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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1131 OF 2021

Shri Bhogawati Sahakari Sakhar Karkhana Limited,
Shahunagar (Parite), Taluka Karveer, District: Kolhapur, Through its Managing Director ...**Petitioner**

~ versus ~

1. **Government of India,**
Ministry of Commerce and Industry, Department of Industrial Policy and Promotion, New Delhi,
Through its Joint Secretary.

2. **Government of India,**
Ministry of Consumer Affairs, Food and Public Distribution Department, Department of Food and Public Distribution, Directorate of Sugar and V.O., Through its Director, having office at, Krishi Bhavan, New Delhi

3. **State of Maharashtra,**
Through the Secretary,
Department of Co-operation, Marketing and Textiles, Mantralaya, Mumbai – 400 032.

4. **The Commissioner of Sugar,**

Maharashtra State, Pune, having office at, Sakhar Sankul, Shivaji Nagar, Pune.

5. **THE REGIONAL JOINT DIRECTOR (SUGAR),**
Kolhapur Region, Kolhapur, having Office at, 1315, 'C' Ward, Saroj Apartment, Laxmipuri, Kolhapur.

6. **SAHYADRI SAKHAR KARKHANA LIMITED,**
Indumati Nagar, Dhamod, Taluka: Radhanagari, Dist:Kolhapur, (A Co-operative Society registered under MCS Act, 1960 and MCS, Rules, 1961), having office at, C/15-31, 'E' Ward, 519, Mahalaxmi Chambers, Near Central Bus Stand, Kolhapur – 416 001, Through its Managing Director. ...**RESPONDENTS**

APPEARANCES

FOR THE PETITIONER	**Mr Anil Anturkar, Senior Advocate**, *i/b Prashant Bhawake.*
FOR RESPONDENT NO. 6	**Mr SS Patwardhan***, with CG Patil, Bhooshan Mandlik.*
FOR THE STATE	**Mr VM Mali, AGP.**

CORAM : G.S.Patel & Madhav J Jamdar, JJ

DATED : 23rd November 2021

ORAL JUDGMENT (*Per GS Patel J*):-

1. The Petitioner is a sugar factory or a Sakhar Karkhana. It does not want the 6th Respondent, also a sugar factory, anywhere near it. That is why it has filed this Writ Petition, the latest in a series of attempts by the Petitioner for precisely this purpose.

2. The 1st and 2nd Respondents are the Government of India. The 3rd Respondent is the State of Maharashtra. The 4th Respondent is the Sugar Commissioner, Maharashtra and the 5th Respondent is the Regional Joint Director, Sugar, Kolhapur Region, Kolhapur.

3. The specific challenge in the Writ Petition is to the proposal by the 6th Respondent to set up a rival sugar factory at Indumati Nagar, Taluka Dhamod, Radhanagari, Kolhapur. It also seeks a Writ of this Court to quash and set aside an order of 31st October 2019 issued by the Government of India through the Ministry of Consumer Affairs declaring the 6th Respondent as an "existing Sugar Factory" (or mill). According to Mr Anturkar for the Petitioners, under the relevant provisions of the Sugarcane (Control) Act, 1966 as amended, no such declaration was ever even possible.

4. Mr Anturkar placed his case on two or three distinct grounds. We will turn to each presently.

5. The facts, to the extent that they are relevant, are like this.

6. The Petitioner is a cooperative sugar factory, originally constituted under the erstwhile Bombay Cooperative Societies Act 1925. That registration has continued under Maharashtra Cooperative Societies Act, 1960. There is no dispute that the Petitioner is a sugar factory registered with approved bye-laws or that it started operations in 1957 and covers several villages. It has expanded its capacity over a period of time.

7. On 31st March 1994, the 1st Respondent issued a letter of intent in favour of the 6th Respondent. The Petition says that by this the 1st Respondent "accordingly granted an industrial license" to the 6th Respondent to establish a new sugar factory, but this was at Durgmandwad, Taluka Radhanagri, District Kolhapur. The Letter of Intent was explicitly said to be valid for a period of three years from the date of its issuance.

8. The 6th Respondent was registered on 25th April 1994. The case of the Petitioner is that all sugar factories required an Industrial Entrepreneur Memorandum or IEM, and permission under the Industries (Development and Regulation) Act, 1951. By an order 7th November 1994, the Government of Maharashtra's Department of Cooperation permitted the 6th Respondent to change the site of its then proposed sugar factory to Dhamod (Ladwadi), subject to Union Government permission.

9. The dispute turns on an interpretation of certain provisions of the Sugarcane (Control) Order, 1966 ("**SCO**"). Before we turn to the relevant provisions, we note that the SCO was specifically the subject matter of the decision of the *Supreme Court in Ojas Industries (P) Ltd v Oudh Sugar Mills Ltd and Ors.*[1]

10. The SCO was amended in 2006. Supreme Court decision in *Ojas Industries* in explicit terms in paragraphs 28 and 32 says that the 2006 amendment is retrospective and applies retrospectively to all cases where IEMs are pending.

11. The requirement of holding an IEM did not exist prior to the 2006 amendment to the SCO. What was required was a license.

12. The 2006 amendment to the SCO introduced some provisions that are immediately important for our purposes. Clause 6A introduced a restriction on setting up of two sugar factories within a radius of 15 km. That clause has a proviso and four explanations and we reproduce it in full below.

> "**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.

1 (2007) 4 SCC 723.

Explanation 1: An existing sugar factory shall mean a sugar factory in operating 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 & Public Distribution, Ministry of Consumer Affairs, Food & Public Distribution, for implement ion 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 irrecoverable letter of credit with suppliers;

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

> (d) sanction of requisite term loans from banks or financial institution;
>
> (e) any other steps prescribed by the Central Government in this regard through a notification."

13. The first argument from Mr Anturkar is that the 6th Respondent's rival sugar factory is within the prescribed distance of 15 km. We note that this requirement has since been expanded to 25 km, but that is not a consideration that needs to be taken into account for the simple reason that while the amendment of 2006 may in fact be retrospective, this does not and cannot mean that an expansion of the distance requirement is also retrospective. That is simply untenable and we have not heard Mr Anturkar to canvass that proposition, and quite rightly so. He first invites our attention to Clause 5.1 at page 155. This is part of the office memorandum that is under challenge. This clause reads as follows:

> "5.1 Whereas, the then Directorate of Sugar noted the change of the location of the proposed sugar mill from "Durgmandwad" to "Dhamod" in Tai-Radhanagari, Dist. Kolhapur on 22.07.1999 based on the recommendation of the State Government."

14. The question still remains as to the exact distance between the two units. It is the Survey of India that is to specify and certify the distance. At page 54, there is a distance certificate of 19th October 2000 issued by the Survey of India. It purports to show the aerial distance between the Petitioner's sugar factory and certain villages. Three villages are mentioned. The third is the village of Dhamod, and the endorsement is that the post office of Dhamod is 9 kms from the Petitioner's sugar factory site. This is also an averment in the Petition itself at page 23 in ground (l) and to which we do not find, it is true, an express traverse in the Affidavits of either the 6th Respondent or the Government. What we do have, however, is another Survey of India certificate at page 194. This is dated 23rd August 2001. It is addressed to the 6th Respondent and it apparently measures the distance between the actual sites. The Survey of India has provided latitudes and longitudes of the rival sites. The distance from the Petitioner's sugar factory to the proposed sugar factory of the 6th Respondent near Dhamod village is said to be "15.5 km (approximately)".

15. First, this immediately raises a very seriously disputed question of fact. For, if the essence of the Petition is that the rival sugar factory is within a prohibited radius of the Petitioners factory then the Petitioner must show that this is unambiguously and unequivocally so. There is a material difference between the two certificates at page 54 and page 194. The earlier certificate of 19th October 2000, at page 54, measured the distance between the Petitioner's site and the nearest village, not the 6th Respondent's actual site. The later certificate at page 194 is, on the other hand, an actual site-to-site measurement against latitudes and longitudes. There is little to commend the argument from Mr Anturkar that the use of the word "approximately" renders the later certificate vulnerable or unreliable. If the Petitioner asserts that the distance between the rival sites is less than 15 kms then, in a Writ Petition, we expect the Petitioner to be able to demonstrate nothing less.

16. The next argument by Mr Anturkar is that the 6th Respondent has shifted sites repeatedly. Mr Anturkar relies on an Affidavit in Reply filed in a previous Writ Petition No. 5058 of 1994 filed by the Petitioner. Here, the question is whether the Respondent's site is at Dhamod (Keloshi) or at Dhamod (Ladwadi). The Dhamod Keloshi site is at 15.28 kms from the Petitioner's sugar factory but the Dhamod Ladwadi site is only 10.5 km away. The Affidavit in 1994 noted that the 6th Respondent sought permission to construct its factory at Dhamod Ladwadi, the closer site. But this Affidavit of 2nd December 2001 is not the basis on which the Petitioner has come to Court, and, in any case, does not address itself to the distance certificate which is required to be produced by the 6th Respondent. Obviously, there cannot be uncertainty about this. If the SCO does not, or did not at the relevant time permit a rival site within a prescribed distance then the 6th Respondent could not use that particular site. But this does not lead to the conclusion that the 6th Respondent is in fact situated at the closer location.

17. This necessarily means that the Petitioner's case today before us is largely in the realm of speculation about the exact location of the 6th Respondent site. That is an unsafe basis on which to proceed in writ jurisdiction.

18. The next argument canvassed by Mr Anturkar is that 6th Respondent is not what it claims to be, i.e. an existing sugar factory. For this, he invites our attention to Explanation 1 to Clause 6A of the SCO extracted above. He submits that on a plain reading, a sugar factory that has not carried out crushing operations for the last five seasons cannot be an existing sugar factory.

19. This interpretation does not commend itself to us. This is not how we would interpret Explanation 1. The Explanation, reproduced above, is in three parts. The first part states the obvious, viz., that an existing sugar factory means a sugar factory that is operational. The second part expands this to include a sugar factory that has taken all effective steps as specified in Explanation 4 to set up a sugar factory. Then comes the third part, which is the exclusion of sugar factories that have not carried out crushing operations in the last five sugar seasons. Obviously, the exclusion cannot apply to the second class, i.e. a sugar factory that has taken effective steps to be set up, but can only be an exclusion to the first i.e. a functional or operational sugar factory. Otherwise, this explanation would make no sense whatsoever and would lead to an inherent contradiction.

20. This then takes us to Explanation 4, as regards the effective steps to be taken for setting up a sugar factory. About the Clause itself in the SCO, there is no ambiguity at all. That our interpretation of Explanation 1 is the only plausible one is borne out by sub-Clause (b) to Explanation 4. One of the requirements for taking effective steps is to place a firm order for purchase of plant and machinery for the factory. Obviously if the machinery is being ordered, there is no question of it being put to use in crushing for five previous seasons. Therefore, the exclusion in Explanation 1 can apply only to the first part of that Explanation and not to the second.

21. As to the steps to be taken, the impugned order in Clauses 9 and 10 at page 158 to 160 lists the various effective steps that the 6th Respondent took and these are said to be specifically in terms of Explanation 4 of Clause 6A of the SCO. These included purchase of land, placement of firm orders for purchase of plant and machinery, commencement of civil works and construction of buildings, sanctioned of requisite term loans etc. For this reason, the 6th Respondent was declared to be an existing sugar mill and was allowed to set up a new sugar factory at Dhamod in Taluka Radhanagari. Mr Anturkar says that these steps were not in fact taken at the time but are being taken only now in 2019, at a much later stage. We fail to see how this can possibly assist Mr Anturkar because what is noted in paragraph 9 is not in generalities but has specific dates such as the agreement for supply of plant and machinery (2001), execution of MoUs (2003), construction of civil work in 2003, obtaining of loans between 1997 and 2000 and so on.

22. Finally, Mr Anturkar says that the Letter of Intent that was issued on 31st March 1994 not only died on its own after three years of its date of issue, within which time the 6th Respondent has done nothing, but there is no contemplation of any such document either under the IDRA or under the SCO. The Letter of Intent, he says, is a nothingness and no rights can be claimed by the 6th Respondent on that basis. The result, he submits is that the 6th Respondent does not have the requisite IEM or any license to set up a sugar factory at all. This seems to have rather to be an argument more of desperation than substance.

23. We have before us a further Affidavit of 23rd November 2021 filed on behalf of the 6th Respondent and we must make reference to the Annexure at Exhibit "AB-1-colly", specifically the communication of 11-12th March 2014 from the Government of India to the 6th Respondent. This is specifically in regard to the LOI of 31st March 1994. Rather than get into any interpretive controversy, we reproduce this short document in full.

> I, Sadashivrao @ Balasaheb Navane, Chairman and Official Representative of the Sahyadri Sugar Factory having office at Dhamod, Taluka Radhanagari, District Kolhapur, the Respondent No. 6 above named do hereby state on solemn affirmation herein as under:
>
> 1. I say that I am the Chairman of the Respondent No. 6 Sugar Factory and have been duly authorized to file the present Additional Affidavit. I have read the contents of the Writ Petition and also the annexures annexed thereto and all the replies filed in the present Writ Petition and having understood the contents thereof, I am filing the present Affidavit on behalf of Respondent No.6, Sugar Factory.
>
> 2. I say that I am filing the present Affidavit for a limited purpose of producing certain documents concerning the issue involved in present Writ Petition.
>
> 3. I say that, although the affidavit in reply filed on behalf of the respondent no. 1 which refers to two orders dated 22-7-1999 and 12-3-2014 issued by the Chief Director (Sugar) and Dy Director (ST) respectively, the same have not been annexed to the said reply. Annexed hereto and marked as **Exhibit "AB1-Colly"** are the copies the orders dated 22-7-1999 and 12-3-2014 respectively.
>
> 4. I say that, Writ Petition bearing no. 209 of 1990 was filed by one Ambaji Baburao Khamkar and others in which the Petitioner herein and several others including the then

chief Promoter of the Proposed Sahyadri Sakhar Karkhana Ltd. were party respondents. The said Writ Petition was rejected by this Hon'ble High Court vide order dated 9-3-1990. The said writ petition and the order passed therein have although been mentioned in my affidavit in reply, however the copy of the same was inadvertently not annexed to the reply. Annexed hereto and marked as **Exhibit "AB2"** is copy of the order dated 9-3-1990.

5. I say that whatever stated herein above is true to the best of my knowledge and belief, and I believe the same to be true and correct."

24. As the last paragraph of this shows, although the LOI may have lapsed, the sugar industry was de-licensed vide a press note 31st August 1998. This resulted in dispensing with the requirement of licenses for sugar mills. Consequently, entrepreneurs were free to set up new sugar mills at their preferred locations subject to compliance of rules and regulations. This answers fully, in our view, Mr Anturkar's argument that a license was a pre-requisite to the 6th Respondent setting up its sugar factory.

25. Mr Anturkar also says that once it has held that the SCO's 2006 Amendment operates retrospectively then the provisions of Clause 6C and Clause 6D will also necessarily apply. These read as follows:

"**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 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 & Public Distribution, Ministry of Consumer Affairs, Food & 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."

26. According to him, therefore, the 6th Respondent was under two-year time limit to take effective steps and a four-year time limit to commence commercial production. If the IEM remained unimplemented, a performance guarantee furnished for its implementation was liable to be furnished.

27. It seems us that this argument is self-defeating because the previous argument was that the 6th Respondent had no IEM at all but only a had a LOI. It is now clear from the further Affidavit filed by the 6th Respondent that this pre-requisite is no longer applicable in any view of the matter. We do not see how this can be used by the

Petitioner to assail the impugned office memorandum and the decision taken.

28. What remains therefore is the controversy about the distance. As we noted, this is not a controversy that can be entertained having regard to these documents. But, in any event, we are satisfied that the 6th Respondent is not shown to be in the prohibited distance within the meaning of the SCO.

29. The Writ Petition is rejected.

30. In the facts and circumstances of the case, there will be no order as to costs.

31. All concerned will act on production of a digitally signed copy of this order.

(Madhav J. Jamdar, J) **(G. S. Patel, J)**