* **THE HIGH COURT OF DELHI AT NEW DELHI**

% *Pronounced on*: August 07, 2015

\+ LPA 674/2013

M/S RANA SUGAR LTD. ..... Appellant

Through: Mr. Jayant Bhushan, Sr. Advocate with Mr. Rishi Agarwala, Mr. Rohit Gupta, Ms.Aayushi Sharma, Advocates

Versus

TRIVENI ENGINEERING & INDUSTRIES LIMITED & ORS. ..... Respondents

Through: Mr. Sanjeev Anand, Mr. Abhas Kumar, Mr. Arush Khanna, Advs. For R-1
Mr. Ruchir Mishra, Mr. Mukesh Kumar Tiwari, Advs. for UOI.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

J U D G M E N T

: **Ms.G.ROHINI, CHIEF JUSTICE**

1. This appeal is preferred against the judgment of the learned Single Judge dated 16.01.2014 in WP (C) No.2503 of 2007. The respondent No.3 in the writ petition (M/s Rana Sugar Ltd.) is the appellant before us.

2. The writ petition was filed by M/s Triveni Engineering and Industries Limited (the respondent No.1 herein) with a prayer *inter alia* to quash the IEM acknowledgement No.1373/SIA/IMO/2006 dated 04.04.2006 issued to respondent No.3 (appellant herein) for establishment of new sugar mill at Village Ameer Khan

Ka Mazra, Tehsil Swar, Distt. Rampur, Uttar Pradesh. A direction was also sought to the Union of India to revoke/cancel the IEM acknowledgement No.1373/SIA/IMO/2006 dated 04.04.2006.

3. The said writ petition was allowed as prayed for by the judgment under appeal and aggrieved by the same the present appeal has been preferred. For the sake of convenience, the Appellant and Respondent No.1 herein shall hereinafter be referred to as they were arrayed in the writ petition, i.e. Respondent No.3 and writ petitioner respectively.

4. The controversy involved in the writ petition is with regard to the restriction on setting up of two sugar factories within the radius of 15 kms as provided under Clause-6A of the Sugarcane (Control) Order, 1966.

5. It may, at the outset, be mentioned that sugar industry has been deleted from the list of industries requiring compulsory licensing under the provisions of the Industries (Development and Regulation) Act, 1951 vide notification of the Central Government issued under Section 29-B dated 11.09.1988 read with the Press Note No.12 dated 31.08.1998. However, in order to avoid unhealthy competition among sugar factories to procure sugarcane, observance of a minimum distance of 15 kms has been continued between an existing sugar mill and a new mill by exercise of power under the Sugarcane (Control) Order, 1966. As per Press Note No.12 dated 31.08.1998, the entrepreneurs who wish to avail themselves of the de-licensing of sugar industry are required to file an Industrial Entrepreneur Memorandum (IEM) with the Secretariat of Industrial Assistance in the Ministry of Industry, Government of India.

6. M/s Triveni Engineering and Industries Limited / Writ Petitioner, who proposed to set up a sugar mill at Village Milak Narayanpur, Tehsil Swar, District

Rampur, Uttar Pradesh, filed its IEM on 2.8.2005 in terms of Press Note No.12 dated 31.08.1998 and the same was acknowledged on the same day. In pursuance thereof, M/s Triveni Engineering and Industries Limited / writ petitioner started taking effective steps like identification of land for setting up the sugar mill, negotiations with growers for purchase of sugarcane and etc. Subsequently, a request was made to raise the capacity of its sugar mill under construction from 5000 TCD to 6000 TCD and the same was acknowledged by the Union of India on 17.05.2006 thereby amending its IEM from 5000 to 6000 TCD.

7. In the meanwhile, on 4.4.2006 the appellant herein/respondent No.3 in the writ petition filed an IEM proposing to set up a sugar factory of 3500 TCD capacity at Village Ameer Khan Ka Mazra, Tehsil Swar, Distt. Rampur, Uttar Pradesh which is admittedly at a distance of 10.297 km from the site of M/s Triveni Engineering and Industries Limited and thus attracting the prohibition of 15 kms. prescribed under the Press Note No.12 dated 31.08.1998.

8. Having come to know of the same, M/s Triveni Engineering and Industries Limited / writ petitioner requested the Union of India to cancel the IEM of the respondent No.3. Alleging that the officials failed to respond, it filed the writ petition.

9. Though the fact that the sugar mill proposed by the respondent No.3/appellant herein is located within the prohibited area of 15 kms is not in dispute, the writ petition was opposed by the respondent No.3 contending *inter alia* that the prohibition regarding set up of two sugar mills within 15 kms was applicable only between an existing sugar mill and a proposed sugar mill and that there is no prohibition for grant of more than one IEM for an area where no sugar mill already existed.

10. The learned Single Judge rejected the contention of the respondent No.3 in the light of the law laid down by the Supreme Court in ***M/s. Ojas Industries Private Limited v. Oudh Sugar Mills Ltd.*, (2007) 4 SCC 723**, in which the effect of the very same Press Note No.12 dated 31.08.1998, providing for the restriction of 15 kms distance was considered. It may be mentioned that the restriction of 15 kms distance has subsequently been reiterated in the Sugarcane (Control) Order, 1966, by inserting Clauses 6-A to 6-E vide Sugarcane (Control) (Amendment) Order, 2006, dated 10.11.2006.

11. As per Clause 6-A of the Sugarcane (Control) Order, as inserted by the Amendment Order, 2006, 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. What is an existing sugar factory has also been explained in Clause 6-A as the sugar factory in operation including sugar factory that has taken all effective steps as specified in Explanation-4 to set up the sugar factory. Similarly Explanation-2 explains what is a new sugar factory. What are the requirements to be fulfilled for filing the IEM have been enumerated in Clause 6-B and time limit to implement IEM has been prescribed under Clause 6-C as two years for taking effective steps and four years for commencing commercial production from the date of filing IEM failing which the IEM shall stand de-recognized. There is also another requirement of furnishing performance guarantee of Rs.1 Crore within 30 days of filing of the IEM as a surety for implementation of the IEM within the stipulated time and the same would be forfeited if the IEM remains unimplemented within the time specified in Clause 6-C.

12. Clauses 6-A to 6-E inserted by Sugarcane (Control) (Amendment) Order, 2006 are reproduced hereunder for ready reference:

"**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 or another new sugar factory in a stat eor 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 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 the 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. Requirement 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 the 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 de-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 e Industrial Entrepreneur Memorandum shall stand de-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. Consequence 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.
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> (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."

13. The issue that fell for consideration before the Supreme Court in ***M/s. Ojas Industries (supra)*** was whether the Amendment Order dated 10.11.2006 operates retrospectively. While holding that it operates retrospectively, it was further clarified that the same imposes a bar on the subsequent IEM holders in the matter of setting up of new sugar mills during the stipulated period given to the earlier IEM holders to take effective steps enumerated in Explanation-4 to Clause 6-A.

14. In the light of the law laid down by the Supreme Court in ***M/s. Ojas Industries (supra)*** the learned Single Judge allowed the writ petition and directed the respondents 1 & 2 to comply with the terms of the Sugarcane (Control) (Amendment) Order, 2006 and the directions in the said judgment of the Supreme Court.

15. The learned Senior Counsel Shri Jayant Bhushan appearing for the appellant contended that the learned Single Judge has failed to take into consideration the fact that the appellant has taken effective steps to set up its sugar mill much prior to the notification dated 10.11.2006 and that notification dated 10.11.2006 is applicable only to new sugar factories and does not affect the existing sugar factories as on 10.11.2006. It is also contended that though the writ petition is barred by laches, the learned Single Judge failed to consider the said issue.

16. We have also heard the learned counsel for the respondent No.1/writ petitioner, and the learned Standing Counsel appearing for the Union of India.

17. As we could see from the material available on record, the IEM of the writ petitioner was admittedly made prior to the IEM of the respondent No.3. It is no doubt true that the writ petitioner's IEM was amended subsequently raising the capacity from 5000 TCD to 6000 TCD, however as rightly held by the learned Single Judge the same is of no consequence in the light of the letter of Department of Industrial Policy and Promotion dated 28.06.2007 clarifying that an amendment of IEM for change of any of the parameters does not change the date of filing of the IEM unless the amendment is for changing the proposed location of the sugar factory. Therefore, admittedly, the writ petitioner's IEM is prior in time.

18. It may be added that both the writ petitioner and the respondent No.3 filed their IEMs prior to the Amendment Order dated 10.11.2006. In the light of the law laid down in ***M/s. Ojas Industries*** (***supra***) that the Amendment Order dated 10.11.2006 operates retrospectively, there can be no dispute that both the writ petitioner and the respondent No.3 are bound by the provisions of the Amendment Order dated 10.11.2006. Para-32 of the Judgment of the Supreme Court in ***M/s. Ojas Industries (supra)*** wherein this aspect was discussed in detail reads as under:

> "32. 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 the Sugarcane (Control) Order, 1996, Press Note 12 and the notification dated 11-9-1998 issued under Section 29-B(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. Therefore, the said 2006 order operates retrospectively. It will not apply to mills which are already functioning. The said 2006 order will apply only to cases where IEMs are pending in disputes in various courts. The said 2006 order will also apply after our judgment to those cases which are under dispute and where milling has not commenced or permitted to commence."

19. In the instant case, the writ petitioner is admittedly the earlier IEM holder. On appreciation of the material available on record, the learned Single Judge found that the writ petitioner had taken the effective steps to implement its IEM within the stipulated time and that it had also started crushing operations with effect from 09.03.2007 and commercial production from 16.03.2007 whereas the sugar mill of the respondent No.3 was still under construction as reflected from the report of the Cane Commissioner dated 10.07.2007. Thus, in fact the sugar mill of the writ

petitioner achieved the status of an existing sugar factory in terms of Explanation-1 to Clause 6-A of the Control Order.

20. Therefore, the learned Single Judge was right in allowing the writ petition as covered by the decision of the Supreme Court in ***M/s. Ojas Industries (supra)***.

21. Even assuming that the plea of the appellant before us that it has taken effective steps to set up its sugar mill much prior to the Amendment Order is correct, the same has no consequence since the Amendment Order operates retrospectively. Admittedly, the writ petitioner has implemented the IEM within the time stipulated under Clause 6-C of the Control Order. Hence, appellant/ respondent No.3 is prohibited from filing the IEM proposing to set up the sugar mill within 15 kms from the proposed sugar mill of the writ petitioner.

22. The objection raised by the learned Senior Counsel for the appellant on the ground of laches is also devoid of any merit in view of the admitted fact that the writ petitioner has been opposing the setting up of industry by appellant/respondent No.3 by filing a complaint before Secretariat for Industrial Assistance on 25.05.2006 and requesting to cancel the IEM acknowledgement dated 04.04.2006 issued to respondent No.3. Even thereafter, several representations were made by the writ petitioner apprising the respondents No.1 and 2 that the proposed sugar mill of the respondent No.3 is situated within the prohibited distance of 15 kms. The writ petition was filed on 02.04.2007 and the delay in filing the writ petition has been sufficiently explained. Therefore, in the light of the ratio laid down by the Supreme Court in ***Ashok Kumar*** vs. ***State of Bihar***, (2007) 8 SCC 445 we are of the view that the writ petitioner can't be denied the relief on the ground of delay and laches.

For the aforesaid reasons, the appeal is devoid of any merit and the same is accordingly dismissed.

CHIEF JUSTICE

RAJIV SAHAI ENDLAW, J.

AUGUST 07, 2015
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