

## **SUPREME COURT OF INDIA**

Sun Beverages (P) Ltd.

Vs.

State of U.P.

C.A.No.4617 of 1996

(P. Venkatarama Reddi and A.C. Lakshmanan JJ.)

28.11.2003

### **JUDGMENT**

#### **A.C. LAKSHMANAN, J.**

1. The present appeal was filed against the judgment dated 19.05.1995 pronounced by the Division Bench of the High Court of judicature at Allahabad by which the writ petition of the appellant bearing No. 1607 of 1988 was dismissed. The writ petition was filed by the appellant to issue a writ prohibiting the respondents from recovering Rs. 18,72,821.92 constituting cash subsidy plus interest thereon from the appellant-company as arrears of land revenue after quashing notice dated 15.09.1987 (annexure 8 to the petition) and recovery certificate dated 31.10.1987 (annexure 11 to the petition).

2. The sequence of facts and events leading to the filing of this civil appeal are as follows: -

2.1. By an order dated 30.09.1982, the government of Uttar Pradesh formulated a scheme known as 'Capital Grant Scheme' (hereinafter referred to as 'scheme') for the grant of subsidies to various industrial units for giving an impetus to the industrialisation of the backward areas i.e. zero industrial areas of the State.

In the said Scheme, 'Pioneer Unit' has been defined as :

"Such industrial units to be set up during the period from 01.10.1982 to 31.03.1985 firstly in any part of the tehsil or at tehsil level where no heavy industry is established prior to 01.10.1982 and that those capital investment is more than Rs. one crore shall be treated as a pioneer unit."

2.2. In view of the aforesaid incentive scheme, Shri Rajan Sethi (since deceased) and his wife decided to incorporate a company for bottling of aerated waters in the backward area of the District Agra. The company was incorporated under the Companies Act on 01.10.1983 and it had entered into a franchise agreement with M/s Campa Beverages Private Limited on 06.05.1983 for bottling various brands of aerated waters. For the purpose of becoming entitled to the cash subsidy under the aforesaid scheme, the appellant purchased land and building and made an investment of Rs. 17,11,845.95. The company made further investment on installing plant and machinery in the unit.

The total investment made by the appellant in establishing this unit amounted to Rs. 1,07,78,368.34 with the location of the industrial unit in a zero industrial area. According to the appellant, because of the total investments made, the appellant became entitled to cash subsidy under the aforesaid scheme as a pioneer unit.

3, The aforesaid scheme prescribed the following two conditions for grant of cash subsidy to industrial units -

(i) That it will be a 'pioneer unit' within the terms of the scheme.

(ii) That it is registered with the Director General of Technical Development.

4. Under the notification issued by the government of India, in the year 1983, a small scale industry has been defined under the Industries Development and Regulation Act, 1951 as one which had made an investment of up to Rs. 20 lacs in plant and machinery alone apart from other assets. As a small scale industry, the appellant was liable to be registered with the government and as a medium scale industry, the appellant was entitled to be registered with the Director General of Technical Development (in short 'the DGTD'), government of India. The investment of the appellant in the plant and machinery exceeded Rs. 20 lacs. The DGTD was obliged to register the appellant industry as a medium scale industry since the investment in the plant and machinery exceeded Rs. 20 lacs. The appellant accordingly applied to the Director General of Industries for registration and the appellant was registered on 28.11.1984 with the DGTD as a medium scale industry for the manufacture of 43.2 million bottles of soft drinks per annum. The appellant applied for cash subsidy to the government of U. P. as it fulfilled both the above stated conditions under the scheme. The government of UP., on 31.03.1986, sanctioned a subsidy of Rs. 15 lacs to the appellant and this subsidy was paid to the appellant in two instalments. An agreement was entered into between the appellant and the respondents under which the mode and method of the payment of subsidy of Rs. 15 lacs was prescribed. It was covenanted :

"1 (b). That the grantee will comply with and faithfully observe all the provisions of the said scheme as also any other conditions imposed by the order sanctioning the said subsidy.

(c) That for a period of five years from the date of receiving the subsidy or any part thereof or from the date of production starts, whichever of these dates are earlier, the grantee will allow the officers subordinate to the Director or any other person or persons authorised by the Director or by the State Level Committee constituted under the said scheme to inspect the work for which the special State capital subsidy has been given and also the machine plant, appliances, tools, equipment for the procuring of which the grant has been made.

(f) That within a period of five years from the date of going into production or of the date of receipt of the subsidy or any part thereof whichever of these dates is later, the grantee will not change the place or location of the said industrial unit entirely or partly, nor enter into partnership with anyone nor change its constitution nor will the grantee effect substantial contractive disposal of substantial part of its total fixed capital investment without the written prior permission of the Director.

2. It is hereby agreed and declared by and between the parties hereto that in any of the following cases the Director shall have the right to stop further payment of the State capital subsidy and to require the grantee to refund the amount of subsidy already paid and the grantee shall refund the

same forthwith together with interest at the bank lending rate then prevailing and in the case of grantee's failure to do so, the Director may recover the same as arrears of land revenue.

(a) Where grantee has obtained the said subsidy by misrepresentation as to an essential fact or by furnishing of false information/or where his industrial unit does not go into production;

(b) Where the grantee's said industrial unit goes out of production within five years from the date of commencement of production except in cases where the unit remains out of production for short periods extending to six months due to reason beyond its control such as shortage of raw material, power, etc. or

(c) Where the grantee fails to furnish the prescribed statement and/or information which it is called upon to furnish, or

(d) If the grantee commits a breach of any one of the covenants herein contained or of the provisions of the said scheme."

5. Subsequent to the registration of the appellant as medium scale industry, the government of India, by notification dated 18.03.1985 altered the definitions of 'small scale industry' and 'medium scale industry'. By this notification, it was provided that if the investment of an industrial unit in plant and machinery alone (excluding other investments) was up to Rs. 35 lacs, it was entitled to be registered as a small scale industry, but if it exceeded Rs. 35 lacs, it was entitled to be registered as medium scale industry. In other words, the limit of investment in plant and machinery for small scale industry was increased from Rs. 20 lacs to Rs. 35 lacs. The existing registered medium scale industries were given option to get themselves registered as small scale industries if they so chose within six months. The appellant was advised to apply to the DGTD for de-registration on the ground that its investment in plant and machinery was less than Rs. 35 lacs in view of the revised definition of the small scale industry and the medium scale industry made by the government of India by its notification issued on 18.03.1985. The appellant was advised to apply to the DGTD for de- , registration more than a year after the cash subsidy had been sanctioned and granted to the appellant under the scheme and much after the expiry of the option period. By letter dated 04.08.1987, the DGTD cancelled the registration of the appellant as a medium scale industry and directed the appellant to approach the Director of Industries. U.P. for registration as a small scale industry. According to the appellant, the registration could not be cancelled as the option period of six months had already expired. The appellant thereupon applied for registration with the General Manager, District Industries, Agra, for being registered as a small scale industry.

6. On 24.09.1987, the appellant received a communication dated 15.09.1987 from respondent No. 2 calling upon the appellant to refund the cash subsidy together with interest amounting to more than Rs.18,40,767.12 on the only ground that the unit of the appellant was required to continue to remain a medium scale industry for five years from the date of the agreement and on account of the cancellation of its registration by the DGTD, the appellant had caused a violation of the scheme. It is also stated that the power to seek refund of the subsidy is also circumscribed by Clause 2 of the agreement dated 31.03.1986 executed between the parties. Clause 2 of the said agreement has already been extracted above.

7. While so the respondent without waiting for a reply from the appellant or affording any opportunity of hearing straight away issued a recovery certificate on 31.10.1987 to the third

respondent calling upon him to recover the sum of Rs. 18 lacs and odd as arrears of land revenue from the appellant. The appellant thereupon made a representation to the government of U.P. that the said demand and subsequent recovery order were illegal and contrary to the factual position. As no response was received to the aforesaid representation and as the respondents were taking recourse to coercive processes, the appellant filed a writ petition before the High Court.

8. It was contended before the High Court on behalf of the respondents that the appellant has not faithfully observed all the provisions of the scheme as also other conditions imposed by the order sanctioning the scheme and that a perusal of the terms of the scheme under which the subsidy was allowed only show that a pioneer unit holding DGTD registration was eligible for subsidy under the scheme and a combined reading of the scheme and the agreement shows that the loanee that is the petitioner (appellant) had to retain its character as a pioneer unit holding DGTD registration for a period of five years to be computed from the year in which the disbursement of the subsidy was made. It was further submitted that after raising of the limit from Rs. 20 lacs to Rs. 35 lacs in the meanwhile, the appellant lost its DGTD registration which was cancelled on its own application vide order dated 04.08.1987 as a result of which the appellant was relegated to the character of a small scale unit. It was further argued by the respondents that the inevitable consequence of the loss of the DGTD registration by the appellant as aforesaid was that the appellant ceased to be eligible for special subsidy paid to it under the scheme and this indeed constituted violation of condition No. 1(b) of the agreement. Under such circumstances, the subsidy of Rs. 15 lacs paid to the appellant under the scheme as a pioneer unit holding DGTD registration became recoverable by the respondents as provided in Clause 2 and Clause 2(d) of the agreement along with interest at current bank lending rate calculated from the date of payment of subsidy till the date of recovery of the amount.

9. The Division Bench of the High Court held that the writ petition filed by the appellant was bereft of merits and that the respondents are entitled to recover the subsidy with interest as demanded. The High Court proceeded on the basis that there was breach of the terms granting subsidy by reason of the appellant being de-recognised by DGTD

10. Aggrieved by the judgment of the High Court, the above appeal has been filed.

11. We have perused the pleadings, the judgment under appeal, the annexures and other relevant documents and, in particular, the scheme, notice for recovery of subsidy, certificate for recovery issued by the Commissioner and Director of Industries, U.P., correspondence between the appellant and the respondents, sanction letter dated 31.03.1986, agreement dated 31.03.1986, cancellation order of DGTD registration dated 04.08.1987 and the proceedings issued by the government of India in regard to the procedure for registration of units on transfer from DGTD etc., consequent upon revision in the definition of small scale industries dated 17.01.1981 and the notification dated 18.03.1985.

12. We heard the arguments of Mr. Kailash Vasudev, learned senior counsel for the appellant and Mr. R.K. Singh, learned counsel for the respondents. The counsel for the respective parties reiterated their submissions advanced before the High Court.

13. On the aforesaid facts and circumstances of the case, the following questions may arise for consideration :

(1) If an industrial unit of a company is granted subsidy in terms of the scheme framed by the State government when it fulfils all the terms and conditions of the scheme, is it open to the State government to call for refund of the subsidy at a later stage when the 'pioneer unit' chooses to get itself registered as a small scale industry with the State government instead of remaining registered as a medium scale industry with the Director General of Technical Development, government of India in accordance with the change effected in the definition of a small scale industry and a medium scale industry by the government of India, although it continues to remain 'pioneer unit' and there is absolutely no change in the control of the State government over the unit in the obligations, investments and assets of the pioneer unit?

(2) Whether there is any provision in the scheme or agreement that a 'pioneer unit' which had been granted subsidy must continue to remain registered with the Director General of Technical Development for a period of five years and if it does not remain registered, are respondents 1 & 2 entitled to seek refund of the subsidy?

In the instant case, the following facts are not in dispute :-

- (1) That both the parties to this action have entered into an agreement;
- (2) That the government of U.P. formulated a scheme known as 'Capital Grant Scheme' for the grant of subsidies to various industrial units for giving an impetus to the industrialisation of the backward areas of the State;
- (3) That the scheme provides for payment of subsidies to the industries sector in the zero industrial area;
- (4) That the petitioner, in fact, had set up his industrial unit in the zero industrial area;
- (5) That the industrial unit had been set up during the period from 01.10.1982 to 31.03,1985 in a backward area where no heavy industry is established prior to 01.10.1982;
- (6) That the appellant's unit was treated as a pioneer unit within the terms of the scheme and that it was registered with DGTD;
- (7) That the appellant had made a total investment of Rs. 1,07,78,368/- on building, land and machinery etc, and became entitled to cash subsidy under the scheme;
- (8) That the appellant's unit was registered with DGTD as a medium scale industry and that the appellant had fulfilled the conditions of the scheme;
- (9) That the sanction of subsidy of Rs. 15 lacs to the appellant and payment of the same in two instalments;
- (10) That the government of India has issued fresh guidelines on 18.03.1985 which provided that an industry, investment of which did not exceed Rs. 35 lacs in plant and machinery alone shall be entitled to be treated as a small scale industry;
- (11) That the DGTD cancelled the registration of the appellant as a medium scale in-industry on

04.08.1987 and directed the appellant to approach Director of Industries, U.P. for registration as a small scale industry and as a consequence of de-registration as a medium scale industry by the DGTD, the government of U.P. issued notice for recovery of Rs. 15 lacs and again called upon the appellant to refund Rs. 15 lacs as DGTD had cancelled the registration contending that the appellant had violated condition 1 (b) of the agreement.

14. A resume of the aforesaid undisputed facts clearly show that there has been absolutely no violation of any provision of the scheme on the part of the appellant and that the demand for the refund was wholly illegal and arbitrary.

15. In this background, we have also to see as to whether the grantee/appellant complied with and observed all the provisions of the scheme and of the covenants of the agreement or violated any terms of the agreement.

16. We have already noticed as a result of change in the definition of small scale industry by the Development Commissioner, government of India the industrial units which had invested upto Rs. 35 lacs in plant and machinery was liable to be treated as small scale industries and that it was on this ground alone, the appellant's industrial unit been de-registered as a small scale industry but it continued to be a pioneer unit in terms of the scheme to which the subsidy had been granted to the appellant. In the circumstances, the appellant stated that the question of seeking refund of the amount from them did not arise as the appellant had not violated any terms of the scheme or of the agreement. In our view, the High Court has overlooked the aforesaid facts and documents in this regard.

17. it is also pertinent to notice that sub-sequent to the registration of the appellant as medium scale industry, the government of India, by notification dated 18.03.1985 altered the definitions of small scale industry and medium scale industry. By this notification, it was provided that if the investment of an industrial unit in plant and machinery alone was up to Rs. 35 lacs. It was entitled to be registered as a small scale industry, but if it exceeded Rs. 35 lacs, it was entitled to be registered as a medium scale industry. In fact, the respondents could not point out that there was any change in the investment, assets, production, land, building, plant and machinery of the appellant and that there had been any change in the control exercised by the respondent Nos. 1 and 2 over the appellant and its units. There has been no change in the obligations of the appellant. The appellant had applied for re-registration with DGTD as a small scale industry more than a year after grant of subsidy on the advise that in view of the revised notification issued by the government of India, the appellant was liable to be registered as a small scale industry. In our opinion, the registration of a unit as a small scale and medium scale industry is done in pursuance of notifications issued under the Industries Development and Regulation Act, 1951 by the government of India and that the subsequent cancellation of registration by DGTD on account of change of criteria has no bearing on the status of an industrial unit as a pioneer unit under the scheme framed by the State of U.P.

18. The appellant was registered as a DGTD unit on 21.10.1983 and the said registration continued. Thereafter, in the year 1985, there have been some changes in the definition of the small scale industries by the Development Commissioner, government of India by which the definition of a small scale industries unit has been amended and the limit of investment in the plant and machineries has been extended from Rs. 20 lacs to Rs. 35 lacs. It has also been made clear that while computing the value of the machineries, only the value of those machineries will be considered which are directly involved in the production, while the other accessories and other

machineries which are used in the manufacturing process but are not directly involved in the process of manufacture were not to be included for considering the unit as small scale industry unit. In this view of the matter, even though the investment of the appellant in the machineries was more than Rs. 35 lacs, but the machineries which are utilised for manufacturing was less than Rs. 35 lacs i.e. Rs. 32,15,8617/-, hence the appellant was compelled to get it registered as small scale industry unit, instead of a DGTU Unit. Thereafter, the appellant applied for registration as small scale industry unit and the requisite registration certificate was granted to the appellant by the General Manager, District Industries center, Agra, registering the appellant as a small scale industry unit.

19. It is also pertinent to notice that the respondents without issuing any show cause notice to the appellant as to why the said recovery be not made against the appellant and without affording any opportunity to show cause, a call notice dated 15.09.1987 has been issued to the appellant for recovering that amount and again followed by a recovery certificate from the office of the Commissioner and Director of Industries for recovering the sum of Rs. 18,72,821.92 as the arrears of land revenue. In our opinion, the entire recovery proceedings initiated against the appellant by the respondents as arrears of land revenue is absolutely illegal and in gross violation of the principles of natural justice.

20. In this context, we may reproduce Clause 13 of the scheme which reads as follows:

"13. Recovery of Special State Capital Grant: The Director of Industry, Uttar Pradesh shall have power to get the Special State Grant recovered as is the recovery of land revenue is done consequent to following circumstances:

- a) If the industrial unit has obtained the State Capital Grant by giving false facts or by submitting necessary facts in fraudulent manner.
- b) If the unit has stopped the production work within five years of the commencement of the production. However, this condition of restriction shall not be applicable to such units where the production work has remained suspended for a short period of 6 months due to reasons beyond its control such as sick and shortage of power etc.
- c) If industrial unit fails to provide prescribed details and information sought for. If Director of Industries of Uttar Pradesh could not get the Special State Capital Grant recovered from the unit under the normal procedure, then he can get the amount of loan recovered as the arrear of land revenue recovery done under the government of Uttar Pradesh Rules.
- d) If the Director of any unit who has partly or fully received the grant has to change the place of his unit or dispose of any part of Immovable property/assets within five years from the date of start of production.

Clause 2 of the agreement has been extracted in paragraphs supra.

21. The above two clauses mentioned the circumstances under which the cash subsidy may be recovered as arrears of land revenue. None of the said clauses is applicable or attracted in the instant case. Therefore, we are of the opinion that the entire recovery proceedings are absolutely illegal and without jurisdiction. It is not the case of the respondents that the appellant has practised any fraud or guilty of making of any misrepresentations in obtaining the sanction/eligibility. The only provision

which refers for recovery of cash subsidy as arrears of land revenue is mentioned in the above two clauses and inasmuch as none of the conditions enumerated therein is attracted, the entire recovery of the cash subsidy as arrears of land revenue is illegal. Even otherwise, the allegations made in the call notice for recovery of the cash subsidy as arrears of land revenue is uncalled for,

22. We have carefully perused the entire scheme which goes to show that the cash subsidy would be granted to the unit which is a pioneer unit i.e. having an investment of more than Rs. 1 crore and which has been established after 01.10.1982 and at the time of grant of cash subsidy, the said unit should be registered as DGTD unit. Nowhere it provides that the said industry should remain as a DGTD unit for a period of five years as mentioned in Clause 4 of the call notice. A perusal of the scheme further goes to show that it has been provided in the scheme that the production should not be stopped for a period of five years but it nowhere provides that the unit should remain as a DGTD unit for a period of five years. In fact, the appellant had been compelled to get the registration under the small scale industries unit on account of the change in the definition Of the small scale industries unit by the Central government and not on account of any inaction of the appellant. Hence, if on account of the change in the definition of the small scale industries unit, the appellant was de-recognised as DGTD unit then the appellant could not be denied the benefit of cash subsidy.

23. We have already seen that Clause 13 of the scheme and Clause 2 of the agreement has been invoked by the respondents for the recovery of the subsidy. A close scrutiny of the above two clauses goes to show that in the event of violation of any conditions, the recovery will be made as arrears of land revenue and so prior to initiating action for breach of the terms of Clause 13 of the scheme and Clause 2 of the agreement, the opportunity ought to have been provided by the respondent No. 2 to the appellant to demonstrate whether the provisions of the scheme and the agreement are violated or not and that having not done so the entire recovery proceedings initiated against the appellant is bad for violation of principles of natural justice.

24. As already observed, a perusal of the pleadings would reveal that there is no allegation regarding playing of fraud or misrepresentation in obtaining the sanction/eligibility. The argument of the learned counsel for the respondents that the appellant on his own free will applied for de-registration vide letter dated 12.06.1987 and that the appellants were no more entitled to be registered under DGTD and since the constitution of the company had undergone change and under the changed conditions the respondents were entitled to recover the subsidy given to the appellant cannot at all be countenanced.

25. Having taken note of the aforesaid factual situation, we have no hesitation to hold that the respondents have acted arbitrarily and contrary to the terms of the scheme and the agreement and on the basis of unwarranted assumptions in seeking to recover the amounts given as subsidy to the appellant.

26. In the facts and circumstances of the aforesaid, we set aside the judgment of the High Court impugned in this appeal and allow this appeal. However, there will be no order as to costs.