternative remedy in the aforesaid paragraph, are the authorities which go to support the contention of petitioner's counsel that when the matter is admitted and is pending in the Court and when it is taken up for final disposal, the petitioner cannot be non-suited on account of availability of alternative remedy. In the present case, this Court admitted the matter vide order dated 10.4.2013 and matter was taken up for hearing in the year 2014 and passage of time would dissuade this Court from relegating the petitioner to alternative remedy even had there been a remedy available. In the instant case, as it is pointed out hereinabove, respondents have failed in pointing out any authority who can go into the aspect, which is surely not the authority or respondent no. 1, as respondent no. 1 is Specified Authority who is to grant or refuse exemption certificate. The dispute, if any, is to be decided by the authority that may be appointed by the State. The State has not appointed any authority so far and therefore, the Court is not persuaded by the submission canvassed on behalf of respondent for relegating the petitioner to any alternative remedy even if there exists one, though there exists none. This brings the Court to consider the matter on merits.

20. The close reading of provisions and explanation in question, reproduced hereinabove, would clearly indicate that for claiming the benefits of exemption in electricity duty, "new industrial undertaking" should not have been formed by splitting up or the reconstruction of a business or undertaking already in existence in the State or should not have been formed by transfer to a new business or undertaking of a building, machinery or plant previously used in India for any industrial purpose, of such value in relation to total value of the aforesaid investments, as the State Government may, by notification in the Official Gazette, specify or should not be an expansion of the existing business or undertaking in the State. The petitioner has narrated following in the petition which are required to be set out verbatim in order to appreciate the contention of the petitioner.

Ground (B): From the record pertaining to the petitioner Company's Application dated 9.1.2008 seeking certificate of exemption from payment of electricity duty, the oral submissions made on 12.6.2012, the synopsis and written submissions

dated 10.3.2012 and the additional written submissions dated 29.6.2012, it is evident that the petitioner Company:

(a) is not formed by the splitting up or the reconstruction of a business or undertaking already in existence in the State or;

(b) is not formed by transfer-to a new business or undertaking-of a building, machinery or plant-previously used in India-for any industrial purpose, of such value in relation to total value of the aforesaid investments, as the State Government may, by notification in the official gazette specify.

The petitioner Company submits that the real issue therefore is whether the Petitioner Company "is" or "is not"- an expansion of the existing business or undertaking in the State. The Petitioner Company submits that it is in-fact not an expansion of the existing business or undertaking in the State and therefore, the Petitioner Company will be a "new industrial undertaking" and accordingly will be entitled to the Certificate (of exemption) under the Act.

Ground (C): The Petitioner Company submits that it has set up a new unit for the purpose of manufacturing a new product, viz., cotton hosiery yarn and knitting grey fabric. For the said new product, the Petitioner Company has :

- i. obtained a fresh financial term loan of Rs. 3360 lacs from State Bank of India.
- ii. acquired new high speed spinning machinery from Laxmi Machine Works Limited.
- iii. Imported Auto Covers and Knitting Machines. (ii & iii at cost of Rs. 1542.86 lacs)
- iv. got a new HT connection.
- v. constructed a new building at the cost of Rs. 495.73 lacs.
- vi. obtained a new central excise registration certificate.
- Vii sales tax certificate, etc.

The petitioner Company states that the building, plant and machinery, used for the old product viz. "synthetic blended yarn" are incapable of being used for the manufacture of the new product viz. "cotton hosiery yarn and knitting grey fabric." Similarly, the new building, plant and machinery used for the new product are incapable of being used for manufacture of the old product, viz. "synthetic blended yarn."

Ground (D): Expansion: The Petitioner Company "submits" that the term "expansion" would mean to become greater or bigger in size, to spread out. As per the New Shorter Oxford English Dictionary, the word (a thing) out,

- (i) spread or stretch (a thing) out,
- (ii) become extended, spread out, unfold,

(iii) give full expression to,

(iv) widen the boundaries of, increase the area, scope etc., of; enlarge , dilate,

(v) become greater in area, bulk, capacity etc; become larger; increase the scope of one's activity or the scale of operations of something.

The petitioner Company "submits" that every new creation in business is some kind of expansion and advancement. The true test is not whether the new industrial undertaking connotes expansion of existing business, but whether it is a new and identifiable undertaking, separate and distinct from the existing business. In order that the new undertaking can be said to be not formed out of the already existing business, there must be a new emergence of a physically separate industrial unit, which may exist on its own as a viable unit. The old unit and the new unit may function under the same name i.e. "Kores (India) Limited", but that is not relevant."

21. The aforesaid averments have remained uncontroverted as could be seen from the affidavit-in-reply, which is contending only general denial. The aforesaid averments which have remained uncontroverted would clearly go to show that said averments indicate that products, which have been discussed are different and new products have warranted installation of new machineries and machineries are not interchangeable. New product is requiring different kind of raw material and end result is also different. There is also an averment to the effect that the sizable investments is made for launching new products as submitted by the petitioner. All these aspects have not been appreciated by the respondent no. 1 for denying the benefits of exemption to the petitioner. The petitioner has categorically claimed that new unit had been set up after investing huge amount money. The factual aspect referred to in para 16 (v) to para 16(x) would clearly indicate the nature of new unit and the investment made for setting it up. The respondent No. 1 has unfortunately not adverted to this aspect at all.

22. The reasoning part of the order impugned has proceeded on the footing that the word "expansion plan" as occurred in balance sheet of the petitioner. The respondent no. 1 has extracted the same as could be read from page-25, which could be read as under :

" TEXTILE DIVISION:

During the year under review the division has fared well and the products of the division are well accepted by the corporate clients also. The division has taken up expansion plan which will be completed in the current year..... "

TEXTILE DIVISION

During Textile division began its operation during the year 1980 at Wankaner Nr. Rajkot (Gujarat) known as "Shri Amarsinhji Mills" converted from a composite textile mill into a spinning and weaving unit...."

Based upon these two, reference in the balance sheet and information incorporated therein, the authority has taken new product and unit, to be merely an expansion of the existing business. Now this is patently unwarranted and not justified as the plain reading of the provisions of exemption and expansion would clearly show that "new unit" if it is not formed by splitting up or the reconstruction of a business or undertaking already in existence in the State or should not have been formed by transfer to a new business or undertaking of a building, machinery or plant previously used in India for any industrial purpose, of such value in relation to total value of the aforesaid investments, as the State Government may, by notification in the Official Gazette, specify or should not be an expansion of the existing business or undertaking in the State. Now the purpose of giving exemption is to encourage more investments and resultant increase in employment and incidental benefits arising out of location and starting of new industry in Gujarat. The real test would have been as to whether the unit on account of its product, investment and usage of machinery and plant qualified itself for getting exemption from electricity duty. At this stage, this would be most advisable to refer to the observation of the Supreme Court in case of State of Gujarat Vs. Saurashtra Cement and Chemical Limited (supra). The relevant observations of Supreme Court decision deserve to be set out herein below in order to appreciate its applicability to present case.

"para-5 The learned counsel appearing for the appellant, State of Gujarat, laid emphasis on the relevant provisions of the statute particularly clause (ii) (c) of Explanation 1 and submitted that in view of the restrictive definition of a new industrial undertaking contained in the said provision, the respondent is not entitled to exemption from payment of electricity duty. The crucial question for consideration in this case is the meaning of the word "new industrial undertaking" contained in clause (b) of Section 3 (2) (vii). Only if a unit can be described as a new industrial undertaking, it will qualify for the exemption. According to sub-clause (ii)(c) of Explanation I an industrial undertaking should not be an expansion of the existing business or undertaking in the State in order to be entitled to the benefit of exemption from levy of electricity duty as a new industrial undertaking. Thus cases of expansion of existing units, irrespective of extent of expansion, will not qualify for being called a new industrial undertaking within the Act. As per facts emerging on record, the respondent is admittedly using its existing crushers, cranes, raw mills, packing machines and old cement mills to complete the process of manufacture of cement in the new unit. According to the learned counsel for the appellant when the existing plant and machinery are used in the process of manufacture of cement in the so called new industrial unit, it is nothing but a case of expansion of the existing business or undertaking. The expansion may be substantial but that would not make any difference. Once it is a case of expansion of existing unit, it will not be entitled to exemption from duty.

6. The learned counsel appearing for the respondent, however, argued that the use of existing plant and machinery in the new unit was only incidental and

actually it is a case of setting up of a new industrial undertaking which entitles the respondent to exemption from duty as envisaged under the Act. In support of his argument, the learned counsel for the respondent relied upon *Textile Machinery Corporation Limited, Calcutta Vs. The Commissioner of Income Tax, West Bengal*, . This was a case under the Income Tax Act. The assessee sought exemption under Section 15C of the Act on the ground that it was a newly established industrial undertaking. The statutory provision under the Income Tax Act is materially different from the one under consideration in the present case. The exception carved out for cases of expansion of existing business or undertaking in the State is not there in Section 15C of the Income Tax Act. In the context of Section 15C of the Income Tax Act, this Court in *Textiles Machinery Corporation Case* observed:

"That manufacture or production of articles yielding additional profit attributable to the new outlay of capital in a separate and distinct unit is the heart of the matter, to earn benefit from the exemption of tax liability under Section 15C."

7. Crucial question for consideration before us is whether it is a case of expansion of an existing unit? The case of expansion of an industrial undertaking would qualify for exemption under Section 15C of the Income Tax Act while in view of clause (ii)(c) of Explanation 1 contained in the *Bombay Electricity Duty Act, 1958*, an expansion of existing business undertaking would not qualify for exemption from electricity duty. Para 18 of the judgment in *Textile Machinery Corporation (supra)* throws considerable light on the controversy before us. Para 18 reads as below:

"18. The assessee continues to be the same for the purpose of assessment. It has its existing business already liable to tax. It produced in the two concerned undertakings commodities different from those which he has been manufacturing or producing in its existing business. Manufacture or production of articles yielding additional profit attributable to the new outlay of capital in a separate and distinct unit is the heart of the matter, to earn benefit from the exemption of tax liability under Section 15C. Sub-section (9) of the section also points to the same effect, namely, production of articles. The answer, in every particular case depends upon the peculiar facts and conditions of the new industrial undertaking on account of which the assessee claims exemption under Section 15C. No hard and fast rule can be laid down. Trade and industry do not run in earmarked channels and particularly so in view of manifold scientific and technological developments. There is great scope for expansion of trade and industry. The fact that an assessee by establishment of a new industrial undertaking expands his existing business, which he certainly does, would not, on that score, deprive him of the benefit under Section 15C. Every new creation in business is some kind of expansion and advancement. The true test is not whether the new industrial undertaking connotes expansion of the existing business of the assessee but whether it is all the same a new and identifiable undertaking separate and distinct from the existing business. No particular decision in one case can lay

down an inexorable test to determine whether a given case comes under Section 15C or not. In order that the new undertaking can be said to be not formed out of the already existing business, there must be a new emergence of a physically separate industrial unit which may exist on its own as a viable unit. An undertaking is formed out of the existing business if the physical identity with the old unit is preserved. This has not happened here in the case of the two undertakings which are separate and distinct."

8. It will be seen from the facts on record in the present case that the so called new unit/undertaking is not totally independent of the assets of the existing unit. Admittedly certain assets, to which reference has already been made, are being utilized in the manufacturing activity carried on by the new unit. It cannot be said that the new unit is completely independent or that the new unit could do without the assets of the existing unit. If use of the old plant and machinery etc., was necessary to complete the manufacturing process in the new unit, the new unit is not totally independent nor it is able to complete the process of manufacture of cement on its own as a viable unit. The new unit is dependent on the existing assets. A physical identity with the old unit is preserved. In view of the exception carved out in the definition of a new industrial unit contained in the Act, it cannot be said that the respondent is entitled to exemption from electricity duty.

9. To appreciate the exception contained in Explanation 1 to clause (ii)(c) of Section 3(2) (vii) (b), it is necessary to understand the meaning of the word "expansion". The word "expansion" is a noun derived from the word "expand", which is a verb. The word "expand" means "to become greater or bigger in size, to spread out. As per the New Shorter Oxford English Dictionary, the word "expand" means 1. v.t. "spread or stretch (a thing) out 2. Become extended; spread out, unfold. 3. v.t. Give full expression to 4. v.t. Widen the boundaries of, increase the area, scope etc., of; enlarge, dilate 5. v.i. Become greater in area, bulk, capacity etc; become larger; increase the scope of one's activity or the scale of operations of something; take in or go into a new area of activity.

10. This meaning is to be applied to the facts on record. The respondent company when it initially started had a production capacity of 660 metric tonnes which was subsequently increased to 1000 metric tonnes. In 1969-70 by setting up the alleged new unit, production capacity of the company more than doubled. But as already seen this unit is not self contained. It is not an independently viable unit. It is dependent on various items of plant and machinery and mills of the existing unit. Further respondent was having two kilns and third is added. This leads to the inevitable conclusion that the new unit is an expansion of an existing undertaking in the State. Once it is held to be a case of expansion, the claim for exemption from electricity duty, set up by the respondent, completely falls to the ground. In the facts and circumstances of the case we are clearly of the view that the respondent is not entitled to exemption from electricity duty. The High Court failed to apply the real test which emerges from the judgment of

this Court in Textile Machinery Corporation (supra) which was affirmed in a subsequent decision in Bajaj Tempo Ltd., Bombay Vs. Commissioner of Income Tax, Bombay City-II, Bombay, . Accordingly, this appeal is allowed. The judgment of the High Court under appeal is set aside. The respondent is held not entitled to exemption from electricity duty."

23. Thus, even the Supreme Court has elaborately discussed the meaning of word "expansion" and its all derivatives. The observation of the Supreme Court in para-10 would indicate those were the reasons for not treating the respondent to be eligible for benefits. As it was in that case capacity was increased, whereas, in the instant case on hand, it is absolutely uncontroverted that company had started altogether new product and when there is a new product, which is requiring the new machinery and which is requiring new premises, and old machinery is not put to use nor is the raw material is put to use. It cannot be said that it is the expansion of earlier product or business. The diversification in production activities requiring new technology, new method and new plant and machinery, new set up cannot denied benefit of exemption in duty only on the ground that the same is merely expansion of the original company. In fact what is to be looked into is whether the new unit meets with the criteria for " new industrial under taking" and if its meet than the certificate of exemption is to be granted to such unit irrespective of the fact that the owner had been producing some other product in State of Gujarat.

24. The "expansion" word occurring in the provision could be understood in terms of increase in capacity or slight modification in the product which may enhance the product's sale ability but that in itself cannot be classified to be diversification so as to give different colour to the undertaking and make it eligible for exemption in electricity duty. As against this, if the same business or organization is venturing into production of new product with different capacity and different machinery with different raw material and input, then, though the Company and organization has been producing another product in the State of Gujarat would in itself not considered as disqualifying factor for the new unit which is based upon new technology for altogether a new product warranting fresh investment, new machinery and plants and technical know how. It is also relevant to note that if the Unit is changing its technology for better result of the same product than in that case such change and investment might not be eligible for duty exemption. The petitioner had in fact established it case for seeking exemption before the respondent no. 1 as its contention referred to in para 16 (v) to 16(x) have not been adverted to at all by the respondent no. 1. in its order dated 8.11.2012 impugned in this petition.

25. The decision cited at bar of this Court in case of Shakti Bio Science Vs Assessment Officer (Supra) would help the case of the petitioner. This Court has in a similar situation, held that the petitioner therein were granted seeking benefits of exemption. The present case is also in my view is one of diversification and respondent has misdirected itself in denying the benefits of

exemption wrongfully.

26. For the aforesaid reasons, the petition succeeds. The order impugned dated 8.11.2012 passed by the respondent no. 1 herein is hereby quashed and set aside. The respondent No. 1 is directed to reconsider the application of the petitioner presented on 9.01.2008 in the light of the above observations and if the new cotton hosiery yarn and knitting grey fabric unit of petitioner is otherwise eligible, it shall not be denied exemption certificate and consequential benefit of the exemption in electricity duty from the appropriate date as if the application was never rejected. The exemption certificate cannot be denied to the petitioner for its new unit of cotton hosiery yarn and knitting grey fabric only on the ground that the petitioner company was already in the business of manufacturing blended synthetic yarn and finished product as the petitioner has already established before this court also that the new product i.e., cotton hosiery yarn and knitting grey fabric is not an expansion of existing product at all. The rule is made absolute to the aforesaid extent. No costs.