(2012) 02 RAJ CK 0113

In the Rajasthan High Court

Case No : Special Appeal (W) No. 1719 of 2011

State (Finance) and Others APPELLANT

Vs

Shree Cement Limited and Others RESPONDENT

Date of Decision : 08-02-2012

Acts Referred:

Citation : (2012) 49 VST 547

Hon'ble Judges : Kailash Chandra Joshi, J;Dinesh Maheshwari, J

Bench : Division Bench

Advocate : G.S. Bafna, AG and with V.K. Mathur and Lokesh Mathur, for the Appellant; S. Ganesh with U.A. Rana and Ramit Mehta, for the Respondent

Judgement

1. We have heard the Learned Counsel for the parties at length on the prayer for interim relief and have perused the material placed on record. This order being related only to the prayer for interim relief, we do not propose to dilate much on the factual and legal aspects involved in the matter. Suffice it shall be to take note of, in brief, the relevant background aspects.

2. This appeal is directed against the order dated October 11, 2011 (Shree Cement Ltd. v. State of Rajasthan (2012) 49 VST 483 (Raj)) as passed in CWP No. 4790 of 2009 whereby the learned single judge of this Court has allowed the writ petition filed by respondents Nos. 1 and 2 and upheld the claim made by the writ petitioner-company, for grant of increased subsidy at 75 per cent of the additional tax liability, instead of 50 per cent as allowed earlier.

3. The matter relates to Rajasthan Investment Promotion Scheme, 2003 ("the Scheme "/" the Scheme of 2003") as introduced on July 28, 2003. Clause 7 of the Scheme provides for capital investment subsidy that has been bifurcated into different components like interest component subsidy and wage component subsidy. Such subsidy was allowable maximum to the extent of 50 per cent of the tax payable and deposited under the Rajasthan Sales Tax Act, 1994, the Central Sales Tax Act, 1956 and the Value Added Tax Act, 2003 (when it came

into force in the State of Rajasthan with effect from April 1, 2006). The Scheme of 2003 was amended on December 2, 2005 and sub-clauses (vi) and (vii) were introduced to the said clause 7 providing, inter alia, for additional upfront subsidy to the extent of 45 per cent based on actual tax payable and deposited; and the maximum limit was increased to 75 per cent. The petitioner-company made separate applications for such subsidy in respect of two units one at Ras, Tehsil Jaitaran, District Pali and another at village Kushkhera, Tehsil Bhiwadi, District Alwar on different dates. On July 29, 2006, the State Level Screening Committee ("SLSC") issued entitlement certificate in respect of the petitioner-company''s unit at village Ras, Tehsil Jaitaran, District Pali; and the decision included grant of subsidy under the notification dated December 2, 2005. In pursuance of the said decision, the Industries Department issued certificate to the petitioner-company. Then, on June 27, 2007, in the meeting of SLSC, the writ petitioner-company was further found entitled for subsidy in respect of 2nd expansion of Ras unit and Kushkhera unit.

4. However, certain events took place in the month of April, 2006, namely, that the VAT Act, 2003 came into force in the State of Rajasthan with effect from April 1, 2006 and from this date, the rate of VAT on cement came to be reduced from 28 per cent to 12.5 per cent. Then, an amendment was introduced in the said Scheme of 2003 on April 28, 2006 seeking to delete the sub-clauses inserted by the notification dated December 2, 2005. A clarification came to be issued by the Finance Department of Government of Rajasthan on May 22, 2008 to the effect that no benefit of amendment dated December 2, 2005 could be granted in respect of the cases where benefit was granted by the SLSC after April 27, 2006.

5. After the events aforesaid, the Commissioner, Commercial Taxes, submitted two revision petitions before the State Government under clause 13 of the Scheme of 2003 for withdrawal of two orders of the SLSC issuing entitlement certificates to the petitioner-company. The said two revision petitions were accepted by the State Government on March 31, 2009 and while quashing the earlier decisions, the SLSC was directed to consider the matter afresh. Aggrieved of the said order dated March 31, 2009 and other orders/notifications operating to its prejudice, the petitioner-company preferred the writ petition wherefrom has arisen this intra-court appeal.

6. Shorn of other details, suffice is to notice for the present purpose chat the learned single judge agreed with the contentions urged on behalf of the writ petitioners; and held that the petitioner-company had satisfied all the conditions for binding the State for grant of increased subsidy at 75 per cent. The learned single judge, inter alia, said (page 545 in 49 VST),-

49. Consequently, this Court is of the firm and clear opinion that the petitioner-company satisfied all the conditions for binding down the respondent-State by the assurance and promise of increased subsidy of 75 per cent of additional tax liability for entire period of seven years especially in view of the fact that SLSC after being duly aware of the withdrawal of notification dated April 28, 2006

granted such benefit and even the entitlement certificates issued for a period of seven years for availing of subsidy at the increased rate of 75 per cent. Therefore, the question is whether the withdrawal notification dated April 28, 2006 can be applied to the petitioner-company giving it virtually retrospective effect and whether the purported clarification issued after 21/2 years of the withdrawal notification dated April 28, 2006 on May 22, 2008 can really shut up the increased subsidy of 75 per cent for the petitioner-company. The answer has to be in clear negative.

7. The learned single judge, accordingly, issued the writ in the following manner (page 547 in 49 VST) :

51. Therefore, on an analysis of factual matrix and legal position, this Court is of the opinion that the present writ petition deserves to be allowed accepting the various contentions raised on behalf of the petitioner which merit such acceptance and the same is hereby allowed and the impugned order of the Principal Secretary, Finance Department, dated March 31, 2009 is liable to be quashed and the same is hereby quashed and it is directed that the petitioner-company would continue to be given increased rebate/subsidy of 75 per cent of the additional tax liability under the notification dated December 2, 2005, for a period of seven years in pursuance of entitlement certificates already issued in its favour for both the units at Ras, Pali and at Bhiwadi, Alwar and withdrawal notification dated April 28, 2006 and clarification dated May 22, 2008 would not come in way of the petitioner-company in getting such increased rebate/subsidy. The respondents shall release the arrears of such subsidy and allow set-off thereof against additional tax liability within a period of one month from today failing which the petitioner-company would be entitled to interest also thereon at nine per cent per annum. Cost are however made easy.

8. Aggrieved by the order aforesaid, the respondents of the writ petition have filed this intra-court appeal on various grounds. After hearing the Learned Counsel for the parties, we found issues arising for consideration and hence, admitted the appeal on January 6, 2012.

9. While making the prayer for interim relief, it was pointed out by the learned Advocate-General on behalf of the appellant-State that irrespective of the present controversy, so far the undisputed amount of arrears of subsidy to the tune of Rs. 116.79 crores was concerned, the same had been released in favour of the petitioner-company as referred in the documents placed on record as annexure A1 with the additional affidavit dated December 20, 2011. The Learned Counsel appearing for the contesting respondents, though did not dispute issuance of such orders (annexure A/ 1), but submitted that the methodology sought to be adopted by the State, of merely making book entries in relation to the aforesaid amount, which was indisputably payable to the petitioner-company but withheld since the month of May 2008, would be unfair and harsh to the company who may not be able to avail of the amount of arrears of subsidy and its availability would be spread over for a long period, practically putting at

naught the advantage available to the petitioner.

10. However, on the queries of the court regarding the methods of accounting and payment, the Learned Counsel for the parties submitted that they shall be placing on record the relevant submissions with necessary, documents to make the position clear. The Learned Counsel for the parties have filed the necessary submissions and were heard further in the matter yesterday, i.e., February 7, 2012.

11. The learned Advocate-General appearing for the appellant-State submitted that the dispute herein is essentially in relation to the direction as issued by the learned single judge for granting subsidy at 75 per cent and otherwise, there is no dispute or lis about the 50 per cent component of subsidy for which, the necessary orders regarding arrears have already been issued (annexure A/1). The learned Advocate-General submitted that the order as passed by the learned single judge entails huge additional liability on the appellant-State and as the entitlement of the petitioner-company to subsidy at 75 per cent remains seriously in question hence, the operation of the impugned order deserves to be stayed. The Learned Counsel for the contesting respondents submitted, on the other hand, that the appellants have not been able to make out a case for grant interim relief as neither they have a prima facie case nor the balance of convenience is in their favour nor they would suffer irreparable injury by making payment under the impugned order. The Learned Counsel further submitted that in any case, so far the undisputed amount of subsidy at 50 per cent is concerned, the learned Advocate-General is right in the submission that the same is not the subject of dispute and when this is an admitted position that the 50 per cent component of subsidy is not the subject of controversy, there was no reason or justification for the appellant-State that they withheld this amount for a long period of over three years since the month of May 2008 causing serious inconvenience to the petitioner-company and resulting in retardation of industrial growth.

12. The Learned Counsel for the respondents further pointed out that when the methodology of payment of arrears of subsidy is of its adjustment in the quarter next after tax payment, and when the petitioner''s tax liability in a quarter comes to about Rs. 30 crores, utilisation of the amount of arrears of Rs. 116.79 crores would get stretched to an abnormally long period though the petitioner has already been deprived of the same for over three years. The Learned Counsel submitted that in every such quarter, the current entitlement of 50 per cent subsidy shall also come into play and from a practical point of view, the utilisation of the arrears would get yet further stretched. Therefore, the Learned Counsel for the respondents emphasised, this amount of Rs. 116.79 crores ought to be ordered to be released in cash immediately or at the most in three monthly instalments. The Learned Counsel submitted that there is no equity in favour of the appellants so far this undisputed entitlement of 50 per cent subsidy is concerned.

13. Rejoining on the submissions, the learned Advocate-General contended that the methodology of payment of subsidy has always been of adjustment against the tax liability and no payment had ever been made in cash in regard to this subsidy and, therefore, the writ petitioner is not entitled to seek any cash payment towards subsidy.

14. After having given our anxious consideration to the entire matter, while we are clearly of opinion that so far the operative portion of the impugned order whereby the petitioner has been held entitled to the increased subsidy at 75 per cent under the notification dated December 2, 2005 and the respondents have been directed to release the arrears of such additional subsidy and allow set-off against additional tax liability (as contained in paragraph 45 of the impugned order) is concerned, the same deserves to be stayed during the pendency of this appeal but on necessary terms and conditions, particularly that in regard to the undisputed component of subsidy, i.e., at 50 per cent.

15. It is not in dispute even on the part of the appellants that the writ petitioner-company was and is entitled for 50 per cent subsidy but the same had been withheld since the month of May 2008 for which, certain reasons including that of pendency of the matter before the court and filing of inappropriate applications by the writ petitioner are suggested. However, without going into the alleged reason at this stage, we feel that when the appellants themselves have realised their liability for making payment of such subsidy and have indeed issued the orders releasing total arrears of subsidy at Rs. 116.79 crores, a part of this amount ought to be paid to the petitioner-company so as to balance the equities even when the other part could be left for adjustment in the future tax liability. In our opinion, it shall meet the ends of justice if we make a direction for payment of about 50 per cent of the said undisputed amount of Rs. 116.79 crores, i.e., Rs. 58.00 crores, while leaving the remaining Rs. 58.79 crores to be adjusted in the future tax liabilities in the ensuing quarters, of course, together with the future component of subsidy as would accrue from time to time.

16. Accordingly, this stay application is allowed to the extent and in the manner that the operation and effect of the impugned order dated October 11, 2011 is ordered to remain stayed until final disposal of this appeal insofar the appellants have been directed to make payment of the questioned subsidy at 75 per cent subject to the following conditions and requirements :

1. (i) the appellants shall make payment of an amount of Rs. 58 crores (Rupees fifty eight crores) to the respondent-company within 30 days from today from out of the amount of Rs. 116.79 crores, credit whereof has already been given;

(ii) the remaining amount of Rs. 58.79 crores (Rupees fifty eight point seven nine crores) shall be available for adjustment as against the tax liability of the respondent-company every ensuing quarter of tax assessment and shall continuously be adjusted until utilisation of the entire amount of Rs. 58.79 crores;

2. It is made clear that this arrangement about adjustments in tax liability shall

not deprive the respondent-company of its future entitlement of 50 per cent subsidy against the tax liability.

3. It shall be permissible for the appellants to work out the methodology for proper adjustment of the amount payable to the respondent-company and so also of the amount payable against the future entitlement of subsidy after leaving aside the disputed part which has been ordered to be stayed hereinabove.

17. It is made clear that the aforesaid shall be an interim arrangement only and shall remain subject to the final orders to be passed in this appeal.

18. It shall be permissible for the parties to apply for early hearing of the appeal. Stay Application No. 18581 of 2011 stands disposed of.