

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPO No. 520 of 2018

**Bally Jute Company Limited and another
Vs.
State of West Bengal and others**

For the petitioners	:	Mr. Dhruba Ghosh, Sr. Adv., Mr. Pradip Kr. Sarawagi
For the State	:	Mr. Abhratosh Majumdar, Ld. AAG, Mr. Prithu Dudhoria, Mr. Debasish Ghosh
Hearing concluded on	:	05.10.2020
Judgment on	:	10.11.2020

The Court:

1. The petitioners have challenged an order dated July 31, 2018 passed by respondent no. 4, whereby it revoked the Registration Certificate (RC) No. DI/2004/484(B) [484(1)2004] dated August 23, 2012 issued by the said respondent to the petitioners. By the same order, the issuance of Commencement of Commercial Production Certificate (CCP), in favour of the petitioners, was also refused.

2. The brief facts of the case are:
3. The Government of West Bengal, Commerce and Industries Department, formulated an Incentive Scheme, known as the West Bengal Incentive Scheme, 2004 (hereinafter referred to as “the 2004 Scheme”) for large and small scale industrial units to be set up in the state of West Bengal.
4. The petitioners expanded their unit of manufacturing jute goods and products at 5, Sree Charan Sarani, Bally, Howrah-711201, consequently constructing new factory buildings. The petitioners purchased and installed imported and indigenous plant and machines at their jute mill. Such expansion was done on and from April 1, 2004.
5. On June 30, 2008, the expanded project (Mega Unit) was commissioned and commercial production was started.
6. On May 20, 2008, the petitioners filed an application before the respondent no. 4 for registration of the Mega Unit of the petitioners.
7. On the application of the petitioners, the West Bengal Pollution Control Board (WBPCB) issued a ‘No Objection’ Certificate (NOC) on March 20, 2010.
8. Later on, the petitioners came to know that no subsidy would be granted to the petitioners, for which the petitioners took out a writ petition, bearing W.P. No. 445 of 2011. On August 2, 2012, a coordinate bench of this court directed the respondent-authorities to consider the application for subsidy to be made by the writ petitioners under the Scheme of 2004.

9. On August 23, 2012 a Registration Certificate (RC), valid up to August, 2015, was issued by the respondent no. 4 under the 2004 Scheme. The RC dated August 23, 2012 was amended and forwarded to the petitioners on September 13, 2012.
10. On August 16, 2013, the respondent no. 2, being the West Bengal Industrial Development Corporation Limited (WBIDCL), issued an Eligibility Certificate (EC) bearing No. INC-2004/EC-333(B) dated August 2, 2013 under the 2004 Scheme, declaring the petitioners' unit as eligible for the incentive detailed thereunder.
11. On September 12, 2013, the petitioners applied to the respondent no. 4 for issuance of a CCP. The respondents, by several letters, went on seeking different particulars and documents, which were provided by the petitioners. However, during pendency of the CCP issuance application, the validity period of the RC dated August 23, 2012 as well as that of the EC dated August 2, 2013 expired.
12. The petitioners applied for renewal of the RC as well as the EC on January 4, 2017 and January 28, 2017 respectively.
13. Since neither the renewal of the RC and EC, nor the issuance of CCP materialized, the petitioners filed another writ petition, bearing W.P. No. 85 of 2017. On March 1, 2017, a coordinate bench of this court disposed of the writ petition by directing the respondents to consider the petitioners' applications for renewal of RC and EC and also the application for issuance of CCP, after

affording the petitioners a reasonable opportunity of hearing, within a specific time-frame.

14. Pursuant to the said order dated March 1, 2017, the respondent no. 4 directed the petitioners to appear for hearing and passed an order recording that, since all plots of the unit were not classified as "Karkhana", the then character of the land was required to be verified and the District Land and Land Reforms Officer (DL&LRO), Howrah, was requested to provide information on the concerned 26 plots within three weeks from the receipt of such order. In the same order dated April 11, 2017, the respondent no. 4 also recorded that, as per the guidelines of the Department of Commerce and Industries dated February 13, 2016, revalidation of RC was not necessary if commercial production was commenced. It was further recorded that the original RC would be returned to the petitioners as commercial production of the unit had started on June 30, 2008 and that the application for CCP would be taken up after the report was received from the DL&LRO. On September 22, 2017, pursuant to the petitioners' request, they were informed that the renewal of the EC would be considered on the production of CCP.

15. Reminders having been issued in the meantime to no effect, the petitioners filed a contempt application bearing CC No. 18 of 2018. Orders were passed on the contempt proceedings. On June 4, 2018, a copy of the report of the DL&LRO was handed over to the petitioners' advocate in court and on July 6, 2018, the

respondent no. 4 informed the petitioners that another hearing would be conducted on July 10, 2018 to dispose of the issue and requested the petitioners to send papers/documents of Power System Installation Agreement and documents that show installation of plant and machinery, manpower engaged and quantum of production for the expansion. On July 10, 2018, the petitioners submitted a letter as its representation for the said meeting, allegedly with the relevant documents.

16. However, on July 31, 2018, the respondent no. 4 issued the impugned order, revoking the RC dated August 23, 2012.
17. By an order dated September 3, 2018 passed in the contempt proceeding, the petitioners were given liberty to avail of their remedies in accordance with law since the court was not inclined to enter upon the merits or demerits of the rival claims with regard to the order dated July 31, 2018 in its contempt jurisdiction.
18. Being thus aggrieved by the order dated July 31, 2018 and by non-renewal of the validity periods of the EC and non-issuance of CCP, the petitioners have moved the present writ petition.
19. Both sides, apart from arguing orally, submitted written notes of arguments.
20. The petitioners' primary contention is that it was already held by the respondent no. 4, by its previous order dated April 11, 2017, that revalidation of the RC was not necessary since commercial production of the unit had started on June 30,

2008. Thus, there arises no further question of renewal or revalidation of the same.

21. As far as the renewal of the EC is concerned, the petitioners argue that the same was already issued on August 2, 2013. Thereafter, entirely due to the delay occasioned by the respondent no. 4, the CCP was not issued, thereby exhausting the validity period of the EC without any fault of the petitioners. The matter was dragged unnecessarily according to the petitioners, due to needless insistence of the respondent no. 4 upon production of irrelevant material. However, the documents sought by the respondent no. 4 were produced by the petitioner.
22. It is argued by the petitioners that the respondent no. 4 misread the RC, EC and NOC granted by the WBPCB and focused only on the portion of the NOC dated March 23, 2010, issued by the WBPCB, which states about “installation of new machinery in place of existing machinery. Manufacturing of various types of jute goods”. Respondent no. 4 concluded that such observation in the NOC automatically meant that the company had modernized, instead of expanding, its existing production facility, although they had applied for expansion only, in the RC and in their Detailed Project Report (DPR). It was also alleged that since the NOC was issued after the expiry of the 2004 Scheme on March 31, 2008, the same could not be treated as a valid document on the basis of which an application for the incentive could be made under the Scheme.

23. However, learned counsel for the petitioners relies on a copy of the NOC dated March 23, 2010, annexed at page-185 (Vol-II) of the writ petition, to indicate that it mentioned that the consent to establish was to be for the “expansion of unit of M/s Bally Jute Company Limited”. The capital investment for the expansion project was enumerated at Rs. 30 crores in the same document. Moreover, the NOC was issued in reference to the petitioners’ letters dated February 8, 2010 and March 15, 2010, annexed at page nos. 11 and 12 respectively of the affidavit-in-reply of the petitioners affirmed on December 4, 2019. Such letters, it is argued, clearly referred to expansion and not modernization. At the time of the application for renewal, the said NOC dated March 23, 2010, which was valid up to August 31, 2014, was the latest NOC. The earlier NOCs dated December 1, 2006 and October 5, 2009, also annexed to the writ petition, are relied on as well, to argue that the objection as to the petitioners not being entitled to RC due to absence of NOC from the WBPCB does not arise.

24. The petitioners had already been found eligible to apply under the 2004 Scheme by the order dated August 2, 2012 passed by a learned Single Judge of this court in W.P. No. 445 of 2011 (annexed at page-97 of the Vol-I of the writ petition). That apart, on the basis of the same documents, an RC was issued by the concerned authority, along with an EC. Only the issuance of the CCP was left pending by respondent no. 4 without any rhyme or reason.

25. By an order dated September 22, 2017 (annexed at page-169 Vol-II of the writ petition), the concerned authority had also stated that the EC would be issued after the CCP; so only the issuance of CCP remained to complete the necessary formalities.
26. Learned counsel for the petitioners further argues that only the question of land was pending decision, even as per the respondent no. 4, which will be evident from the records and orders passed by the said respondent. However, such question was also conclusively answered upon the DL&LRO having filed the connected report.
27. Only the documents as mentioned in the format under Form-1 (annexed at page-88 at 92 of the writ petition), were to be submitted by the petitioners at the time of registration. The petitioners have to submit documents pertaining to expenses incurred only at the time of seeking subsidy, in terms of Form-II (annexed at page-69 of the writ petition). Such stage has not been reached as yet.
28. Moreover, the respondent no. 4, according to the petitioners, refused to exercise jurisdiction vested in it by withholding the CCP without reason and in rejecting the RC of the petitioners *de hors* the law, although it was previously held to be valid by the respondent no. 4 itself.
29. Learned counsel for the petitioners refuted the respondents' arguments based on the judgment of *Commissioner of Customs (Import), Mumbai vs. Dilip Kumar and Company and others reported at (2018) 9 SCC 1*, on the principle that benefit of any

ambiguity in an exemption clause/notification cannot be extended to the assessee, by arguing that no dispute as to interpretation of any statute or the scheme is involved in the present case. It is argued that there is no scope for interpreting any clause in the scheme, let alone there being any ambiguity under the Scheme. Rather, this court had held on August 2, 2012 that the petitioners were eligible to apply under the 2004 Scheme. Moreover, the RC was issued in 2012 and had expired by efflux of time due to no fault of the petitioners. Since the RC was held, by the respondent no. 4 itself, to prevail as no renewal was necessary due to commencement of commercial production on June 30, 2008, there arises no question of withholding the CCP.

30. As regards the judgment of *Union of India and others vs. Unicorn Industries*, reported at (2019) 10 SCC 575, relied on by the respondents, the petitioners argue that the same was rendered on the issue of promissory estoppel and that it was held by the Supreme Court that the doctrine cannot be invoked in the abstract and courts are bound to consider all aspects, including the result to be achieved and the public good at large, since courts have to be equitable. In the facts of that case, the concerned product ('pan masala') was included in a "negative list" and, as such, not entitled to exemption from excise duty. In the present case, however, no larger public interest outweighs the independent loss of the petitioners. The 2004 Scheme was issued in the public interest to promote trade. The public authorities are to act fairly and not arbitrarily.

31. As regards *State of Maharashtra and others vs. Swanstone Multiplex Cinema Private limited*, reported at (2009) 8 SCC 235, it was held that the private respondents had collected tax illegally and unjustly enriched itself. Since it was difficult to return the money to the cinema-goers themselves, the State was directed to realize such wrongly collected amount and pay the same to some voluntary and charitable organization. In the present case, the petitioners argue, the stage of availing of subsidy has not yet arrived, thus shutting out the question of unjust enrichment of any sort. Hence, the said cited judgment does not help the respondents.
32. Learned counsel for the respondents, on the other hand, argues that the NOC issued by the WBPCB clearly referred to installation of new machinery in place of existing machinery and manufacturing various types of jute goods. The EC was issued in favour of the petitioners for expansion of its existing unit, but the installation of new machinery would tantamount to modernization of the unit, which subsidy is not available to Mega Projects.
33. By the order dated March 1, 2017, this court permitted the authorities to carry out a three-stage verification – renewal of RC, renewal of EC and the determination of date of commencement of commercial production. The authorities were allowed to consider such other documents as they deem necessary at all the stages. By a notice dated July 6, 2018, the respondent no. 4 had requested the petitioners to submit documents that show installation of plant and machinery. But the petitioners, by a reply dated July 10, 2018, stated that a list of the entire

plant and machinery had been submitted long back. Such list, according to the respondents, would not evince that the petitioners had made an investment in excess of Rs. 25.39 crores, as alleged, towards plant and machinery on or after April 1, 2003 and prior to May 20, 2008 (date of submission of application for incentive). The EC was obtained by the petitioners only on March 23, 2010 and the NOC clearly required the petitioners to obtain consent to operate prior to operation of its new machinery, which was not obtained on or before June 30, 2008, when the petitioners claimed to have commenced commercial production in the expansion project. Central Excise Returns for the period from April, 2008 to January, 2009 were produced by the petitioners in spite of having claimed commencement of commercial production on June 30, 2008.

34. The Power Installation Agreement, 2013 is not relevant as the petitioners claimed to have commenced commercial production on June 30, 2008.
35. The respondents further argue that the authorities did not determine the date of commencement of commercial production at any stage and the benefits of the Scheme had never been extended to the petitioners. Substantial tax concessions are also available to Mega Projects, as provided in Clause 20(e) of the 2004 Scheme. However, the petitioners were not able to establish their investment in plant and machinery as claimed in the composite application under the Scheme and, therefore, altered their position to their disadvantage.

36. The respondents further argue that the term 'concession' is a form of privilege, as is the term 'exemption'. Incentive Schemes and Exemption Notifications should be interpreted strictly and the burden of proving applicability of such privilege would be on the assessee. There is ambiguity in the Exemption Notification which is subject to strict interpretation according to the petitioners. The benefit of such ambiguity cannot be claimed by the subject/assessee and must be interpreted in favour of the revenue, as per *Dilip Kumar and company (supra)*.
37. The respondents rely on the judgments already discussed while considering the arguments of the petitioners, for the proposition as indicated in the petitioners' arguments.
38. In order to decide the dispute involved herein, some of the relevant provisions of the 2004 Scheme have to be looked into.
39. "Expansion of Existing Unit" has been defined in Clause 2(xix) of the Scheme to mean expansion for the same item(s) of production within its existing approved capacity or for expansion for enlarged approved capacity or for manufacture of a new item with an approved capacity. Even without going into the definitions of the terms "unit", "existing industrial unit", "Mega Unit" etc., it may also be seen from the definition of "Eligible Unit" in Clause 2(xviii) to mean a unit in the large/small scale sector having Registration Certificate issued by the Directorate of Industries and Eligibility Certificate by the WBIDC or Registration Certificate issued by the District Industries Centre, as the case may be. Moving on to Clause

18A of the 2004 Scheme, it is seen that special package of incentives has been envisaged in respect of Mega Projects on a case by case basis in the following areas:

- (i) Size of investment;
- (ii) Special nature of the industry;
- (iii) Employment potentiality;
- (iv) Down-stream effect of the industry;
- (v) Ancillarisation effect of the industry;
- (vi) Export potentiality.

40. The Payment Modalities for Mega Projects are stipulated in Clause 21 of the 2004 Scheme. The relevant provisions therein are quoted below:

"1. Capital Investment Subsidy, Industrial Promotion Assistance, Employment Generation Subsidy, Subsidy for conversion for use of Piped Gas and Refund of Stamp Duty & Registration Fee will be credited to the account of the unit as and when such claims are preferred and entertained.

2. the unit will make applications in the prescribed forms on commencement of commercial production to the Managing Director, WBIDC Ltd. praying for release of incentives as detailed above.

....

6. The unit will make applications in the prescribed forms on commencement of commercial production and on investment of Rs. 25 crores to the Managing Director, WBIDC Ltd. praying for release of incentives as detailed above.

7. The unit will also apply to the Commissioner, Commercial Taxes, West Bengal in the form shown in Annexure-VI requesting him to certify the total amount of sales tax paid during the year in respect of which the application has been made. Such application should be filed at the end of each year.

8. upon receipt of the application, the Commissioner, Commercial Taxes, West Bengal would verify the payments and other particulars as contained in the application and issue a certificate to the Managing Director, WBIDC Ltd. certifying the sales tax paid by the unit during the year in question.

9. MD. WBIDC Ltd. on receipt of the information, as above, will issue cheque/s in favour of the Commissioner, Commercial Taxes to be deposited by him into the Reserve Bank of India, Kolkata or Government Treasuries in Sales Tax Challan as advance payment of tax made by the unit for the year. Such cheque/s shall be drawn in favour of the Commissioner, Commercial Taxes, West Bengal on account of the unit only in a year in respect of the concerned unit.

....

11. The unit would be eligible to all the benefits including the Industrial Promotion Assistance only after the total investment crosses the limit of Rs. 25 crores and on starting commercial production.

12. The total investment must be forthcoming within a date to be specified at the time of granting registration by the Director of Industries, West Bengal. If total investment does not exceed of Rs. 25 crore and commercial production does not commence within the date specified by the Director of Industries, West Bengal at the time of granting the registration, then the unit will not be entitled to IPA and will be treated as an ordinary unit as per WBIS, 2004."

41. It is evident from the aforesaid clause of the Scheme that the claim and disbursement of subsidies, as envisaged therein, is in the form of reimbursement at a later stage, post-commencement of commercial production.

42. On the contrary, the CCP could not be held up on the ground of alleged non-production of necessary documents to show the production costs, which could only come at a later stage. Seeking proof of commercial production necessary for granting subsidies prior to issuing a CCP would be like the oft-quoted "putting the cart before the horse" syndrome. The petitioners substantially complied with

the provisions of the Scheme and answered every query of the respondent no. 4 at each stage. Moreover, the RC and EC were previously allowed and renewed. The implementation of those was stalled due to no fault of the petitioners but due to the respondent no. 4 unlawfully withholding the CCP for reasons best known to the concerned functionaries of the authorities.

43. The 2004 Scheme was conceived to boost commerce in the State and not to hamper it in unnecessary red-tapism. In the present case, a specific order of this court, pertaining to the 2004 Scheme being applicable to the petitioners' mega unit, subsists, as discussed repeatedly above. There is also a specific order of the respondent no. 4 itself, dated April 11, 2017, whereby only a previous issue of land, which was subsequently supposed to be closed on the filing of the DL&LRO report and relevant documents by the petitioners, was seen to be pending. In the said order, the respondent no. 4 categorically recorded that, in view of the commencement of commercial production by the unit-in-question on June 30, 2008, revalidation of Registration Certificate was not necessary as per the guidelines of the Department of Commerce and Industries dated February 13, 2016. The respondent no. 4 went so far as to record that the original RC would be returned to the petitioners. As such, there could not arise any question (or jurisdiction, for that matter) of subsequent revocation of such RC on frivolous grounds by the respondent no. 4 itself. Insofar as the EC goes, the same was also in favour of the expansion projection contemplated by the petitioners and

sanctioned by the respondent-authorities by issuance of EC. All the aforesaid documents clearly indicated that the project was for expansion, and not modernization of the existing units. Mere mention of installation of new plant and machinery in place of the existing ones in the manufacturing of jute goods, on a stray occasion, that too in the NOC issued by the WBPCB, could not convert the expansion project into a modernization of the capital assets.

44. Moreover, the rest of the NOC itself clearly indicated that the project was for one for expansion and there was no question of imputing the ingredients of modernization into it.

45. Even taking into consideration the lay person's connotation of modernization vis-à-vis expansion, an expansion has to take within its fold increments of quality as well as quantity. In the dynamic technological scenario of the present times, even if all the old plant and machinery are replaced with new ones, the same may very well be a part of an expansion project and need not necessarily indicate modernization. A strait-jacket compartmentalization of the two terms, "expansion" and "modernization", is impossible as the two are interactive concepts.

46. Replacement of old machinery may indicate, from a holistic perspective, the following (among others):

- (i) Improvement of the quality of the existing plants and machinery;
- (ii) Increment in quantity of the existing plant and machinery;

- (iii) Adaption of the existing plant and machinery to modern technological advancement;
- (iv) Diversification into new fields of the same business/industry; and
- (v) Generation of new employment, in whatever form.

47. All the above go a long way to fetch more revenue for the industry concerned and the economy as a whole and such capital formation and/or increment thereon amounts to expansion of industry, even though it might have some common elements with modernization.

48. In view of the above discussions, the petitioners are absolutely justifying in alleging that the respondent no. 4 withheld the extension of EC and issuance of CCP unjustly. As far as the impugned order dated July 31, 2018 passed by the respondent no. 4 is concerned, the same does not disclose any valid reason to revoke the RC of the petitioners, which was, in any event, beyond the jurisdiction of the respondent no. 4 while considering the question of issuance of CCP. In view of the compliance of all necessary conditions by the petitioners, which is evident from the record, it was unreasonable and beyond comprehension of a reasonable intellect, as to why the respondent no. 4 revoked the RC of the petitioners and refused to issue CCP in favour of the petitioners.

49. Accordingly, WPO No. 520 of 2018 is allowed, thereby setting aside the order dated July 31, 2018 passed by the respondent no. 4 (Director of Industries, West Bengal), being Annexure P26 to the writ petition. The respondent no. 2 is

directed to extend the validity period, by renewal, of the Eligibility Certificate dated August 2, 2013 granted in favour of the petitioners, annexed at page-128 of the writ petition. The revocation of the Registration Certificate in favour of the petitioners by the order dated July 31, 2018 accordingly stands abrogated. On the basis of the RC and the renewed EC, the respondent no. 4 is directed to issue necessary Certificate of Commencement of Commercial Production for the unit-in-question in favour of the petitioners at the earliest, positively within a month from the date of communication of this court to the respondent no. 4.

50. There will be no order as to costs.

51. Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)