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W.P.No.5998 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 01.03.2023

Pronounced on: 13.03.2023

CORAM

THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**

WP.No.5998 of 2016 and
WMP.Nos.5325 & 5326 of 2016

M/s.Chettinad Cement Corporation Ltd.
Rep. by its Company Secretary
Rani Seethai Hall Building
603, Anna Salai,
Chennai 600 006.

... Petitioner

Vs

1.State of Tamil Nadu
Represented by Principal Secretary to Government,
Industries Department
Secretariat, Fort St. George
Chennai 600 009.

2.State Industries Promotion Corporation of Tamilnadu Limited
19A, Rukmani Lakshmipathy Road,
Chennai 600 008.

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records of the 2nd Respondent contained in the impugned condition set out in paras 3a and 3c



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limiting the Investment Promotion Subsidy against Net Output VAT + CST to a period of 5 years from 01.09.2010 contained in the Eligibility Certificate bearing No.15/V/IPS/E/2015 dated 31.12.2015, and quash the same condition as being arbitrary, illegal and void thereby permitting the Petitioner to avail Investment Promotion Subsidy against Net Output VAT + CST paid to the State Government for the sales over and above the Base Production Volume and Base Sales Volume subject to a ceiling of benefits fixed at 50% of the actual investment made in the eligible fixed assets within the investment period of 3 years from 01.07.2009 as set out in G.O Ms.No.150 Inds (MIG 1) Dept dated 28.10.2010.

For Petitioner : Mr.P.H.Arvind Pandian, Senior Counsel
for Mr.T.Balaji

For Respondents : Mr.Ramanlal, Additional Advocate General
Assisted by Mr.B.Vijay (for R1)
Additional Government Pleader
Mr.Silambanan, Additional Advocate General
Assisted by Mr.V.S.Rajaram (for R2)
Government Advocate

ORDER

The petitioner is a company engaged in the manufacture of cement. The challenge in the present case is to be decided in the background of the Tamil Nadu Industrial Policy 2007 that has, at its avowed objects, the promotion of investments by providing structured packages for eligible projects.



2. The incentives for the manufacturing sector are to be decided on a case-to-case basis subject to preservation of existing production volume or value in case of Districts other than Kancheepuram, Thiruvallur and Chennai, in which cases, minimum investment was pegged at a sum of Rs.350 crores.

3. The policy further adumbrated on the umbrella of measures that were proposed to be meted out to eligible investors in various arenas. For instance, and as regards power, a back-ended state capital subsidy and electricity tax exemption on power purchased from TNEB or generated and consumed captively was extended for all manufacturing units based on employment and investment in eligible fixed assets made within three years.

4. That apart, both new and expansion units were granted electricity tax exemption for five years from date of commercial production. In addition, manufacturing units located within SIPCOT industrial park or SEZ were to be provided an additional 50% capital subsidy over and above eligible limits.

5. An exemption from stamp duty was provided in certain enumerated circumstances, and where the new manufacturing units had set up dedicated Effluent Treatment Plants (ETP) or Hazardous Waste Treatment Storage and Disposal Facilities (HWTSDF), they were granted a special subsidy for this purpose.



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6. Special and specific incentives were also extended, sector-wise. This is only to say that the policy covered investment promotion, manufacturing and infrastructure sectors and envisaged different means, measures and methodologies to incentivise and encourage economic activity in the State.

7. One notices differences and an individualistic approach in the manner in which the incentives have been proposed and crafted, the State, no doubt, having invested some time and effort in what the requirements of various sectors were at a given point in time. The structuring of the incentive package was itself thus, to be decided on case-on-case basis subject to certain conditions.

8. Based on the aforesaid policy, G.O.Ms.No.180, Industries (MIB.1) Department dated 30.09.2008 had come to be passed. Since this constitutes the parent order, it would be apposite to extract the G.O. in full for completion of narration.

ABSTRACT

Industries – Special package of Incentives for Industrial Development of Southern Districts in Tamil Nadu – Orders – Issued.

INDUSTRIES (MIB.1) DEPARTMENT

G.O. (Ms) No.180

Dated : 30.09.2008



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ORDER

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In Tamil Nadu, the Southern Districts have seen less Industrial activities in the past. On an analysis of the investing companies, it was noticed that investment of more than Rs.250 crores are generally done by the multinational companies or top-level national companies. Since the investment commitment is high, they never like to try a place, which is considered as backward. The Government, is therefore of the view that if some attractive incentives are given for investment less than Rs.250 crores in the Southern Districts, the impact of such intervention will be much better and it is more likely to give the desired result. Also the structured package for investment above Rs.250 crores in Southern Districts needs to be made more attractive.

2. Therefore, with a view to ensure that the fruits of industrialization reach the Southern Districts of Tamil Nadu and thereby improve the Socio – Economic status of people living in Madurai, Theni, Dindigul, Sivagangai, Ramanathapuram, Virudhunagar, Thirunelveli, Thuthukudi and Kanniyakumari Districts and help the youth in these districts to get employment, the Government have decided to give a Special Package of Incentives to investors who come forward to set up industries in those districts.

3. Accordingly, the Government offer the following Special Package of Incentives for investments less than Rs.250 crores to be made in new manufacturing facilities or expansion projects within the Southern Districts of Madurai, Theni, Dindigul, Sivagangai, Ramanathapuram, Virudhunagar, Thirunelveli, Thuthukudi and Kanniyakumari:-

(i) New manufacturing facilities or expansion projects with an investment in eligible fixed assets of less than Rs.250 crores in a period of 3 years from the date of sanction order, Memorandum of Understanding or any other date to be fixed by Government (investment period), will be given a soft loan equivalent to the net



output VAT + CST paid to the Government, in the following manner:-

<i>Sl.No</i>	<i>Investment within 3 years</i>	<i>Soft loan given would be equal to VAT paid in the</i>
<i>1</i>	<i>Rs.50 crores – Rs.100 crores</i>	<i>First 3 years from commencement of commercial production</i>
<i>2</i>	<i>Rs.100 crores – Rs.200 crores</i>	<i>First 4 years from commencement of commercial production</i>
<i>3</i>	<i>Rs.200 crores – Rs.250 crores</i>	<i>First 5 years from commencement of commercial production</i>

Expansion projects will mean those projects, which create net additional capacity in the State through the projects located in Southern Districts. The package will be available only for significant capacity addition. The soft loan given in the first year will be permitted to be repaid in full along with a nominal interest of 0.1% per annum in the month of April in the 8th Financial year; the soft loan given in the second year will be permitted to be repaid in full along with a nominal interest of 0.1% per annum in the month of April in the 9th Financial year and so on.

(ii) The New Industrial Policy 2007 treats expansion units on par with new units for the purpose of incentives, subject to the production volume / value in the older unit being preserved. Therefore, for expansion projects set up in Southern Districts, the ceiling on cumulative availment of soft loan will be fixed at 100% of the investment made in eligible fixed assets during the investment period on par with new projects.



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(iii) In case of expansion projects, availment of output VAT and CST incentive is generally restricted to certain percentage of the output VAT and CST paid in a year as per a sliding scale. As part of Special Package, this sliding scale will not be applied to the expansion projects set up in Southern Districts mentioned above. However, the Base Volume Principle will be applied.

4. For all investments above Rs.250 crores in eligible fixed assets within 3 years period as well as super-mega projects in Southern Districts, refund of output VAT + CST paid to Government will be given instead of soft loan based incentive. Other norms of Structured Package will be followed. The ceilings now prescribed will not change.

5. The above Special Package will be considered along with the capital subsidy, electricity tax exemption, environment protection infrastructure subsidy etc., to which the new or expansion units in Southern Districts will be eligible as per the New Industrial Policy 2007.

6. This order issues with the concurrence of Finance Department, vide its U.O.No.183/SS (AP)/08, dated.26.9.2008.

(BY ORDER OF THE GOVERNOR)

M. F. FAROOQUI,

PRINCIPAL SECRETARY TO GOVERNMENT.

9. The petitioner has three integrated cement plants in Tamil Nadu, located at Puliur, Karikali and Ariyalur. The petitioner informed R1 of its proposal to establish an additional cement manufacturing unit with 2 MTPA capacity at Karikali along with additional captive thermal power plant in the same location.



This was expected to provide direct employment to 400 persons and indirect employment to around 600.

10. The petitioner sought structured assistance for an investment of Rs.572 Crores in eligible fixed assets for setting up of the aforesaid plants. The request came to be considered favourably and on 28.10.2010, G.O.Ms.No.150, specific to the petitioner, came to be issued, granting various benefits upon compliance with the conditions therein.

11. The eligible investment and period of investment was quantified as follows:

a) Investment

Investment in Green Field Cement Plant at Karikali Village, Dindigul District amounting to 520 crores and a sum of Rs.52 crores (out of Rs.160 crores investment in captive power plant) being 10% of the investment in Eligible Fixed Assets of Rs.520 crores, (i.e 572 crores Rs.520+52 crores) will be taken as eligible investment for sanctioning of structured package of Assistance to M/s.Chettinad Cement Corporation Limited.

b) Investment Period

Since the proposal for expansion of Karikali Plant was given on 04.06.2009, the investment period for this plant will be three years from 1st July 2009 and end on 30.06.2012.

12. The State offers incentives by way of two modus operandi, one a soft loan based upon the production and the second, by way of a refund of sales



tax/VAT paid. The investment period was set out as three years from 01.07.2009 to 30.06.2012 and the manner in which the quantification of subsidy was to be effected is per the second method, set out in clause (c), reading thus:

c) Investment promotion subsidy

Since the Expansion of Karikkali plant is in Dindigul District which is a Southern District, M/s.Chettinad Cement Corporation Limited will be given a Investment promotion subsidy against the net output VAT + CST paid to the State Government for the sales over and above the base volume from the date of commencement of commercial production in the expansion unit without applying the sliding scale and the incentive will be restricted to 50% of the investment made in the eligible fixed assets. The subsidy will be met from Industries Department Budget. The Base Volume will be fixed as follows:

i)The average production of Chettinad Cement Corporation Limited during the last three financial years preceding the date of commercial production of the expansion now undertaken in State of Tamil Nadu or the existing capacity in State of Tamil Nadu, whichever is higher will be taken as the Base Production Volume (BPV). The capacities created under this project will not be taken into account while calculating the Base Production Volume. The Investment Promotion Subsidy based incentive will be considered only if this BPV is achieved and for the production in excess of BPV as prescribed below

ii)The average sales made by Chettinad Cement Corporation Limited in State of Tamil Nadu during the last three financial years, preceding the date of commercial production of



the expansion now undertaken, be taken as Bse Sales Valume (BSV). After fulfilling the condition (i) above, if the BSV is also achieved, then Investment Promotions Subsidy will be given for the sales from the Project in excess of BSV. (The reference here is VAT+CST) paid to Government of Tamil Nadu)

13. The petitioner was extended the benefit of an exemption from electricity tax for a period of five years restricted, in line with the policy, to the expansion unit only and effective from date of commencement of commercial production. It was also given a capital subsidy for a dedicated ETP/HWTSDf, upon condition that such plant was to be set up on back-ended capital subsidy. The order stipulated full compliance of the petitioner in regard to the level of investment, creation of capacity and provision of employment within the investment period.

14. By way of analogy one may compare the investment benefit granted to another unit of this petitioner, which is a manufacturing unit at Puliyur village, Karur. On an application made by that unit, G.O.Ms.No.65 dated 01.03.2011 was issued. Aside from various stipulations, conditions and benefits set out, the investment promotion subsidy was itself granted for a period of 10 years from date of commercial production subject to a ceiling of



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50% of the eligible investment as defined in that Government Order. The unit in Puliur opted for the soft loan method for incentive.

15. The petitioner proceeded to set up a unit and has, admittedly, commenced commercial production on 29.09.2010. Also admittedly, there has been, till date, notwithstanding the elapse of 13 years from date of first commercial production, no application from the petitioner seeking refund of VAT paid. Evidently, this is for the reason that the petitioner has, admittedly, been unable to achieve any production above the base production volume of 65 lakhs MT fixed under the impugned eligibility certificate. This failure has a relevance which I will elaborate shortly.

16. While this is so, Eligibility Certificate dated 31.12.2015 has been issued by SIPCOT substantially along the lines of G.O.No.150 of 2010 dated 28.10.2010 save for a condition that the petitioner will be entitled to the benefit of Investment Promotion Subsidy only for five years from 01.09.2010 to 31.08.2015. Clause (a) and (c) have been challenged solely on the ground that they insert a ceiling of five years as the period of benefit, whereas G.O.150 dated 28.10.2010 and the 2007 policy itself are both silent in regard to the tenure of the benefit.



17. The petitioner would argue that nowhere does the policy contain or envisage any time limit for the grant of the benefit thereunder. The petitioner is also candid in stating that the reason why it was unable to obtain the benefit with five years or even ten, for that matter, was on account of its inability to achieve any production in excess of 65 lakh MT as per the eligibility clause. According to the petitioner, the eligibility certificate should remain faithful to the stipulations under the Industrial Policy and where no time limit has been set out, R1 had erred in imposing such limits.

18. Mr.Arvind Pandian, learned Senior Counsel appearing for Mr.T.Balaji, learned counsel on record for the petitioner, places reliance on the ratio of the following cases to buttress his submission that incentives must be liberally construed.

- i) *M/s.Motilal Padampat Sugar Mills Co. Ltd. V. State of Uttar Pradesh and others* ((1979) 2 SCC 409
- ii) *State of Jharkhand and others V.Brahmaputra Metalics Ltd.* ((2022) 7 SCC 323.
- iii) *State of Orissa and others V. Tata Sponge Iron Ltd.* ((2007) 8 SCC 189)

19. Perhaps, in deference to the fact that subsidy is dependent on state policy and largesse, the petitioner waters down its submission somewhat, stating alternatively, that if at all there were to be a cap on the period of benefit,



it ought to have be ten years and not five as per the impugned eligibility certificate. For this purpose, my attention is drawn to a request from the petitioner to R1, wherein they draw an analogy to the subsidy granted in the case of its own sister unit, that I have referred at paragraph 14 supra.

20. Vide letter dated 20.08.2009, the petitioner thus requests that the period of benefit be capped to a minimum period of 10 years. Thus, without prejudice to its main demand of a permanent largesse from the State, the petitioner pursues the alternate argument that it be granted the benefit for a period of 10 years. To be noted, that even the period of ten years as sought for alternatively expired as on date, leaving one to suspect that that is perhaps the reason why the primary argument was at all being advanced.

21. The submission of Mr. Ramanlal, learned Additional Advocate General assisted by Mr.B.Vijay, learned Additional Government Pleader for the State/R1 and Mr.Silambanan, learned Additional Advocate General assisted by Mr.V.S.Rajaram, learned counsel for SIPCOT/R2 is that the 2007 Industrial Policy is a document that sets out the aims, intentions and objects of the State in regard to the economic benefits that it proposes to grant to eligible units in certain identified and specified sectors upon their complying with prescribed conditions. The details of the packages are not set out therein and in fact the



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policy is itself clear in stating that the packages shall be customised to suit a unit once an application is found eligible.

22. They also admit that the Government Orders do not contain any stipulation in regard to time, but would brush that aside as being unnecessary as the orders have been issued generally, in the spirit of the corresponding policy. The Industrial Policy sets out the intention of the State to offer incentives and subsidy/aid packages to deserving sectors.

23. Upon scrutiny of the applications received, the State issues orders accepting in-principle such application as it deems deserving and setting out the general conditions for compliance. It is only the eligibility certificate that contains the terms and conditions specific to an application exhaustively. The sequence of events and the documentation issued in this case are reflective of the procedure being uniformly followed.

24. However, in order to buttress their position, pending Writ Petition and just a day before filing of the counter, the State has hastily passed G.O.No.235 dated 02.12.2022 amending G.O.Ms.No.150 dated 28.10.2010. By virtue of this amendment issued on 02.12.2022 (counter being dated 05.12.2022), a time limit has been prescribed even under the G.O., evidently to



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bring the eligibility certificate in line with the time limit under the Government Order.

25. The prayer in the Writ Petition has not been amended to challenge Government Order dated 02.12.2022, as the petitioner believes that, being an event lis pendens, it can well be addressed by the Court, even on the basis of the present pleadings. Reliance has been placed in this regard on the following decisions:

- i) *Pournami Oil Mills V.State of Kerala* (1986 (Supp) SCC 728
- ii) *Union of India V. Tushar Ranjan Mohanty* (1994 SCC (5) 450)
- iii) *Lalram and Others V. Jaipur Development Authority and another and others* ((2016) 1 SCC 31)
- iv) *MRF Ltd. V. Asstt. CST* ((2006) 8 SCC 702)

26. There is really no effective defence from the State as far as this aspect of the matter is concerned and I concur with the petitioner on the position of law qua this issue. If the Court were to ultimately accept the stand of the petitioner, then the mere fact that the State has hurriedly issued a clarification pending Writ Petition, is certainly going to have no effect on such a decision.

27. Thus, in my considered view, the amendment to G.O.Ms.No.150, by virtue of G.O.No.235 dated 02.12.2022 is irrelevant and in bad taste. If at all, the State were confident in its stand, it ought to have rested content with the



documentation, as available. Thus, and being of the view that the clarification is irrelevant, I eschew the same in deciding this matter.

28. The counters filed on behalf of both the State and SIPCOT, and their stand, in one voice, is that the incentive package has been crafted taking note of the specifics of the petitioner's case. Being a matter of policy, and one that empowers the respondents to customise the same, including the duration thereof, no fault can be attributed to the time limit fixed.

29. They also point out that it is the petitioner that had itself, sought a ten year minimum period for the benefit. Though that period was not accepted under the impugned order, even that period has worked itself out as on date. Thus, even if the respondents had granted the period as per the request of the petitioner, nothing would have turned on that as of now, as the issue is merely academic.

30. The State has filed a compilation dated Nil, filed on 06.12.2022 containing letter dated 10.08.2015, which is an internal communication between the Additional Secretary to Government, Industries Department and the Managing Director of the SIPCOT. The letter is issued in response to a query from SIPCOT dated 20.02.2015 in regard to the application filed by the petitioner for subsidy.



31. While referring to G.O.Ms.No.150 dated 28.10.2010, SIPCOT has listed out various clauses of the proposed eligibility certificate and had sought clarification on some aspects. With regard to the period, SIPCOT has sought a clarification on the following two issues:

1.To issue Eligibility Certificate for Investment Promotion Subsidy by considering the investment made in EFA for the expansion of Cement Plant for a period of 10 years from the date of commencement of commercial production pending decision of the Govt. with respect to capacity creation and investment made in captive power plant.

2.The Govt. may decide on the capacity created (30MW) in the expansion of CPP by the company and the eligible amount that may be included in the Eligibility Certificate.

32. The clarification noted under Letter No.5037/MG.1/2011-1 dated 10.08.2015 is to following effect:

I am directed to invite attention to the reference 2nd cited and to inform you that the period of Special Package Assistance may be taken as 5 years. Further with regard to Captive Power Plant, consider 10% of the investment made in Eligible Fixed Asset i.e. Rs.52.00 crores, may be considered after confirming that investment made in Captive Power Plant is fully utilized and the unit is generating power.

2.I am therefore, to request you to take action accordingly.



33. This, then, is the procedure followed. SIPCOT, being an arm of the State has conferred with and consulted the appropriate departments of the Government and this inter- departmental discretion has resulted in the issuance of the Eligibility Certificate imposing a cap on the period of benefit. The respondents have also established clearly that there has been application of mind to the request of the petitioner as well as to various other aspects of the project including the exemptions.

34. To my mind, there is nothing perverse in the procedure that has been followed or on the restriction imposed. The petitioner cannot dictate any aspect of the benefit that it seeks and it is a matter of negotiation between the petitioner and the respondents as to the kind of aid that it receives. No doubt, it is always within its discretion to seek a particular benefit and in this case, the petitioner has sought the benefit of 10 years, which has been rejected. The policy and consequential the Government Orders issued reveal that there are several considerations to be taken into account by the State in curating an incentive/aid package to an applicant.

35. Interference in such a decision would, in my view, fall outside the realm of judicial review, unless the applicants were to establish conclusively



and unambiguously that the decision taken, and the customisation offered, is perverse. In the present case, the petitioner has utterly failed to do so.

36. The last ditch of argument is that it would be impossible for it to ever achieve a production of 65 lakhs MT and thus the question of exceeding that capacity will simply not arise. However, the petitioner has not challenged the fixation of base volume and the entirety of the thrust of its challenge is only as against the fixation of time limit.

37. The fixation of base volume has itself been done in line with the policy which stipulates that there shall be a comparison of the production volume proposed to be achieved by the new unit as compared with the actual production volume of all units combined of that applicant in the State of Tamil Nadu, and the higher of the two, be adopted.

38. In this case, the anticipated production of the new unit is 3352687 MT, being and the existing capacity of its units in the State of Tamil Nadu is 65 lakhs MT. The higher of the two figures being 65 lakhs MT, there is nothing erroneous in adopting that figure to fix the base volume.

39. Incentives and subsidies are premised on performance. It is not just a compliant industry, but also one that performs to expectations that is intended



to be the benefit of State largesse. Such performance has to be all round and on all counts.

40. In the present case, the fact that the petitioner has failed to achieve the requisite production for 13 years after commencement of production stands as testimony to its ineligibility to the incentive. Incidentally, the cement industry, the respondents point out, are not beneficiaries under the later industrial policies floated by the State.

41. Incentives are extended by the State based on a periodic assessment of industries that are deserving of the same. The mere fact that a period or a tenure has not been set out under an order of exemption would thus, in my considered view, not lead to the conclusion that such a benefit was extended to be permanent.

42. In such instances, I would think that an express provision must be made if the respondents intended that such benefits were intended to continue endlessly. The judgments cited by the petitioner in this context would be distinguishable.

43. In the case of *Tata Sponge* (supra), the Hon'ble Supreme Court was concerned with the interpretation of an exemption Notification in regard to the levy of sales tax, whereas in the present case, this Court is concerned with a



policy decision of the State extending a subsidy for investment. While it is settled proposition that an exemption Notification must be liberally construed it is equally settled that such a liberal construction would depend on a strict compliance of the entity seeking exemption to the conditions set out under the Notification.

44. In the present case, one of the conditions requires compliance with performance stipulations within a reasonable time which has not been achieved for a period of nearly 13 years from commencement of commercial production. Hence, this judgment is of no avail to the petitioner.

45. In the other judgments relied upon, the respective State Governments are seen to have issued Notifications subsequently modifying the terms and conditions of the original Notifications. In such circumstances, the Courts have held that those Notifications would militate against the principles of legitimate expectation and promissory estoppel.

46. In the present case, there is no modification as such to the terms and conditions barring the cap in post on the tenure of benefit under the Notification. To my mind, this would not constitute an amendment of the original terms, as the petitioner has revealed its hand by way of its own letter that a proper period for the currency of the investment benefit would be a



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minimum of ten years. Even on this score, the petitioner has failed since even today, after the expiry of 13 years, the petitioner accedes to the position that it has been unable to achieve the requisite production.

47. On the basis of the detailed reasons adduced, challenge to Eligibility Certificate dated 31.12.2015 is repelled. This Writ Petition and the Connected Miscellaneous Petitions are dismissed. No costs.

13.03.2023

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Index : Yes

Speaking Order

Neutral citation: Yes

To

1.State of Tamil Nadu

Represented by Principal Secretary to Government,
Industries Department
Secretariat, Fort St. George
Chennai 600 009.

2.State Industries Promotion Corporation of Tamilnadu Limited

19A, Rukmani Lakshmipathy Road,
Chennai 600 008.



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