IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.1312 of 2015
IN
Civil Writ Jurisdiction Case No. 10193 of 1997

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1. M/s Kishan Seva Cold Storage Pvt. Limited, Market Yard, Mussallehpur, P.S. Sultanganj, District Patna through Sita Ram Yadav its Managing Director.
2. Sita Ram Yadav S/o Sri Triveni Rai Managing Director of Kishan Seva Cold Storage Pvt. Limited, Market Yard, Mussallehpur, P.S. Sultanganj, District Patna.

.... Appellant/s

Versus

1. The Bihar State Electricity Board, Vidhut Bhawan, Bailey Road, Patna through its Chairmans.
2. The Joint Secretary, Bihar State Electricity Board, Vidhut Bhawan, Bailey Road, Patna.
3. The General Manager cum Chief Engineer, Central Bihar Area, Electricity Board, Patna.
4. The Chief Engineer, Patna Electricity Supply Undertaking, Mangles Road, Patna.
5. The Electrical Executive Engineer, Patna Electricity Supply Undertaking, Mangles Road, Patna.
6. The Electricity Superintending Enginner, Patna Electricity Supply Undertaking, Mangles Road, Patna.
7. The Assistant Electrical Engineer, Incharge H.T. Building, Patna Electricity Supply Undertaking, East Circle, Patna.

.... Respondent/s

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Appearance :

For the Appellants : Mr. Sanjeev Kumar Mishra, Advocate
Mr. Piyush Saurav, Advocate
Mr. Chandan Priyadarshi, Advocate
For the Respondent Board : Mr. Vinay Kirti Singh, Advocate
Mr. Vijay Kumar Verma, Advocate

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CORAM: HONOURABLE THE ACTING CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date: 01 -04-2016

This is an appeal under Clause 10 of the Letters Patent of this Court assailing an order, dated 19.02.2015, passed by a learned single Judge of this Court, in CWJC No. 10193 of 1997, whereby the writ application by the appellants herein, under Article 226 of the Constitution of India, has been dismissed.

2. I.A. No. 5739 has been filed seeking condonation of delay of 192 days in preferring the present appeal.

3. Having considered the statements made in the petition, we are of the considered view that the appellants have been able to make out a case that there existed sufficient cause which, prevented them from filing the appeal within prescribed time.

4. The delay, in filing of present appeal, accordingly, is condoned in the interest of justice. I. A. No. 5793 of 2015 accordingly stands allowed.

5. Facts of the case, in brief, are that the appellants are said to have taken a Cold Storage on lease from the Bihar State Agricultural Produce Marketing Committee, Mussallehpur, in terms of an agreement entered into between the two on 10.11.1993. They came in possession over the Cold Storage on 01.03.1994. In the year 1993, the State Government of Bihar had come out with an Industrial Incentive Policy through resolution No. 4847, dated 10.06.1993 (hereinafter referred to as the 1993 Industrial Policy). The apparent purpose of the said Policy was to enhance industrial development and investment in industrial sector, in the State of Bihar, by providing incentives/reliefs to the Entrepreneurs. The incentives were intended

to be given to such Units, which were to come in production between 01.04.1993 and 31.03.1998. As pleaded in paragraph 6 of the supplementary affidavit filed on behalf of the appellants in writ proceedings, their Cold Storage started functioning from 01.03.1994.

6. Several incentives were provided for in the said Industrial Incentive Policy. The dispute, in the present case, relates to “power incentive”, i.e., concession in the matter of payment of electricity bills. Clause 6 of 1993 Policy provided that new Industrial Units, having connected load up to 500 KVA, would have exemption from payment of Annual Minimum Guarantee (hereinafter referred to as ‘AMG’). With respect to such Industrial Units, where the investment made was up to 75 lacs on plant and machinery, remission of 18 paise per unit of electricity consumption was allowed, whereas, for such industrial units, where the investment was more than 75 lacs, remission of 15 paise per unit electricity consumption was granted.

7. The State Government of Bihar came out with revised Industrial Incentive Policy in the year 1995 with effect from 01.09.1995 (hereinafter referred to as 1995 Industrial Policy) with certain significant variations bringing within its scope such industries also, which did not fall under the 1993 Industrial Policy and which were non-production units.

8. The present dispute relates to exemption from payment of

AMG only, which the appellants claim to be entitled to in the light of 1993 Industrial Incentive Policy.

9. The appellants were denied the benefit of exemption from payment of AMG and they were asked to pay the said amount by the erstwhile Bihar State Electricity Board (now, North Bihar Power Holding Company Limited, the successor Company) (hereinafter referred to as the 'Company'). The appellants approached this Court by filing a writ application, under Article 226 of the Constitution of India, giving rise to CWJC No. 10193 of 1997. The Company resisted the claim of the appellants, in the writ proceeding, taking a plea that the Cold Storage, in question, did not come within the meaning of "*Industry*" in terms of either 1993 or 1995 Industrial Policy, because Cold Storage cannot be said to be engaged in any manufacturing activities and, therefore, not covered by exemption Clause of 1995 Industrial Policy.

10. From the counter affidavit filed on behalf of the erstwhile Electricity Board, it appears that the main ground for denying the appellants the benefit of exemption from payment of AMG was that Cold Storage, being not a manufacturing Unit, was not covered by the 1995 Industrial Policy of the State Government. They also took a plea that since the appellants had taken the concerned Cold Storage on lease from the Agriculture Produce Marketing Committee,

Mussallehpur, they could not be treated to be entrepreneurs for the purpose of grant of incentive, under the said Industrial Policy.

11. Learned single Judge of this Court dismissed the aforesaid CWJC No. 10193 of 1997 preferred by the appellants by an order, dated 19.02.2015, in the following terms:-

> *"Counsel for the petitioner is not in a position to place any record to show that the industrial policy is applicable to the old Industry as generally exemption is granted to the new Industry for attracting the investment and, as such, this Court is not inclined to accept the plea of the petitioner for granting any exemption.*
>
> *Accordingly, this petition is dismissed."*

12. This appeal, under Clause 10 of the Letters Patent of the High Court, has been preferred against the said order, dated 19.02.2015, passed by a learned single Judge of this Court.

13. Mr. Sanjeev Kumar Mishra, learned Counsel, appearing on behalf of the appellants, assailing the order under appeal, has referred to Clause 2 of the Industrial Incentive Policy, 1993, in support of his submission that the Cold Storage Unit was covered by the said Policy as it applied to such Industrial Units, which started manufacturing between 01.04.1993 and 31.03. 1998. He has further submitted that the Board wrongly denied the appellants the benefit of

exemption from payment of Annual Minimum Guarantee on the ground that Cold Storage could not be treated to be manufacturing Unit and, therefore, covered under the Industrial Policy of the State Government announced in the year 1995. He submits that non-production and service based industries were not intended to be excluded from the benefit of exemption from payment to AMG charges.

14. Relying upon a decision of this Court in case of ***M/s Keshav Sheet Grih pvt. Ltd. Vs. Bihar State Electricity Board***, reported in ***(2003 (1) PLJR 97)***, Mr. Sanjeev Kumar Mishra, learned Counsel for the appellants, has submitted that the expressions "*gone into production*" and "*start commercial production*" have been held to mean going into operation and starting commercial operation, in case of non-production, service based Industrial Units. He has made particular reference to paragraph 29 of the said decision which reads thus:-

> *"29. On the basis of the discussions made above, I come to the conclusion that the cold storage is also covered by the Industrial Policy and consequently by the Government resolution, dated 3.9.1996 and the Board's circular, dated 11.10.1996".*

15. Mr. Sanjeev Kumar Mishra, learned Counsel for the

appellants,has further submitted that 1993 Industrial Policy was applicable to such Industries, which came into commercial operation between the periods 01.03.1993 and 31.03.1998. In the meanwhile, the State Government came out with 1995 Industrial Policy. There is common factor in both the policies that the Industrial Units, having connected load up to 500 KVA, would be granted exemption from payment of Annual Minimum Guarantee Charges. He has, accordingly, submitted that in no circumstance, the Unit of the appellants could have been denied the benefit of exemption from payment of AMG charges.

16. Mr. Vinay Kirti Singh, learned counsel appearing on behalf of the respondents Company, on the other hand, submits that the decision of this Court in case of ***M/s Keshav Sheet Grih Pvt. Ltd.*** (supra) is not applicable to the case of the appellants inasmuch as the said decision is based on 1995 Industrial Policy of the State Government. According to him, 1995 Industrial Policy was applicable only to such new Industrial Units, which came into existence after 1995 Industrial Policy had come into force. He has further submitted that in the 1995 Industrial Policy, the State Government identified "*thrust areas*" of manufacturing activities for which incentives were provided. He accordingly submits that considering the "*thrust Industry*", as identified under Clause 15.1 of

the 1995 Industrial Policy, this Court, in case of ***M/s Keshav Sheet Grih Pvt. Ltd.*** (supra), held a Cold Storage to be an Industrial Unit for the purpose of grant of exemption from AMG. He has further submitted that 1995 Industrial Policy is not applicable to the appellants Unit as the said Cold Storage of the appellants already existed before said policy was implemented. Further, since the appellants, took on lease the said Cold Storage from the Agriculture Produce Marketing Committee, Mussallehpur, the Unit cannot be said to be a new Unit established after 1993 policy came to be implemented, Mr. Singh contends. It is his specific case that 1993 Policy was applicable to new Units established in terms of the said 1993 Industrial Policy.

17. He has next submitted, referring to Clause 24 of the 1993 Industrial Incentive Policy, that for the purpose of getting benefits under the said Policy, the concerned Industrial Units were required to get their projects registered with the concerned District Industries Centre or with the office of Industrial Area Development Authority with an intimation to the Director Industries, Government of Bihar.

18. English translation of Clause 24 of the 1993 Industrial Incentive Policy, reads thus:-

> *"24. In order to get the benefit of incentive plans the industrial units shall have to inform the*

> *Director, Industry, Bihar, Patna after getting their plans registered in the office of concerned District Industrial Centre of Industrial Area Development Authority. In the matter of extension/opening of Branch prior permission of the Director, Industry, Bihar, Patna is necessary before extension/opening of Branches".*

19. We have gone through the pleadings and other materials on record and have considered rival submissions made on behalf of the parties.

20. It is the specific case of the appellants, as has already been noticed above, that the said Cold Storage became functional with effect from 01.03.1994. 1995 Industrial Policy was implemented with effect from 01.09.1995. This Court's decision, in case of ***M/s Keshav Sheet Grih Pvt. Ltd.*** (supra), is in relation to 1995 Industrial Policy.

21. Clearly, therefore, the appellants can take advantage of the reasoning of this Court's decision, in case of ***M/s Keshav Sheet Grih Pvt. Ltd***. (supra), for holding that a Cold Storage is covered by 1995 Industrial Policy only if they are in a position to establish that the said Cold Storage, in question, which became functional with effect from 01.03.1994, is covered by 1995 Industrial Policy. In order to decide this aspect, we need to take into account Clause 11 under the heading "*definitions*" of 1995

Industrial Police, relevant portion of which reads thus:-

> *"11. Date of production.- xx xx xx*
>
> *xx xx xx xx*
>
> *The Industrial units which have come into commercial production on or after 1.9.1995, but had made substantial fixed capital investment prior to 1.9.1995, will have the option to avail of the package of incentives/assistance as provide in the Industrial Incentive Policy, 1993 (provided the unit is eligible under that policy) or under this Industrial Policy. They will not be entitled to partial benefits from both these policies. The option must be given in writing to the Director of Industries or Director, Technical Development within 3 months of the date of notification of this policy in the Bihar Gazette."*

22. There is no ambiguity in the language as quoted above, which, in no uncertain terms, provides that those Industrial Units, which came into commercial production on or after 01.09.1995, but had made substantial capital fixed investment prior to 01.09.1995, shall have the option to avail the package of incentives provided in the 1993 Industrial Incentive Policy, provided that the unit is eligible under that Policy. Such units could also avail of the package of the incentives under 1995 Industrial Policy. It is also explicit in the 1995 Policy that such Industrial

Units would not be entitled to partial benefits from both the Policies and option must be given, in writing, to the Director of Industries or Director, Technical Development within three months from the date of notification of the Policy.

23. Apparently, thus, the Industrial Units, which started commercial production prior to 01.09.1995, are not covered by 1995 Industrial Policy. As has been noticed above, 1993 Industrial Policy was formulated providing for industries, which started commercial production between 01.04.1993 and 31.03.1998. Before 1998, however, the State Government formulated a new 1995 Industrial Policy. 1995 Industrial Policy is apparently not applicable to those Industrial Units, which had started production prior to coming into force of 1995 Industrial Policy and could be entitled to receive incentives under 1993 Policy. From the aims and objectives of 1995 Industrial Policy, it is evident that it was intended to enhance investments in Industrial Units. 1995 Industrial Policy could not be said to be applicable to the industries already existing. It, however, covers, within its fold, an industry, wherein substantial amount of investments had been made before coming into force of 1995 Industrial Policy and Industrial Unit came in production after coming into force of the 1995 Industrial Policy subject to the condition that such Units were covered under the

1993 Industrial Policy. The present Industrial Unit is apparently not covered by 1995 Industrial Policy.

24. Upon comparison of 1993 Industrial Policy and 1995 Industrial Policy, we find that the change is noticeable. Various industries including Hotel, Saw Mill, Flour Mill, Rice Mill and several other industries were specifically excluded from the purview of 1993 Industrial Policy as is evident from Schedule-III of 1993 Industrial Policy, whereas 1995 Industrial Policy covers food and food processing industries, Agro based industries, health services, tourism etc, which had been held to be entitled for the incentives. Whereas 1993 Industrial Policy covers only such units, which were capable of production, 1995 Industrial Policy covers such units also, which were service oriented or which fundgion as service-provider, such as, health service, tourism, etc. There is, thus, apparent and considerable shift in 1995 Industrial Policy from 1993 Industrial Policy.

25. As has been noticed hereinabove, Clause 24 of the Industrial Incentive Policy, 1993, specifically provides that Industrial Units, seeking benefit of incentives plan, shall have to inform the Director, Industry, Bihar, after getting their plans registered in the office of the concerned District Industries Centre of Industrial Area Development Authority. There is no pleading on

record that the appellants had given to the Director, Industry, Bihar, any such information, which was needed for the purpose of getting benefit of incentives under 1993 Industrial Policy. We have also noticed that Schedule-II of 1993 Industrial Policy lays down definition of Industrial Units for the purpose of applicability of the said Policy. There is no pleading that the present unit is covered by the definition as given in Schedule-II.

26. We do not find, therefore, any merit in the contention that the Industrial Unit, in question, comes within the definition of Industrial Unit under 1995 Industrial Policy. We consider it apt to quote paragraphs 5 and 6 of the supplementary affidavit filed on behalf of the appellants, which are as follows:-

> *"5. That the petitioner No.1 is an Industrial Unit a stated in the definition of the Industrial Policy 1995.*
>
> *6. That the said Cold Storage started functioning from 1.3.1994 for the first time."*

27. The statements made in paragraphs 5 and 6 are self-contradictory as units, which started functioning prior to 01.09.1995, do not come within the definition of Industrial Unit under 1995 Industrial Policy.

28. We do not find, therefore, any illegality in the order, under appeal, passed by learned single Judge, whereby writ

application filed by the appellants has been dismissed.

29. This appeal has no merit and is, accordingly, dismissed.

30. There shall, however, be no order as to costs.

(Chakradhari Sharan Singh, J)

I.A. Ansari, ACJ:- I agree.

(I.A. Ansari, ACJ)

A.F.R.
ArunKumar/-

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