IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Before:
The Hon'ble Justice Hiranmay Bhattacharyya

WPA 5957 of 2019
Fena (P) Limited
Vs.
The State of West Bengal & Ors.

For the Petitioner : Mr. Saptansu Basu, Sr. Adv
Mr. Sayan Sinha … advocates

For the Respondent : Mr. Anirban Ray, Ld. GP
Mr. Tanoy Chakraborty
Ms. Saptak Sanyal
… advocates

Reserved on : 13.09.2023

Judgment on : 14.12.2023

Hiranmay Bhattacharyya, J.:-

1. The writ petitioner prayed for setting aside the decision of the General Manager, District Industries Centre, Howrah which was communicated through the letters dated 16.07.2018, 31.07.2018 and 03.01.2019. Petitioner also prayed for a mandamus to command the respondent authorities to issue the Eligibility –cum-Registration Certificate in its name as a small enterprise in terms of the West Bengal Incentive Scheme, 2013 and to extend the benefits of the said Scheme.

2. The writ petitioner company claims to be a manufacturer of detergent having its units in various parts of the country. The petitioner claims

that after coming to know about the West Bengal Incentive Scheme, 2013 (for short "the Incentive Scheme, 2013"), the company intended to set up its unit at Howrah and applied for the Entrepreneurs Memorandum (Part-I) before the General Manager, District Industries Centre, Howrah and obtained the same on 05.04.2013. The petitioner company, after following the stipulation contained in the Incentive Scheme, 2013 established the unit by installing machineries and equipments for manufacturing of their products at Satgharia under Police Station Panchala in the District of Howrah. After complying with all formalities, the unit commenced the commercial production on and from 24.01.2015. The petitioner company applied for Entrepreneurs Memorandum Part-II on 27.03.2015 and obtained the approval of the same on that date from General Manager, District Industries Centre, Howrah. On 15.01.2016 the petitioner company applied for the Eligibility-cum-Registration Certificate in prescribed form before the General Manger, District Industries Centre, Howrah as per the provisions of the said Incentive Scheme, 2013. The petitioner company claims to have complied with the directions issued by the respondent authorities from time to time for submission of several documents. The petitioner further claims that as directed by the respondent authorities the petitioner company submitted a list containing the break-up of investments in plant and machinery of all the units of the petitioner company duly certified by a chartered accountant.

3. By a letter dated 07.05.2018 the respondent authority directed the representative of the petitioner company to appear before the concerned authority on 18.05.2018. The petitioner claims that the representatives of the company duly attended the said hearing on 18.05.2018. The petitioner company received a letter dated 16.07.2018 from the General Manager, District Industry Centre,

Howrah together with a record note of hearing dated 18.05.2018. The petitioner claims to have received a letter from General Manager, District Industries Centre, Howrah dated 31.07.2018 rejecting the petitioner's application for incentive under the Incentive Scheme, 2013. Petitioner submitted a representation requesting the authorities to cancel/withdraw the order of rejection and to issue the Eligibility-cum-Registration Certificate for the unit at Howrah. By a letter dated 03.01.2019 the General Manager, District Industries Centre Howrah informed the petitioner that the incentive application of the petitioner company in respect of the unit at Howrah cannot be considered as the unit does not fall within the purview of MSME Sector.

4. Being aggrieved, by the aforesaid decision of the General Manager, District Industries Centre, Howrah rejecting the application of the petitioner company for incentive under the Incentive Scheme, the petitioner has approached this Court.

5. Mr. Saptansu Basu, learned Senior Counsel for the petitioner contended that the Government of West Bengal, Department of Micro and Small Scale Enterprises and Textiles introduced the West Bengal Incentive Scheme, 2013 for Micro, Small and Medium Enterprises vide notification dated 03.02.2014. He further contended that the object of such scheme was to extend fiscal incentives to encourage entrepreneurs to set up micro, small and medium enterprises. He contended that the said scheme contains a clear and unequivocal promise to extend certain incentives with a clear understanding that it would be acted upon by the parties for whom such promise was made. He submitted that the petitioner company acted upon the promise made by the Government of West Bengal which is contained in the said incentive scheme and therefore, the government cannot be allowed to go back on such promise. He, therefore, submitted that the principle of promissory estoppel shall squarely apply to the facts of the

case and in support of such contention he placed reliance upon the decisions of the Hon'ble Supreme Court in the case of ***State of Jharkhand and Ors. vs. Brahmputra Metallics Ltd., Ranchi and Anr.*** reported at ***(2020) SCC Online SC 968***, ***M/s. Motilal Padampat Sugar Mills Co. Ltd. vs. State of Uttar Pradesh and Ors.*** reported at ***(1979) 2 SCC 409*** and ***Union of India and Ors. vs. Indo-Afghan Agencies Ltd.*** reported at ***AIR 1968 SC 718***.

6. Mr. Basu further contended that the respondent authority after clubbing the investments made by the petitioner company in plant and machinery at its five other units at Pondicherry, Roorkee, Silvasa, Surajpur and Delhi arrived at a finding that the unit at Howrah cannot be considered as an MSME unit as the investments made by the petitioner company in plant and machinery clubbed together for the financial year 2014-15 and 2015-16 exceeds the threshold limit. By referring to a circular dated 03.03.2016, Mr. Basu contended that the clubbing of investment of different enterprises under the same ownership is not permissible. Mr. Basu, therefore, concluded by submitting that the decision of the authorities to reject the application of the petitioner company for incentive under the said incentive scheme by clubbing of investments of different enterprises under the same ownership is liable to be set aside and quashed.

7. Per contra Mr. Tanoy Chakraborty, learned Advocate representing the State seriously disputed the submissions advanced by Mr. Basu. He submitted that the petitioner company has existing industrial units at different location and the unit at Howrah can be treated as a new industrial unit only if such unit manufactures new items. In support of such contention he placed reliance upon the definition of "new industrial unit" in Clause 4(vii) of the Incentive Scheme, 2013. He further submitted that since the items manufactured by the unit of the petitioner company at Howrah are not new items but same items

which are manufactured by the existing industrial units of the petitioner company, the benefits of the Incentive Scheme, 2013 cannot be extended to the unit at Howrah. Mr. Chakraborty seeks to justify the action of the respondent authority in clubbing of investments of different enterprises under the same ownership by relying upon a circular dated 29.09.2015 issued by the Ministry of Micro, Small and Medium Enterprises, Government of India. Mr. Chakraborty contended that as on the date of submission of application by the petitioner company for issuance of the Eligibility-cum-Registration Certificate the circular dated 29.09.2015 was in force and therefore, the respondent authority was justified in clubbing the investment made by the petitioner company in plant and machinery at its other units as well.

8. In reply, Mr. Basu learned Senior Counsel for the petitioner contended that as on the date of consideration of the prayer of the petitioner company for incentive under the Incentive Scheme, 2013 the circular dated 03.03.2016 and not 29.09.2015 was in force. He submitted that the claim of the petitioner company for extension of the benefits of the Incentive Scheme has to be considered in the light of the rule that was in force as on the date when the application of the petitioner company was considered. In support of such contention he placed reliance upon the decisions of the Hon'ble Supreme Court in the case of ***State of Uttar Pradesh and Ors. vs. Rachna Hills and Ors.*** reported at ***(2023) SCC Online SC 506*** and ***Deepak Agarwal and Ars. vs. State of Uttar Pradesh and Ors.*** reported at ***(2011) 6 SCC 725***.

9. Heard the learned advocates for the parties and perused the materials placed.

10. The petitioner company claims to have commenced production at their Howrah unit on 24.01.2015. Application for incentive was submitted

before the concerned authority on 15.01.2016 for (a) power subsidy (b) subsidy on stamp duty and registration fees (c) refund of entry tax, (d) refund of VAT and CST and (e) work force welfare assistance.

11. The Joint Director of MSME (Headquarter), Government of West Bengal in its record note of hearing dated 18.05.2018 noted that the enterprise has another five units at Pondicherry, Roorkee, Silvasa, Surajpur and Delhi where directors are same. It was further recorded in the said note that from ROC document the valuation of the plant and machinery of the enterprise stood at Rs. 38 crore in 2014-15 and Rs. 40 crore in 2015-16. Therefore, for such ground the unit of the petitioner at Howrah could not be considered as an MSME unit and therefore, the prayer for extension of the incentive scheme was not approved.

12. It appears from the said record note of hearing dated 18.05.2018 that the reason for rejection of the claim of the petitioner company for incentive is that the valuation of the plant and machinery of the enterprises by clubbing of investments at its five units situated at different locations in the country far exceeds the threshold limit for consideration of a unit as an MSME unit.

13. The short question that falls for consideration in this writ petition is whether for considering a unit as an MSME unit, the investment made by different enterprises under the same ownership is to be clubbed or not.

14. Record reveals that the petitioner company applied for incentive on 15.01.2016 which was taken up for consideration only on 18.05.2018. The Ministry of Micro, Small and Medium Enterprise, Government of India issued a circular dated 29.09.2015 which states that the competent authority after examining the issue regarding withdrawal of clarifications issued relating to clubbing of investment of different

enterprises under the same ownership decided that the investments in plant and machinery/equipments of all enterprises under same ownership shall be clubbed together while assessing the status of MSMEs as per the provisions of the Micro, Small and Medium Enterprises Development Act, 2006 (for short "MSMED Act, 2006"). The said circular dated 29.09.2015 was, however, withdrawn with immediate effect vide circular dated 03.03.2016 issued by the Ministry of Micro, Small and Medium Enterprises, Government of India. Therefore, as on the date of consideration of the claim of the petitioner company for incentive under the said Incentive Scheme for its unit at Howrah i.e., 18.05.2018, the circular dated 29.09.2015 had already lost its force in view of the circular dated 03.03.2016.

15. It is now well settled that the claim of an applicant is to be considered in the light of the existing rules i.e., the rules in force on the date when the consideration takes place.

16. The Hon'ble Supreme Court in ***Rachna Hills*** (supra) and ***Deepak Agarwal*** (supra) reiterated the aforesaid well settled principle of law that an applicant has a right to be considered in the light of the existing rules which implies the "rules in force" on the date the consideration takes place. Therefore, by applying the aforesaid well settled proposition of law this Court holds that the circular dated 29.09.2015 cannot have any manner of application as on 18.05.2018 i.e., the date when the application of the petitioner company for incentive was considered as the said circular had lost its force in view of the circular dated 03.03.2016. In view of withdrawal of the circular dated 29.09.2015, the question of clubbing of investments in plant and machinery of the other units of the petitioner company for deciding as to whether the Howrah unit is an MSME does not arise.

17. That apart the learned Advocate for the State, in course of his argument, could not point out any provision under the MSMED Act, 2006 which provides for clubbing of investments of different enterprises set up by same person/ company for the purpose of classification as micro, small and medium enterprises. In view of the aforesaid discussion, this Court is of the considered view that for the purpose of classification of the Howrah unit of the petitioner company as micro, small and medium enterprises the investments made in plant machinery by the petitioner company at its other units situated at different locations in the country could not have been clubbed by the respondent authorities.

18. In view thereof the decision of the respondent authorities holding that the unit of the petitioner company at Howrah cannot be considered as an MSME unit by clubbing of investments made in plant and machinery of different enterprises under the same ownership calls for interference.

19. This Court shall now consider as to whether an industrial unit, in order to be treated as a new industrial unit has to manufacture new items.

20. For the purpose of deciding such issue it would be relevant to take note of the definition of "new industrial unit" and for such purpose Clause 4(vii) of the Incentive Scheme, 2013 is extracted hereinbelow-

> *""New Industrial Unit" means a micro, small or medium enterprise in the manufacturing sector which has started production on or after the 1st April, 2013 and filed EM(Part-II). If an existing industrial unit sets up a branch as second/third unit etc. in different location in the State and manufactures new items, its second/third unit etc. will only be treated as a new industrial unit provided EM(Part-II) is filed for the same."*

21. Upon reading the definition of new industrial unit this Court is of the view that if an existing industrial unit sets up a branch as second or third unit in different locations in the State and manufactures new items, its second or third unit will be treated as a new industrial unit provided Entrepreneurs Memorandum (Part-II) is filed for the same.

22. In the case on hand it is not the case of respondent State that the petitioner company has an existing industrial unit within the State of West Bengal and has set up a branch at Howrah as second or third unit. The question of manufacturing new items by a unit for such unit to be treated as a new industrial unit shall arise only in case an existing industrial unit sets up a branch as second or third unit in different location in the State of West Bengal. Therefore, this Court is not inclined to accept the contention of the learned advocate for the State that the unit of the petitioner company at Howrah cannot be treated as a new industrial unit. It would be relevant to point out at this stage that the petitioner company has filed the Entrepreneurs Memorandum Part II as required under Clause 4(vii) of the Incentive Scheme.

23. The only ground on which the application for incentive of the petitioner company under the Incentive Scheme for its unit at Howrah stood rejected was that after clubbing of investments in plant and machinery of various units of the petitioner situated in different parts of the country, the threshold limit has exceeded. No other reason was cited in the orders of rejection dated 16.07.2018, 31.07.2018 and 03.01.2019. This Court has already observed that for the purpose of classification of a unit as micro, small and medium enterprise, investments of different enterprise set up by same person cannot be clubbed. Therefore, there is no foundational basis of the aforesaid orders of rejection.

24. There is, however, no quarrel to the proposition of law laid down by the Hon'ble Supreme Court on the doctrine of promissory estoppels as laid down by the Hon'ble Supreme Court in the decisions of ***Brahmputra Metallics*** (supra), ***M/s. Motilal Padampat Sugar Mills*** (supra) and ***Indo-Afghan Agencies*** (supra). The said reported decisions are of no assistance in the case on hand as the issue which fell for consideration was whether the unit at Howrah was eligible under the Incentive Scheme and not as to whether the said Scheme contained any clear and unequivocal promise.

25. The petitioner company claims to have invested a sum of Rs. 4.38 cores in plant and machinery. Such assertion does not appear to have been disputed by the respondent authority in its affidavit-in-opposition. The petitioner company has also filed its Entrepreneurs Memorandum (Part-II) which was approved on 27.03.2015. It is also not the case of the respondent authorities that the Howrah unit of the petitioner company is not eligible as per the terms and conditions of the Incentive Scheme, 2013 for MSMEs. Taking into consideration the investment made by the petitioner company in plant and machinery at its Howrah unit, this Court finds that the said unit falls within the category of small enterprises in terms of Section 7 of the MSMED Act, 2006.

26. The learned Advocate for the State would vehemently contend that the petitioner received the benefits of the West Bengal Industrial Promotion (Assistance to Industrial Units) Scheme, 2010 and, therefore, is not entitled to the benefits of the Incentive Scheme of 2013. It appears from the record that the petitioner applied for the Incentive Scheme, 2013 for power subsidy, subsidy on stamp duty and registration fees, refund of entry tax, refund of VAT and CST and work force welfare assistance.

27. Explanation (v) to Clause 7 of the Incentive Scheme, 2013 specifically states that an eligible enterprise which has availed of incentive/subsidy in respect of any of the items specified under any other Incentive/subsidy scheme of Government of India/ State Government shall also be eligible to get the benefits of other items only under the Incentive Scheme, 2013 for MSMEs subject to fulfillment of terms and conditions of the Scheme. The learned advocate for the respondent failed to demonstrate before this Court that the Howrah unit of the petitioner company availed of the benefits in respect of the aforesaid items under the 2010 Scheme. This Court, therefore, holds that merely because the petitioner company availed of certain benefits under the 2010 Scheme that by itself cannot disentitle the petitioner company of the benefits of the Incentive Scheme, 2013.

28. For all the reasons as aforesaid, the decision of the General Manager, District Industries Centre, Howrah rejecting the application of the petitioner for incentives under the Incentive Scheme, 2013 which was communicated vide letters dated 16.07.2018, 31.07.2018 and 03.01.2019 are set aside and quashed. The General Manager, District Industries Centre, Howrah being the 7th respondent is directed to issue the Eligibility-cum-Registration Certificate in respect of the Howrah unit of the petitioner company as a small enterprise in terms of the West Bengal Incentive Scheme, 2013 for Micro, Small and Medium Enterprise as expeditiously as possible but positively within a period of four weeks from the receipt of server copy of this order. The said respondent is further directed to extend the benefits of the Incentive Scheme, 2013 which the petitioner may be entitled to, as per the said Scheme, within a period of four weeks from the date of issuance of the Eligibility-cum-Registration Certificate. The writ petition stands allowed with the aforesaid directions. There shall be, however, no order as to costs.

29. Urgent Photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

(Hiranmay Bhattacharyya, J.)

(P.A.-Sanchita)