

THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

WRIT PETITION NO.23454 of 2011

Date:20-11-2015

Between:

M/s. Sun Re-Rolling Mills and Cold Storage Pvt. Ltd.,
Rep. by its Managing Director Y. Sanyasi Naidu.

PETITIONER

AND

1. The District Collector, Visakhapatnam, and others.

RESPONDENTS

THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

WRIT PETITION NO.23454 of 2011

ORDER:

Heard Dr. P.B. Vijaya Kumar, learned counsel for the petitioner and learned Government Pleader for Agriculture for respondents.

Brief facts of the case are that the petitioner is a private limited company. It has established a cold storage unit and applied for Capital Investment Subsidy under APSAMC Capital Investment Subsidy for Cold Storage Units/Chains. Accordingly, the 4th respondent sanctioned subsidy for a sum of Rs.34,93,000/- as per G.O.Ms.No.211, dated 2.07.1999 by obtaining agreement dated 12.01.2001 from the petitioner with structured conditions. As per Clause 10 of the said G.O., Cold Storage units set up in the State of Andhra Pradesh will be eligible for Capital Investment subsidy of 25% on power bills (both demand and energy) for a period of 3 years from the date of commencement of commercial production with a maximum total admissible rebate of Rs.30 lakhs. The rebate shall be allowed by the Andhra Pradesh State Electricity Board in their monthly bills (vide G.O.Ms.No.108, Industries and Commerce (P) Department dated 20.05.1996). G.O.Ms.No.211 dated 2.07.1999 was in operation from 1.07.1999 to 31.03.2001 and the petitioner unit became operational on 17.01.2001. Since the Electricity Board started demanding the entire electricity consumption charges without extending any rebate contrary to Clause 10 of G.O.Ms.No.211, the petitioner had to pay Rs.1 lakh every month towards power consumption charges. The petitioner unit carried its business for about 38 months and became unviable and suffered huge losses.

In the process, the petitioner defaulted in payment of loan

installments to A.P. State Finance Corporation Limited (APSFC). To recover dues A.P. State Finance Corporation Limited initiated distress proceedings. To avoid the consequences, the petitioner sold away the unit to Visakha Cooperative Dairy through negotiated settlement on 18.03.2004, and discharged the liability of Rs.1,36,75,922/- to APSFC.

Earlier when 3rd respondent issued notice dated 11.09.2011 the petitioner filed W.P.No.6155 of 2011, which was disposed of on 8.03.2011 directing the 3rd respondent to consider the explanation submitted by the petitioner to the show cause notice dated 11.09.2007 and pass appropriate orders after giving opportunity of being heard to the petitioner. Again the 3rd respondent issued proceedings dated 13.07.2011 directing the petitioner to pay a sum of Rs.70,03,465/- representing the subsidy of Rs.34,93,000/- and interest @ 18% thereon. Challenging the same, the present writ petition is filed.

Learned counsel for the petitioner contended that as the respondents did not provide power subsidy as required under G.O.Ms.No.211 dated 02.07.1999 the petitioner's unit became sick and having no other option, the unit was sold to Visakha Cooperative Dairy. He further contends that if the petitioner-unit does not remain in production continuously the subsidy amount can be recoverable. In as much as Visakha Dairy, who is the purchaser of the petitioner-unit is continuing to run the unit, it cannot be said that the unit has been closed. He further contended that the 1st respondent having failed to implement the promise made under G.O.Ms.No.211 dated 2.07.1999 and having failed to extend the power subsidy, is solely responsible for the sale of unit by the petitioner, and thus, even on that count the subsidy amount is not recoverable from the petitioner. He further contended that Visakha Cooperative Dairy having purchased the unit has been running the same and thereby it had fulfilled the condition in Clause-12(b) of G.O.Ms.No.214 and thus subsidy amount shall not be recoverable from the petitioner. Even assuming that the subsidy

amount is recoverable only part of the amount can be recovered in view of Clause-6 of the agreement dated 12.08.2001, since the petitioner operated the unit for about 38 months out of 60 months and there was shortfall of only 22 months. In view of the same the 1st respondent failed to consider and grant proportionate subsidy amount, and thereby violated Clause-6 of the Agreement dated 12.08.2001.

A counter affidavit has been filed by the 3rd respondent denying various allegations made in the writ affidavit. The sum and substance of the counter is that as per G.O.Ms.No.211 dated 02.07.1999 and the procedure and guidelines for claiming APSAMC Capital Investment Subsidy, where the unit goes out of production or is sold without prior approval of the sanctioning authority within five years from the date of commencement of production, capital investment subsidy shall be recoverable with 18% interest. This will not apply in case the unit remains out of production for short periods or seasonal periods extending upto eight months due to reasons beyond its control, such as, shortage of raw materials, power etc. As the petitioner violated the above clause and sold the unit before the completion of five years without obtaining the prior approval of the sanctioning authority it is not entitled to subsidy. Further, the petitioner operated the unit for 38 months during which period it was never appealed or complained to the sanctioning authorities duly showing the evidences that the unit is not getting power rebate or there is shortage of raw material, power etc. Therefore the reasons set out by the petitioner are not tenable and prayed to dismiss the writ petition.

It is a case where young entrepreneur was forced to sell the unit after running the same for some time. The case of the petitioner, in a nutshell, is that notwithstanding the sincere efforts made by it, it could not run the unit as the Government failed to fulfill its promise after notifying the concessions by issuing G.Os. The specific allegation of the petitioner, that power subsidy was not extended, was not denied by the respondent authorities. What has been stated in the counter is that

the petitioner has not made any grievance at the relevant point of time, thus the petitioner was disentitled to seek any relief with respect to capital investment subsidy.

The fact that the petitioner was forced to sell the unit to avoid distress sale by the APSFC is also not denied. Further from the very impugned proceedings, it is evident that a sum of Rs.66,41,000/- has been retained by Visakha Cooperative Dairy from the sale proceeds to which the petitioner was otherwise entitled to receive on account of the claim arising with regard to capital investment subsidy. It is further stated that the petitioner had sold the unit to Visakha Cooperative Dairy without obtaining prior sanction of the authorities. As per the impugned proceedings, the said amount has been deposited in a joint account with Canara Bank, Chettivaripalem Branch, Visakhapatnam.

Now the question that requires to be considered in the present writ petition is whether the petitioner is required to return the capital investment subsidy availed in terms of G.O.Ms.No.211, dated 02.07.1999, and if so, what extent of subsidy is recoverable from the petitioner considering the fact that the petitioner did run the unit for a period of 38 months, and to what relief.

To answer the above, a reference may be made to relevant clauses in G.O.Ms.No.211, dated 02.07.1999, and agreement dated 12.08.2001.

“Clause-7 – The subsidy may be sanctioned as per the approved project report but disbursement shall be in proportion to the assets created. The disbursement of subsidy will commence after fixed assets to the extent of at least 75% have been created.

First advance subsidy installment amounting to 50% of the project cost can be claimed after creation of 75% assets and second installment of remaining 50% after the unit commences functioning.

If the Unit fails to commence functioning with one year after receiving the 1st installment of 50% of the subsidy, the amount of subsidy will be liable to be recovered as arrears of land revenue.

Clause-8 – The subsidy amount released shall claimed from Government of India, to the extent eligible, under special incentives to Cold Storage Industries.

Clause-9 – The subsidy shall initially be met by Agricultural Market Committee in whose area of operation unit is located and the Central market Fund on 50% basis.

Clause-10 – Rebate in Electricity Charges: 25% rebate in power bills (both demand and energy) for a period of 3 years from the date of commencement of commercial production with a maximum total admissible rebate of Rs.30 lakhs. The rebate shall be allowed by the Andhra Pradesh State Electricity Board in their monthly bills, (Vide G.O.Ms.No.108 Industries and Commerce (P) Department dt.20.05.96).

Clause-11 – Procedure for Claiming Subsidy:

The detailed procedure for sanctioning, disbursement and claiming of investment subsidy under this scheme will be issued separately by Director of Marketing.

Clause-12 – The Capital Investment subsidy sanction and disbursement under this scheme will be subject to the following conditions:

- a) The unit availing of subsidy under this scheme shall install and effectively operate and maintain pollution control measures as per the standards prescribed.
- b) The unit will remain in production continuously for at least five years after it is commissioned except in cases when it remains out of production for short periods or seasonal periods upto 8 months due to reasons beyond its control such as shortage of raw material, power etc.
- c) The unit availing of subsidy under this scheme will follow and maintain any other condition laid down by this scheme or by the procedural instruction, clarifications or amendments issued under this scheme.

Breach of any of these conditions will make the subsidy liable to be recovered as arrears of land revenue along with interest @ 18% per annum.”

Clauses 6 & 7 of the Agreement dated 12.08.2001 read as under:

“6. That the grantee shall refund the said subsidy or part thereof to the APSAMC in case the same is found recoverable under the provisions of the scheme or the procedure and guidelines issued thereunder:

7. That in case it is found that the grantee has given some false, incorrect or incomplete information or the grantee has gone out of operation within 5 years from the date of operation, the Director of Marketing after according him an opportunity of being heard shall be empowered to recover the whole amount of subsidy paid to the grantee together with 18% interest per annum, from the date of payment of subsidy. The amount shall be recoverable as arrears of Land Revenue under the A.P. Land Revenue Act.”

The above extracted Clauses in the said G.O., leave no manner of doubt to answer the question. The G.O. has to be read as a whole. It cannot be disputed that the G.O. gives an enforceable right in favour of the petitioner under the principle of *promissory estoppel*. The G.O., while declaring the policy and giving a right to an entrepreneur, casts a duty on the Government to fulfill its sovereign promises. The G.O. also casts a corresponding duty on the entrepreneur to satisfy the conditions for availing the notified benefits.

In the facts of the present case, there is no dispute that the petitioner did not run the unit beyond three years two months and thus had failed to fulfill Clause-12(b) in its entirety. Clause 12(b) itself says even non-production in the unit up to a period of 8 months due to the reasons beyond its control, such as, shortage of raw-material, power etc., does not disentitle a unit from availing the subsidy.

Clause 6 of the agreement casts an obligation on the petitioner to refund the subsidy or part thereof to APSAMC, in case the same is recoverable under the provisions of the scheme or procedure and guidelines issued therein. A bare reading of Clause 6 casts an obligation on the 1st respondent-Government to examine as to what is the amount that is recoverable in the facts of the case.

In the present case, admittedly, the petitioner-unit was in production for a period of 38 months and there is shortfall of 22 months

only. The capital investment subsidy is based on the fixed capital, subject to a maximum limit of Rs.50 lakhs. Based on the capital invested, the petitioner was found to be eligible for subsidy of Rs.33,94,000/-. For the purpose of income tax on the capital, depreciation is provided on year to year basis, usually wiping out entire investment on machinery over a period of time. Further, the financing institution-APSFC sanctioned the loan following a definite methodology.

Suffice it to say that the Government can determine the proportionate subsidy amount to which the petitioner would be entitled for the period for which petitioner's unity was in operation. The 1st respondent ought to have granted partial rebate by adopting one or the other method for the purpose of arriving at a figure to what extent the petitioner would be entitled to. Judicial notice may be taken note of the fact that a large number of writ petitions are pending before this Court seeking implementation of G.Os granting rebate on account of power consumption.

As stated supra, the specific assertion of the petitioner that the power rebate as promised was not made available to it has not been adverted to or denied. This fact is required to be considered by the 1st respondent. The 1st respondent being the author of G.O.Ms.No.211 dated 02.07.1999, and as grant of power rebate is also one of the rebates falling in Clause-10 of the said G.O, it would be obligatory on the part of the 1st respondent to determine component of power rebate to which the petitioner is entitled to. The figure can easily be arrived at as the same is based on the consumption charges month on month basis from the bills issued by the electricity department and paid by the petitioner. In view of the above it is to be held that the petitioner is liable to refund only a part of the subsidy received.

In the circumstances the writ petition is disposed of with the following directions.

- a) The 1st respondent is directed to determine the capital investment subsidy entitlement of the petitioner proportionately for a period of 38 months and the balance amount corresponding to 22 months is recoverable from the over all subsidy amount that was released in faovur of the petitioner.
- b) The power subsidy amount which the petitioner is otherwise eligible, is payable to the petitioner. In as much as it is only arithmetic working out, to avoid future litigation and to show the earnestness on the part of the Government to attract future investments from the entrepreneurs, the respondent authorities shall fairly honour their commitments which they proclaim through various G.Os., calling young entrepreneurs to come and establish units in the State. The fairness on the part of the Government in settling the issues would go a long way in bringing the investment into the State and encourage the young entrepreneurs to come forward and set up commercial units.
- c) In view of the fact that newly established State is making efforts to bring in investors and investments into the State, the entire exercise shall be completed by the 1st respondent within a period of three months from the date of receipt of a copy of this order.

Accordingly the writ petition is disposed of. As a sequel, pending miscellaneous petitions, if any, shall stand closed.

CHALLA KODANDA RAM, J.

20th November, 2015
Js.

L.R. Copy to be marked.