

(2013) 08 GUJ CK 0052

In the Gujarat High Court

Case No : Special Civil Application No. 15788 of 2010, Civil Application No. 7772 of 2012 in Spl. C.A. No. 15788 of 2010 and Spl. C.A. No. 6162 of 2011, Civil Appli. No. 7641 of 2012 in Spl. C.A. No. 6162 of 2011

Shakti Bio Science Ltd. and Another

APPELLANT

Vs

Assessment Officer, Gandhinagar and Others

RESPONDENT

Date of Decision : 08-08-2013

Acts Referred:

Citation : (2014) 1 GLR 545

Hon'ble Judges : Rajesh H. Shukla, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Rajesh H. Shukla, J.—Special Civil Application No. 6162 of 2011 has been filed by the petitioner-Jindal Saw Ltd. under Art. 226 of the Constitution of India as well as under the provisions of the Bombay Electricity Duty Act, 1958 for quashing and setting aside the order passed by the Collector of Electricity Duty, Gandhinagar dated 7-9-2010 on the grounds stated in the petition. Special Civil Application No. 15788 of 2010 has been filed by the petitioner-Shakti Bio Science Ltd. under Art. 226 of the Constitution of India as well as under the provisions of the Bombay Electricity Duty Act, 1958 for quashing and setting aside the order passed by the Collector of Electricity Duty, Gandhinagar dated 21-8-2010 on the grounds stated in the petition.

2. Heard learned Senior Counsel, Shri K.S. Nanavati appearing for Nanavati Associates for the petitioner, learned A.G.P. Shri Bharat Vyas for the respondent Nos. 1 to 3 and learned Senior Counsel, Shri R.J. Oza for the respondent No. 3 in Special Civil Application No. 6162 of 2011 as well as learned Counsel, Shri Kunal Nanavati appearing for Nanavati Associates for the petitioner, learned A.G.P. Shri Bharat Vyas for the respondent Nos. 1 to 3 and learned Senior Counsel, Shri R.J. Oza for the respondent No. 3 in Special Civil Application No. 15788 of 2010.

3. Facts of Special Civil Application No. 6162 of 2011 briefly summarized are that

the petitioner is one of the Steel Pipe Manufacturing Public Limited Companies. The petitioner established a new industrial undertaking as stated in the petition for carrying out coating of pipes by use of the material and State of Art Technology. It is, therefore, the case, of the petitioner that new industrial undertaking is completely self-contained and independent unit. It is also stated that new industrial undertaking was not (i) formed by the splitting up or the reconstruction of a business or undertaking already in existence in the State; (ii) formed by transfer to a new business or undertaking of a building, machinery or plant previously used in India for any industrial purpose and, (iii) an expansion of the existing business or undertaking in the State. It is stated that new industrial unit has been set up with a new unit with new building and plant involving huge expenditure and it has already been registered under the Factories Act. Therefore, when the petitioner made an application dated 6-3-2007 for electricity duty exemption, same has been refused by the respondent No. 2 by impugned order dated 7-9-2010 on the ground that the petitioner-company was manufacturer in State of Gujarat prior to 17-9-2006 under Sec. 3(2)(vii) of the Bombay Electricity Duty Act, 1958 (hereinafter referred to as "the Duty Act") and is not entitled to claim electricity duty exemption as a new industrial undertaking.

Special Civil Application No. 6162 of 2011:

4. Learned Senior Counsel, Shri K.S. Nanavati referred to the background of the facts and the contentions mainly touching the aspect of new industrial undertaking as per the provisions of the Sec. 3(2)(vii)(b) of the Duty Act. He submitted that therefore the Court is required to consider that the petitioner-Company, which is having many other group of companies and has set up new industrial undertaking, would be entitled to claim benefit or not. Learned Senior Counsel, Shri Nanavati submitted that merely because the company is having other companies in the group would not disentitle it from claiming benefit though the unit set up is fulfilling the necessary requirement/criteria of a new industrial undertaking. Learned Senior Counsel, Shri Nanavati also submitted that new industrial undertaking, which has been set up as stated above has to undertake the coating of the pipe for State of Art Technology using the advance technology and the unit has been registered under the Factories Act. Learned Senior Counsel, Shri Nanavati submitted that new industrial undertaking is situated on a separate land with an independent plant and machinery as well as building and raw-material used by the new industrial undertaking is different from other companies under the group. Therefore, the rejection of the application for exemption on the ground mentioned in the order that the petitioner-company was the manufacturer in the State of Gujarat prior to 17-9-2006, and therefore, is not entitled, is required to be considered. Learned Senior Counsel, Shri Nanavati submitted that whether new industrial undertaking or unit set up is falling in the criteria of a new industrial undertaking or not has to be considered with reference to the provisions of the Duty Act. He emphasized and submitted that the authorities were required to consider whether it was an existing unit or it was a newly established undertaking may be under one umbrella of group of

companies. Learned Senior Counsel, Shri Nanavati submitted that merely because it would come under the umbrella of group of companies would not mean that it is not a new industrial undertaking. For that purpose, definition and criteria of a "new industrial undertaking" is required to be considered. Learned Senior Counsel, Shri Nanavati therefore, submitted that unit which has been established is totally an independent unit with different labour force as well as registration under the Factories Act and other laws. Learned Senior Counsel, Shri Nanavati referred to Annexure-D at page No. 22 to give an idea about the new industrial undertaking and submitted that there are different units but they are all independent units or the undertakings. He also referred to the affidavit-in-reply of the respondent No. 2 and submitted that it is sought to be contended that it is not "new industrial undertaking" in view of the explanation given in Sec. 3(2)(vii) of the Duty Act. Learned Senior Counsel, Shri Nanavati referred to Sec. 3(2)(vii) and submitted that said Section defines industrial undertaking and it has made clear that it does not include the service undertaking. Learned Senior Counsel, Shri Nanavati also referred to Sec. 3(2)(ee), which defines "service undertaking". He referred to the affidavit of the respondent No. 2 and submitted that it has been contended that the petitioner is having five units at different location, and therefore, new unit at a different location is for expansion of its existing undertaking in the State. Learned Senior Counsel, Shri Nanavati submitted that there is misconception with regard to very basic idea about the expansion and diversity. He further submitted that now a days one group of companies may have a business or manufacturing of variety of items by different company or the units under the same umbrella of group. He however submitted that each company or unit would have a separate identity and it would be a separate self-contained unit by itself, and therefore, truly speaking, it is not an expansion. He emphasised that term "expansion" would convey when there is increase in the capacity of same item or manufacturing of same item or the goods or capacity is enhanced with some difference in the quality of same product. He submitted that in the facts of the present case, it is not so, and therefore, view of the authority is contrary to later and spirit of the statute and it reflects non-application of mind.

5. Learned Senior Counsel, Shri Nanavati also submitted that there is breach of principles of natural justice inasmuch as the opportunity has not been given. He emphasised that had the opportunity of hearing been given, the petitioner would have been able to clear doubts and explain with relevant facts. He therefore submitted that the present petition may be allowed.

6. In support of his submission, learned Counsel, Shri Nanavati has also referred to and relied upon the judgment of the High Court in case of Maruti Textiles Vs. State of Gujarat, and submitted that as observed, the underlying object is not only to attract more industries, but also to encourage such industries in making fresh investments in the State. Therefore, such interpretation would be contrary to the statutory provisions. Learned Senior Counsel, Shri Nanavati has also referred to and relied upon the judgment of the Hon'ble Apex Court in case of

State of Gujarat and Others Vs. Saurashtra Cement and Chemical Industries Ltd., , and emphasized that it was also case with regard to the exemption from the electricity duty and same issue was addressed. However, learned Senior Counsel, Shri Nanavati has emphasised the observation, which reads as under:

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 Sec. 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.

7. Therefore, learned Senior Counsel, Shri Nanavati submitted that test is whether it is a self-contained separate unit or merely an expansion of existing industrial unit. Learned Senior Counsel, Shri Nanavati submitted that if it is physically a separate industrial unit which has come on its own as a viable unit at different place and different plant machinery and also different product with separate registration under the Factories Act as well as other provisions of law, it would be a new industrial undertaking. Therefore, learned Senior Counsel, Shri Nanavati submitted that reliance placed on this judgment by other side referring to the observation made with regard to the expansion would not be applicable to the facts of the case. He therefore submitted that it cannot be said to be an expansion of existing industrial undertaking.

8. Learned Senior Counsel, Shri Nanavati submitted that the decision which is taken without providing an opportunity of hearing of involving consequence would violate the rules of natural justice. He submitted that even if there is no express provision, it could be read into it and had the opportunity been given, it could have been explained. He has also referred to the judgment of the Hon''ble Apex Court in case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, .

9. Learned Senior Counsel, Shri Nanavati referred to and relied upon the judgment of the Division Bench of this High Court in case of Gujarat Alkalies & Chemicals Ltd. v. Commissioner of Income Tax, rendered in Income Tax Reference No. 141 of 1991 and submitted that there also, issued for the purpose of Income Tax Act with regard to the new industrial undertaking had come up and the observations have been made by the Division Bench of the High Court. He emphasized that if new industrial undertaking has separate and distinct identity merely because to certain extent, new industrial undertaking is dependent on the existing unit and it will not deprive separate and distinct identity. Therefore, learned Senior Counsel, Shri Nanavati submitted that the present petition may be allowed.

10. Per contra, learned A.G.P. Shri Vyas has referred to the affidavit-in-reply and submitted that as stated in the impugned order, the petitioner-Company was already manufacturer in State of Gujarat, and therefore, cannot claim benefit of new industrial undertaking. He further submitted that establishment of a new unit at the most could be an expansion of the business, and therefore, it would not entitle to claim the benefit. Learned A.G.P. Shri Vyas referred to the provisions of Sec. 3(2)(bb) of the Duty Act, which defines industrial undertaking and submitted that the petitioner-Company as stated above was already having the manufacturing activity in the year 2006, it cannot be said to be a new undertaking. Learned A.G.P. Shri Vyas has referred to and relied upon the judgment of the Hon"ble Apex Court in case of Saurashtra Cement and Chemical Industries Ltd. (supra) and submitted that it was with regard to the claim for exemption under the Duty Act and as observed in the said judgment, a new machinery or a new unit for increase production or for expansion would not make it eligible for any such exemption. Learned A.G.P. Shri Vyas emphasized the observation made in Para. No. 9 of the said judgment as under:

To appreciate the exception contained in Explanation 1 to clause (ii) of Sec. 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.....

11. Learned A.G.P. Shri Vyas therefore submitted that the petitioner would not be covered in the definition/criteria of a new industrial undertaking as provided under Sec. 3(2)(vii)(bb) of the Duty Act. He also referred to and relied upon the judgment of the High Court in a judgment in case of Essar Steel Limited v. State of Gujarat, delivered in Special Civil Application No. 10946 of 2009 dated 25-2-2010 (reported in 2010 (2) GLR 1263) and submitted that similar issue was considered and that petition was not entertained for the benefit under the Duty Act. Learned A.G.P. Shri Vyas also referred to the Government Notification for amendment in the Act by Gujarat Act No. 8 of 2003, by which, the Gujarat Electricity Duty Act, 1958 has been amended. He emphasised and submitted that word "additional plant" has been added. He therefore referred to the Bombay Electricity Duty (Gujarat) Rules, 1986 and submitted that as provided in the Act as well as Rules, the applicant is required to make an application in the manner provided therein for the exemption and procedure is provided. He submitted that the petitioner has not made any application as provided and still an alternative remedy is available, therefore, the present petition would not be maintainable. For that purpose, he referred to Bombay Electricity Duty Act, 1958, Part-II and emphasised that it has been clearly provided in Schedule-I, Part-II that whether an undertaking is an industrial undertaking or new industrial undertaking or a service undertaking and when dispute arises, it shall be referred to the decision by such authority as the State Government by Notification in the Official Gazette specified. He further submitted that the decision of such authority will be subject to further Appeal or Revision by the State Government. He therefore submitted

that the present petition may not be entertained.

12. Learned Senior Counsel, Shri Nanavati submitted that since the matter has been admitted, alternative remedy would not be a bar for maintainability of the petition under Art. 226 of the Constitution of India. In support of this submission, he has referred to and relied upon the judgment of the Hon''ble Apex Court in case of Satwati Deswal Vs. State of Haryana and Others, and submitted that as observed in this judgment, even though there may be an alternative remedy, it is not necessary that it has to be exhausted when there are circumstances like violation of fundamental rights, violation of rules of natural justice or whether the order is without jurisdiction. He has also referred to and relied upon the judgment of the Hon''ble Apex Court in case of Gurmej Singh Vs. State of Punjab and Another, and emphasized the observations made in Para. Nos. 7, 12, 14 and 15. Therefore, learned Senior Counsel, Shri K.S. Nanavati submitted that the present petition may be allowed for the purpose of benefit of exemption from the electricity duty as new industrial undertaking.

Special Civil Application No. 15788 of 2010:

13. Learned Counsel, Shri Kunal Nanavati submitted that the application with regard to the claim for exemption from the electricity duty under Sec. 3(2)(vii) of the Duty Act as a new industrial undertaking has been turned down by the respondent, which has led to filing of the present petition. However he submitted he would adopt the submissions made by learned Senior Counsel, Shri K.S. Nanavati appearing in Special Civil Application No. 6162 of 2011 as referred to hereinabove. However, he pointedly referred to the facts of the case and submitted that exemption is denied on the ground that it is not a new industrial undertaking. He emphasized that meaning of "a new industrial undertaking" defined in the Duty Act in its proper perspective. Therefore, he submitted that the petitioner-company is engaged in manufacturing of Pharma products from December, 2006 and on 6-12-2008, the petitioner has purchased the land and the unit has been established with new plant and machinery as well as building for the manufacturing of Pharma product. He, therefore, submitted that it would be a new industrial undertaking. However, when the application was made by the petitioner for the exemption from the electricity duty vide letter dated 20-12-2007, it has been turned down by impugned order dated 21-8-2010. He submitted that the petitioner-Company is not using any infrastructure plant machinery of the old unit except land and there is totally a new unit which has come up with different products with new machinery, and therefore, benefit could not have been denied. Learned Counsel, Shri Nanavati has referred to and relied upon the judgment in case of Saurashtra Cement and Chemical Industries Ltd. Vs. State of Gujarat and Others, and submitted that the character of a new unit is required to be seen and considered. Learned Counsel, Shri Nanavati has referred to the papers and also the affidavit filed by the respondent and submitted that it has been rejected on the ground that the petitioner was already producing the goods in the State of Gujarat at the same place before

16-12-2006, and therefore, is not entitled and eligible as "new industrial undertaking" as per Sec. 3(2)(vii) of the Duty Act. Learned Counsel, Shri Nanavati has stated that in fact, it is a diversification and not expansion which has been explained and clarified. He submitted that Form-F produced by the petitioner has been relied upon and it has been stated in the affidavit that it is diversification of the old unit. Learned Counsel, Shri Nanavati therefore submitted that there is misconception with regard to the test to be applied for the purpose of determining as a "new industrial undertaking".

14. Learned A.G.P. Shri Vyas has referred to the affidavit-in-reply and submitted that in the Form-F produced by the petitioner, it has been mentioned by the petitioner about the diversification, and therefore, the petitioner-undertaking has expanded its manufacturing existing business, and therefore, is not eligible to claim benefit. He also referred to the affidavit of one M.K. Meena, Deputy Commissioner of Central Excise and Customs and submitted that he has also stated that the classification of the product is the same under the Central Excise Act.

15. In rejoinder, learned Counsel, Shri Nanavati referred to the affidavit filed by M.K. Meena, Deputy Commissioner of Central Excise and Customs and submitted that a close look at the affidavit would clearly show that he has also stated that various products are referred and he has stated that products at Sr. No. 1 were manufactured by M/s. Shakti Organics (P), and thereafter, M/s. Shakti Bio Science Ltd. are identical and similar products and its classifications are also same as per the provisions of the Central Excise Act. He emphasized that it has already been stated "Further, it is to report that in addition to above said products, M/s. Shakti Bio-Science Ltd., have manufactured some other products mentioned at Sr. Nos. (vii) to (xvii) above during the period mentioned in Remarks column".

16. He, therefore, submitted that new products are also manufactured and as it is a claim about diversification and not an expansion, it would suggest that the company has diversified from its line of product, and therefore, it cannot be termed as expansion.

17. In view of these rival submissions, it is required to be considered whether the claim of the petitioner in respect of new established undertaking as a new industrial undertaking is justified or not.

Special Civil Application No. 6162 of 2011:

18. As provided in the statute, Sec. 3(2)(vii) of the Duty Act provides in a negative covenant that such industrial unit, which is not formed by splitting up or is not formed by transfer of business or undertaking or is not an expansion of existing business or undertaking, would be a new industrial undertaking. In the facts of the case, the claim for the industrial unit by the petitioner does not fall in any of the category. Further, the industrial unit of the petitioner is established on a separate land with separate plant machinery and is self-contained independent

unit. Further, it has been registered under the Factories Act and other laws, meaning thereby, it is a separate unit. Therefore, as could be seen from the impugned order, there is no issue with regard to the set up of a new unit by the petitioner, however, it has been claimed that the petitioner-Company is manufacturing since 2006 in Gujarat and claim for exemption of electricity duty for the new separate unit cannot be entertained. As rightly submitted by learned Senior Counsel, Shri Nanavati that for the purpose of exemption under the electricity duty, what is required to be considered is whether the unit is qualifying as a "new industrial unit" as per the criteria fixed by law or not. As stated above, since, it is not formed by any of the modes as stated hereinabove, it is a separate new industrial undertaking. However as stated in the affidavit-in-reply by the respondent No. 2 that the petitioner is having five units at different location and he has also stated "it is very clear that the petitioner undertaking has set up new unit but it has been sought to be termed as an expansion". Therefore, the focus is on the expansion of the existing undertaking. At the same time, it has been accepted that it is a new unit but it has been sought to be termed as expansion of the existing undertaking. Again the Hon''ble Apex Court in a judgment in case of Saurashtra Cement and Chemical Industries Ltd. (supra) while referring to the same issue of exemption from duty to new industrial undertaking has addressed this issue. Learned Senior Counsel, Shri Nanavati has pointedly referred to the test, which could be applied referring to the observations where learned A.G.P. has referred to the aspect of expansion, which has already been discussed. However, the conclusion part is required to be considered inasmuch as it has been found in a given case that it was not a self-contained unit as independent viable unit and depending on various items and plant machinery etc. of the existing unit. Further, there was enhancement of the capacity, and therefore, the finding was given that it was an expansion. In the facts of the case, it is not so as it is not an enhancement of the capacity of the coating, but it is a different item i.e. the pipes are coated with process, which would amount to manufacturing process and therefore unit is an independent unit. Therefore, while considering new industrial undertaking, what is required to be considered is manufacturing process and the product as to whether it is a new industrial undertaking or not. Therefore, the observations made by the Hon''ble Apex Court in a judgment in case of Saurashtra Cement and Chemical Industries Ltd. (supra) as to the true test that whether a new and identifiable undertaking separate and distinct from the existing business has been formed or not is required to be considered. The Hon''ble Apex Court has also referring to earlier judgment in case of Bajaj Tempo Ltd., Bombay Vs. Commissioner of Income Tax, Bombay City-II, Bombay, made observation though it was with reference to the provisions of the Income Tax Act that:

a provision in a taxing statute granting incentives for promoting growth and development should be construed liberally; and since a provision for promoting economic growth has to be interpreted liberally, the restriction on it too has to be construed so as to advance the objective of the provision and not to frustrate

it. it becomes necessary to resort to a construction which is reasonable and purposive to make the provision meaningful.

19. Therefore, as such provisions of granting exemption is intended to give boost to the industrial growth and such exemption is one of the measures for attracting the industrial units to be set up, the denial of such benefit on such a ground that the company (meaning by group) has started manufacturing earlier, and therefore, in other company or unit set up by it newly would not be entitled is contrary to what has been provided in the statute like the Duty Act. A useful reference can also be made to the observations made by the Division Bench of this Court in Tax Reference No. 141 of 1991 dated 12-3-2012 (Gujarat Alkalies Chemicals Ltd. v. Commr, of Income Tax) wherein though the discussion is with reference to the provisions of Sec. 50(1) of the Income Tax Act and it has been observed that:

The new undertaking must not be substantially the same old business. Substantial investment of new capital is imperative and in the present case, there has been a huge substantial investment of around Rs. 7 crore almost three decades ago.The true test is not whether the new industrial undertaking connotes expansion of the existing business of the assessee but whether it is a new identifiable endeavor where substantial investment of fresh capital is made to enable earning of profit attributable to that new capital.

20. In the facts of the present case, on the contrary there is a totally separate independent unit established, for which, claim is made as new undertaking, which is declined as stated above on the ground which cannot be sustained.

21. Another facet of submission made by learned A.G.P. Shri Vyas about the alternative remedy is misconceived in view of clear provision and observation made by the Hon"ble Apex Court including the judgment in case of Gurmej Singh (supra).

Special Civil Application No. 15788 of 2010:

22. As it appears, by considering new industrial undertaking for the purpose of exemption under the Duty Act as provided in Sec. 3(2)(bb), the unit has been established separately with new plant machinery for a different product or chain of products. Therefore, moot question which is required to be considered, is whether it could be termed as a "new industrial undertaking" with diversification of business for manufacturing of other items or it is merely an expansion of business for enhancement of the capacity or the quality of the product, which was already manufactured. The answer has to be that it cannot be termed as an expansion inasmuch as the word expansion as referred to in the judgment in case of Saurashtra Cement and Chemical Industries Ltd. (supra) (Para. No. 9), would mean that enhancement of the capacity or adding of capacity of volume. In the facts of the present case, there are new products which are sought to be manufactured. The word expansion and diversification have a separate and distinct connotation for the purpose of manufacturing or product. Therefore,

merely because the petitioner-company was already in the business having a factory on the same land by itself would not be sufficient to deny the benefit of exemption when a new machinery and plant has been set up for a different products along with the same products, which were already manufacture, it is not an expansion, but it could be a diversification under the Duty Act for the duty. Therefore, the impugned decision/order of the respondent authority cannot be sustained and deserves to be quashed and set aside.

23. Therefore, as both petitions deserve to be allowed on merits without any further elaboration on this aspect of alternative remedy and on the aspect of rules of natural justice, detailed deliberation is not required. Therefore, both petitions deserve to be allowed. Therefore, following order is passed.

24. In the circumstances, Special Civil Application No. 6162 of 2011 stands allowed in terms of Para. No. 8(A). The impugned order dated 7-9-2010 passed by the respondent No. 2 refusing the application of the petitioner dated 6-3-2007 is hereby quashed and set aside. The petitioner-Jindal Saw Ltd. would be eligible for the claim of exemption under the Duty Act as new industrial unit. Rule is made absolute. In the circumstances, Special Civil Application No. 15788 of 2010 stands allowed in terms of Para. No. 15(A). The impugned order dated 21-8-2010 passed by the Assessment Officer, Gandhinagar is hereby quashed and set aside. The petitioner No. 1 - M/s. Shakti Bio Science Limited would be eligible for the claim of exemption under the Duty Act as new industrial unit. Rule is made absolute.