(2015) 08 KAR CK 0118

In the Karnataka High Court

Case No : Writ Petition Nos. 38983 of 2002 and 3271 of 2008 (GM-RES)

Ugar Sugar Works Ltd. APPELLANT

Vs

The Union Government and Others RESPONDENT

Date of Decision : 27-08-2015

Acts Referred:

Industries (Development and Regulation) Act, 1951 — Section 29B(1)

Citation : (2015) 08 KAR CK 0118

Hon'ble Judges : Anand Byrareddy, J.

Bench : Single Bench

Advocate : H.N. Shashidhara, Advocate, for the Appellant; M.B. Kanavi, Central Government Counsel, for the Respondent

Final Decision : Dismissed

Judgement

Anand Byrareddy, J.—These petitions are heard and disposed of by this common order, as they are inter-linked and are brought by the same petitioner. The facts and circumstances are as follows.

2. The petitioner is a company incorporated under the Indian Companies Act and is engaged in the manufacture and sale of sugar. It has a factory situated at Ugar Khurd, Athani taluk, Belgaum District. The factory was said to have been established in the year 1939 and presently is said to have a crushing capacity of 10000 MT per day. That as on the date of filing the petition in W.P.38983/2002, the minimum quantity of sugarcane that was required for crushing by the petitioner''s factory was 15 lakh MT per year. It was the petitioner''s case that there had been a shortfall of supply from its ''reserved area'' in several years. In this background, the establishment of another sugar factory close to the petitioner''s factory would result in further depletion of the quantity of the essential raw material, thereby jeopardizing the economic viability of the petitioner''s factory.

3. It is stated that the fourth respondent company had made an application

seeking to establish a sugar factory at Aigali on 21.8.1990. The Central Government by its Order, dated 3.7.1996, is said to have issued a Letter of Intent (LOI) permitting it to establish a sugar factory with a crushing capacity of 2500 TCD. Apart from this, the Central Government had issued such permission to two other entities to establish sugar factories in Athani Taluk, thereby creating a grim situation of a short supply of cane.

It is stated that the fourth respondent had, without taking any further steps to establish the factory at Aigali, had approached the State government and the Union government - requesting for a change in location of its factory to Kagwad, Athani taluk. The State government is said to have promptly recommended it. The petitioner is said to have protested that the distance from the petitioner''s factory and Kagwad was only about 12 kilometres and if the change in location sought for by the fourth respondent is allowed, it would eat into the petitioner''s reserved area and would spell irreparable damage to the continued existence of the petitioner''s factory. However, the Central government is said to have permitted the change in location of its factory, as sought for by the fourth respondent.

The petitioner had challenged the grant of permission as aforesaid, in favour of the fourth respondent, by a writ petition in W.P.7708/1999, before this court. The same is said to have been disposed of by an order dated 15.1.2002, with liberty to the petitioner to approach the Chief Director of Sugar, New Delhi. The said authority by its order dated 9.4.2002, had held that the establishment of the factory by the fourth respondent at the proposed location was contrary to the guidelines and could not be permitted.

The fourth respondent having sought for a review of the said order, the Central Government by its order dated 18.9.2002 had opined that the objection as to the fourth respondent''s factory being within 15 KM from the petitioner''s factory - could not be with reference to the radial distance and that the actual distance by road was more than that and hence there was no infirmity in the permission granted.

It is this which is sought to be questioned in the said petition.

4. In the petition in W.P.3271/2008, the petitioner seeks to urge that the minimum quantity of sugarcane required by the petitioner, as was evident from the statistics furnished in respect of the previous years, up to the date of the petition, was in the order of 18 lakh MT per year. It is stated that even during the pendency of the above petition in W.P.38983/2002, the petitioner is said to have been called upon to state its objections if any, before the sugarcane growing area could be earmarked for the second respondent (the fourth respondent in the first of these petitions) at Kagwad. The petitioner is said to have pointed out that the matter with regard to establishment of the fourth respondent''s factory within a radial distance of 15 KM was pending consideration before this court. However, the first respondent having proceeded to delete certain areas earmarked for the

petitioner''s factory - and having allotted the same in favour of the second respondent, the second of these petitions is filed.

5. Statement of objections are filed by the fourth respondent in the first of these petitions to contend that the premise on which the petitioner had filed the petition, namely, that the reserved area for it was not adequate to supply sugar cane and hence the establishment of any other sugar factories in the vicinity of the petitioner''s factory would jeopardize the economical functioning of its factory - was with reference to the reserved area as earmarked in the year 1978. That there was a changed scenario since then, in that, there was more land brought under irrigation in the region and that after meeting the petitioner''s requirement of about 13.50 lakh MT of sugar cane for a season, there would be an excess of about 8.91 lakh MT of sugar cane.

The change in location of the fourth respondent''s factory was warranted on account of insufficient water facility at Aigali. The State government had recommended such change in location only after a careful study of the cane availability and the distance factor as between the unit of the petitioner and that of the fourth respondent. That according to the guidelines issued in the year 1997, the distance between the two factories could not be less than 15 km. The distance was in fact more than that. In any event, it was claimed that the petitioner was unable to crush all the cane available in its reserved area and farmers were being permitted to supply to factories in nearby Maharashtra State.

6. Statement of objections are filed in the second of the writ petitions, by the contesting respondent, to state that it has already completed the process of commissioning and erecting its sugar plant as approved and licensed by the Central Government.

That the Central Government had issued a Letter of Intent (LOI) in the year 1997 itself. After the respondent''s plant was commissioned, in the year 2007, the State government had, after verifying the availability of sugar cane in the area and the required capacity of the sugar factories in the area, had allotted the reserved area for the respective factories. The de-reservation of some areas earmarked for the petitioner and allotment of the same to the fourth petitioner was only after hearing the petitioner, and on a consideration of the pros and cons. Thus 7 sugar cane growing villages were de-reserved from the petitioner''s quota and allotted to the respondent. Apart from 2 other villages which were reserved for M/s. Doodh Ganga Krishna Sakkare Kharkane Ltd. Further, it was found that the farmers in these areas were self-sufficient and had not been depending on the petitioner for providing water facilities, seed, fertilizer or other requirements, as was sought to be contended.

7. The learned counsel for the petitioner would contend that it is not in dispute that a Letter of Intent was issued in favour of the fourth respondent to establish a new sugar factory of 2500 TCD, at Algali, Athani Taluk by the Ministry of Food, New Delhi, as on 3.7.1996. However, the said respondent having sought for a

change in location from Algali to Kagwad of the same taluk, was granted, in the face of strong objection by the petitioner, as per communication dated 6.3.1997. In the meanwhile, the Ministry of Industry, Government of India had issued guidelines for considering applications for industrial licences for sugar factories, vide Press Note No. 1 (1997 Series), one of the conditions was as follows:

"Licences for new sugar factories will be issued subject to the condition that the distance between the proposed new sugar factory and an existing/already licensed sugar factory should be not less than 15 kilometres."

It is emphasized by the learned counsel that the interpretation of the above condition by the Central Government, in favour of respondent No. 4 to the effect that the actual distance by road as between the petitioner''s sugar factory and that of the fourth respondent being more than 15 KMs, as the above condition did not prescribe a radial distance but only prescribed a distance - cannot any longer be sustained having regard to the subsequent developments and the legal position having been settled by the Apex Court.

It is pointed out that even during the pendency of this petition, Clause 6A to 6E were inserted, in the Sugar Cane (Control) Order, 1966, vide Order dated 10.11.2006, to provide as follows:

"6A. Restriction on setting up of two sugar factories within the radius of 15 Kms. - Notwithstanding anything contained in clause 6, no new sugar factory shall be set up within the radius of 15 Kms of any existing sugar factory or another new sugar factory in a state or two or more states:

Provided that the State Government may with the prior approval of the Central Government, where it considers necessary and expedient in public interest, notify such minimum distance higher than 15 Kms or different minimum distances not less than 15 Kms for different regions in their respective States.

Explanation 1. - An existing sugar factory shall mean a sugar factory in operation and shall also include a sugar factory that has taken all effective steps as specified in Explanation 4 to set up a sugar factory but excludes a sugar factory that has not carried out its crushing operations for last five sugar seasons.

Explanation 2. - A new sugar factory shall mean a sugar factory, which is not an existing sugar factory, but has filed the Industrial Entrepreneur Memorandum as prescribed by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry in the Central Government and has submitted a performance guarantee of rupees one crore to the Chief Director (Sugar), Department of Food and Public Distribution, Ministry Consumer Affairs, Food and Public Distribution for implementation of the Industrial Entrepreneur Memorandum within the stipulated time or extended time as specified in clause 6C.

Explanation 3. - The minimum distance shall be determined as measured by the Survey of India.

Explanation 4. - The effective steps shall mean that following steps taken by the concerned person to implement the Industrial Entrepreneur Memorandum for setting up of sugar factory:-

(a) purchase of required land in the name of the factory;

(b) placement of firm order for purchase of plant and machinery for the factory and payment of requisite advance or opening of irrevocable letter of credit with suppliers;

(c) commencement of civil work and construction of building for the factory;

(d) sanction of requisite term loans from banks or financial institutions;

(e) any other step prescribed by the Central Government, in this regard through a notification.

6B. Requirements for filing the Industrial Entrepreneur Memorandum.-

(1) Before filing the Industrial Entrepreneur Memorandum with the Central Government, the concerned person shall obtain a certificate from the Cane Commissioner or Director (Sugar) or Specified Authority of the concerned State Government that the distance between the site where he proposes to set up sugar factory and adjacent existing sugar factories and new sugar factories is not less than the minimum distance prescribed by the Central Government or the State Government, as the case may be, and the concerned person shall file the Industrial Entrepreneur Memorandum with the Central Government within one month of issue of such certificate failing which validity of the certificate shall expire.

(2) After filing the Industrial Entrepreneur Memorandum, the concerned person shall submit a performance guarantee of rupees one crore to Chief Director (Sugar), Department of Food and Public Distribution, Ministry of Consumer Affairs, Food and Public Distribution within thirty days of filing the Industrial Entrepreneur Memorandum as a surety for implementation of the Industrial Entrepreneur Memorandum within the stipulated time or extended time as specified in clause 6C failing which Industrial Entrepreneur Memorandum shall stand defendant-recognized as far as provisions of this Order are concerned.

6C. Time limit to implement Industrial Entrepreneur Memorandum.-

The stipulated time for taking effective steps shall be two years and commercial production shall commence within four years with effect from the date of filing the Industrial Entrepreneur Memorandum with the Central Government, failing which the Industrial Entrepreneur Memorandum shall stand defendant-recognized as far as provisions of this Order are concerned and the performance guarantee shall be forfeited:

Provided that the Chief Director (Sugar), Department of Food and Public Distribution, Ministry of Consumer Affairs, Food and Public Distribution on the recommendation of the concerned State Government, may give extension of one year not exceeding six months at a time, for implementing the Industrial Entrepreneur Memorandum and commencement of commercial production thereof

6D. Consequences of non-implementation of the provisions laid down in clauses 6B and 6C. - If an Industrial Entrepreneur Memorandum remains unimplemented within the time specified in clause 6C, the performance guarantee furnished for its implementation shall be forfeited after giving the concerned person a reasonable opportunity of being heard.

6E. Application of clauses 6B, 6C and 6D to the person whose Industrial Entrepreneur Memorandum has already been acknowledged.-

(1) Except the period specified in sub-clause (2) of clause 6B of this Order, the other provisions specified in clauses 6B, 6C and 6D shall also be applicable to the person whose Industrial Entrepreneur Memorandum has already been acknowledged as on date of this notification but who has not taken effective steps as specified in Explanation 4 to the clause 6A.

(2) The person whose Industrial Entrepreneur Memorandum has already been acknowledged as on date of this notification but who has not taken effective steps as specified in Explanation 4 to the clause 6A shall furnish a performance guarantee of rupees one crore to the Chief Director (Sugar), Department of Food and Public Distribution, Ministry of consumer Affairs, Food and Public Distribution within a period of six months of issue of this notification failing which the Industrial Entrepreneur Memorandum of the concerned person shall stand de-recognized as far as provisions of this Order are concerned."

The scope and effect of the above provisions came in for direct interpretation by the Apex court in the case of M/s. Ojhas Industries (P) Ltd. V. M/s. Oudh Sugar Mills Ltd. & Ors. 2007 AIR SCW 2381. The learned counsel would place particular reliance on the following views expressed by the Apex court:

"In our view Clauses 6A to 6E are clarificatory in nature. There are certain norms mentioned in the Accounting Standards of Institute of Chartered Accountants for setting up industries. They may be sugar mills, paper mills, textile mills etc. When effective steps are enlisted in Sugarcane (Control) (Amendment) Order, 2006 dated 10.11.2006 vide Explanation 4 to Clause 6A those in-built norms are made explicit, therefore, Explanation 4 to Clause 6A is clarificatory. Therefore, it is retrospective. There is one more reason why we hold that the Sugarcane (Control) (Amendment) Order, 2006 is retrospective. The Central Government has taken note of various pending matters in different courts on the interpretation of Sugarcane (Control) Order, 1966, Press Note No. 12 and the Notification dated 11.09.1998 issued under Section 29B(1) of the said 1951 Act to put an end to litigations and keeping in mind the concept of "Distance Certificate" as distinct from the concept of "effective steps", the Central Government has issued the Sugarcane (Control) (Amendment) Order, 2006. It is to plug the loophole that the said Order has been issued on 10.11.2006. In our view, therefore, the Sugarcane (Control) (Amendment) Order, 2006 is retrospective. In all pending cases the Central Government now seeks to put a bar for setting up new sugar factory (mill) for a limited period during which the Former or Earlier IEM Holder is required to take effective steps. The said Order of 2006 is not putting a ban on setting up of new units. It is only giving a priority in the matter of setting up of new units. Therefore, the said 2006 Order operates retrospectively."

It is hence contended that the bar to establish a new sugar factory within a radial distance of 15 KMs of an existing sugar factory, is clarified as being with retrospective effect and therefore the fourth respondent could not have been granted a licence to commission its plant and commence crushing of sugar cane at all. It is also pointed out that this court had granted an interim order of stay prohibiting the fourth respondent from taking any steps to construct its plant and in spite of the order of stay, the fourth respondent having chosen to commence construction, this court had placed the fourth respondent on terms in stating that any construction put up by the said respondent would be subject to the result of the writ petition and that it shall not be permitted to plead equities. Hence the said respondent has taken the risk of establishing its factory and should now face the consequence.

The learned counsel hence would seek that both the above petitions be allowed as prayed for.

8. On the other hand, the learned Senior Advocate, Shri Jayakumar S. Patil, appearing for the counsel for the fourth respondent would contend that the writ petition is misconceived and is not maintainable and would seek to draw support for the same even from the very judgment relied upon by the learned counsel for the petitioner.

It is pointed out that at paragraph No. 5 of the judgment it is observed by the Apex Court, thus:

"On 31.8.98 Government of India (for short, ''GOI'') decided to delete sugar industry from compulsory licensing under the Industries (Development and Regulation) Act, 1951 (For short, ''1951 Act''). In that Press Note No. 12, GOI clarified that in order to avoid unhealthy competition among sugar factories to procure sugarcane, a minimum distance of 15 KMs has to be observed between an existing sugar mill and a new mill (factory). Further, the entrepreneur who desires to avail of the de-licensing of sugar industry was required to file an Industrial Entrepreneur Memorandum (for short, ''IEM'') with the Ministry of Industry. In the said Press Note it was further clarified that those entrepreneurs who have been issued Letter of Intent (for short, ''LOI'') for manufacture of sugar need not file an initial IEM and in such cases, the LOI Holders shall file Part ''B'' only of the IEM at the time of commencement of commercial production."

Hence it is contended that in so far as the fourth respondent was concerned, it was a LOI holder even prior to the issuance of the 1997 guidelines and was not required to file an initial IEM, nor was required to comply with the taking of "effective steps", as was the case in respect entrepreneurs entering the field after 31.8.1998.

9. It is also pointed out that the Apex Court has indicated the difference between the concept of prescribing a "distance" between two sugar factories and the concept of effective steps being taken thus:

".....In this connection, we have to keep in mind the conceptual difference between the distance certificate, the concept of effective steps to be taken by an IEM Holder and the question of bona fides. Sugarcane (Control) (Amendment) Order, 2006 inserts Clauses 6A to 6E in Clause 6 of the Sugarcane (Control) Order, 1966. It retains the concept of "Distance". This concept of "Distance" has got to be retained for economic reasons. This concept is based on demand and supply. This concept has to be retained because the resource, namely, sugarcane, is limited. Sugarcane is not an unlimited resource. "Distance" stands for available quantity of sugarcane to be supplied by the farmer to the sugar mill. On the other hand, filing of bank guarantee for Rs. 1 crore is only as a matter of proof of bona fides. An entrepreneur who is genuinely interested in setting up a sugar mill has to prove his bona fides by giving bank guarantee of Rs. 1 crore. Further, giving of bank guarantee is also a proof that the businessman has the financial ability to set up a sugar mill (factory). Therefore, giving of bank guarantee has nothing to do with the Distance Certificate. As far as effective steps are concerned we may point out that apart from the steps enlisted in the earlier Notification dated 11.9.98 read with Press Note No. 12 dated 31.8.98, the Sugarcane (Control) (Amendment) Order, 2006 has laid down such steps like purchase of required land in the name of the factory (mill), placement of a firm order for purchase of plant and machinery for the factory, payment of advance or opening of letter of credit with suppliers, commencement certificate of civil work and construction of building, sanction of requisite term loans from the banks or financial institutions and any other step prescribed by the Central Government in this regard.

Before concluding on this issue we may reiterate that raising of resources and application of resources by a unit is different from the Condition of Distance. The concept of "Distance" is different from the concept of "setting up of unit" in the sense that setting up of a unit is the main concern of the businessman whereas a concept of "Distance" is an economic concept which has to be taken into account by the Government because it is the Government which has to frame economic policies and which has to take into account factors such as demand and supply."

Further, it is pointed out that Clause 6 of the Sugar Cane (Control) Order, provides for regulation, distribution and movement of sugarcane. The Central Government could determine the quantity of sugarcane which a factory will require for crushing during any year. Apart from providing for other exigencies which the petitioner is enabled to invoke to ensure adequate supply of sugar cane from its Reserved area. The fact that certain villages within its Reserved

Area having been de-reserved and having been allotted to the fourth respondent notwithstanding, in any eventuality of a short fall in supply, the fourth respondent would have no objection if the petitioner is given priority for supply of sugar cane from those villages so de-reserved and allotted to the fourth respondent.

The learned Senior Advocate would thus contend that the first of the above writ petitions be dismissed as not maintainable and the second of the above writ petitions be disposed of in terms as above.

10. In the light of the above rival contentions and on a perusal of the material on record, the authorities having taken a view that the actual distance between the sugar factory of the petitioner and the factory of the fourth respondent being more than 15 KMs, on the ground that the prescription was of a distance and not the radial distance, cannot be said to be illogical. However, the insertion of Clauses 6A to 6E into the Sugar Cane (Control) Order, which were held to be clarificatory in nature and which were said to be applicable with retrospective effect - as declared by the Apex court, in Ojhas'' case, it is again expounded therein that the concept of an entrepreneur being required to demonstrate his bona fides in establishing a sugar factory and the concept of "distance" prescribed under the said provisions, being made with different objects all together, namely, that the prescription of distance being an economic concept which has to be taken into account by the Government which has to frame economic policies and which has to take into account factors such as demand and supply, the interest of the petitioner can be adequately safeguarded by ensuring that the petitioner has priority over the available sugar cane in those villages that have been de-reserved from its Reserved area and allotted to the fourth respondent. The said respondent has even volunteered that it will have no objection if the competent authority should resort to such assignment of the supply of sugarcane, if and when the occasion arises. This is even assuming that the respondent''s factory is within a radial distance of 15 KMs from the petitioner''s factory.

Accordingly, the first of these petitions is dismissed as not maintainable. The second petition is disposed of in terms as above, leaving it open to the competent authority to ensure supply of sugar cane to the petitioner by recourse to Clause 6 of the Sugar Cane (Control) Order, 1966.