

IN THE HIGH COURT OF PUNJAB AND HARYANA  
AT CHANDIGARH

CWP No. 11757 of 2010  
Date of Decision : 9.10.2013

A.S. Bindra, Collaborator

..... Petitioner

Versus

Principal Secretary, Department of Industries  
and Commerce, Punjab and another

..... Respondents

CORAM: HON'BLE MR. JUSTICE SANJAY KISHAN KAUL, CHIEF JUSTICE  
HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH

Present:- Mr. Anil K. Aggarwal, Advocate, for the petitioner.  
Mr. Harsirman S. Sethi, Additional Advocate General, Punjab.  
Mr. Arun Nehra, Advocate, for respondent No. 2.

SANJAY KISHAN KAUL, CHIEF JUSTICE (ORAL)

The petitioner as a collaborator entered into a Financial Collaboration Agreement (FCA) with M/s Punjab Agro Industries Corporation Limited/respondent No. 2 for setting up a cement processing unit under the name and style of M/s Superior Genetics India Limited. It is not necessary to go into the other details set out in the petition, but suffice to say that the unit never commenced production with blame being laid on each other. The case of the petitioner is that the petitioner-Company never earned any income or made profit, but on the other hand has been incurring expenses which accumulated to ₹ 62,78,407/- as on 31.3.2008 and thus, the petitioner is not a profit making company.

The aforesaid allegation is relevant in the context of One Time Settlement Policy (OTS) notified on 2.3.2009 which was applicable for a period of 90 days from the date of its notification. The eligibility criteria as set out in the said policy was as under :-

“I. Eligibility Criteria

The collaborators/promoters of profit making companies as per Audited Balance Sheet as on 31.3.2008 shall not be eligible.”

The said policy was, however, amended by the notification dated 10.12.2009 extending the time period and making certain changes in the policy including the aforesaid. Clause 1 which read as under :-

“1. Clause 1 – Eligibility Criteria is amended as under :-

The collaborators/promoters of profit making companies as per Audited Balance Sheet as on 31<sup>st</sup> March, 2008 shall not be eligible.

A profit making company is one which is earning profits over different years and having Reserves and Surpluses appropriated from the Profit and Loss a/c as per audited Balance Sheet as on 31.3.2008”.

It is thus, the plea of the petitioner that as to what is profit making company came to be defined specifically vide the amended notification.

Respondent No. 2 is stated to have addressed a letter dated 14.12.2009 to the petitioner offering the petitioner to avail the OTS policy and on query was informed that the amount payable by the petitioner in terms of the OTS policy comes to ₹ 3,32,23,835/- plus expenses. The petitioner thus, submitted his OTS application to respondent No. 2 on 30.12.2009 alongwith bank drafts towards 15% down payment amounting to ₹ 49,83,575.25 as was required under the OTS policy. The audited balance sheets of the company for financial years ending 31.3.2006, 31.3.2007 and 31.3.2008 were also submitted and the drafts submitted by the petitioner were encashed.

It is only on 12.5.2010 that respondent No. 2 informed the petitioner of the rejection of OTS proposal on the ground that it failed to meet the eligibility criteria because the audited balance sheet as on 31.3.2008 does not ascertain that the company is not a profit making company. The relevant communication is as under :-

“Sub: One Time Settlement (OTS) of dues in respect of purchase of equity shareholding of Punjab Agro Industries Corporation (PAIC) in Superior Genetics India Ltd. (SGIL) in terms of State Government's Notification dated 2.3.2009 and as extended vide Notification dated 10.12.2010.

Dear Sir,

Please refer to your letter dated 30.12.2009 on the subject cited above.

In this connection, it is stated that your proposal of OTS cannot be accepted as it fails to meet the eligibility criteria specified in the OTS policy.

As per clause 1(i) OTS Policy for equity-2009 :-

“The Collaborators/promoters of profit making companies as per audited balance sheet as on 31.3.2008 shall not be eligible.”

The audited balance sheet of your company for the financial year ending 31.3.2008 does not ascertain that the company is not a profit making company in terms of OTS policy referred to in the subject. Therefore, in view of the aforesaid reason, your OTS proposal is rejected by PAIC.”

It is relevant to note that while rejecting the OTS proposal of the petitioner, Clause 1(i) of the OTS policy which was reproduced for reference was incomplete inasmuch as it was as per the un-amended policy of 2.3.2009 and not as it stood post amendment, vide notification dated 10.12.2009, which defined a profit making company. It is this rejection of the OTS proposal which is sought to be assailed by the petitioner in the present writ petition under Article 226 of the Constitution of India.

We have been informed that respondent No. 2 did not refund the amount sent with the OTS proposal, but infact adjusted the amount towards the loan outstanding.

Second aspect arises from the dispute inter se the parties being referred to arbitration and an award being rendered by the Arbitral Tribunal of three arbitrators on 6.3.2013 which is stated to be now under

challenge by the petitioner. Suffice to say that on our query, a copy of the award was produced for our perusal as we wanted to know whether any defence based on the OTS policy was taken by the petitioner and the result thereof. A perusal of the award shows that the petitioner did comprehensively take the plea arising from the OTS policy, but the Arbitral Tribunal opined that since this dispute was pending adjudication in the present writ petition, the same could not form subject matter of adjudication by the Tribunal and the Tribunal could not comment on the pleas/defences taken in the writ petition.

Learned counsel for the petitioner has drawn our attention to the balance sheet ending 31.3.2008 (which is the crucial one). Under the heading of sources of funds, only share capital is mentioned and thus, there are no reserves or surplus. Under the heading of miscellaneous expenditure/losses is mentioned the actual expenses which stood as on 31.3.2008 at ₹ 62,78,407/- as also the financial year ending on 31.3.2007 at ₹ 62,32,039/-. It is thus, the submission of learned counsel for the petitioner that the company cannot be called a profit making company as it infact never commenced production nor did it earn profits.

On the other hand, the stand of the learned counsel for respondent No. 2 is that the petitioner is not eligible under the OTS settlement on the ground that the company, which has never commenced production, cannot be said to have either made profit or losses and such a non-starter company could not avail the benefit of OTS.

We posed a question to learned counsel for respondent No. 2 as to under which clause was such a non-starter company excluded. No clause in this behalf of any OTS policy has been pointed out to us. The effect of accepting the submission of the learned counsel for respondent No. 2 would

be that if a company commenced business and suffered losses in the first year, it would be eligible to be considered while if it did not even commence production for the one reason or the other, it could not be so considered.

In our view the crucial issue is only as to whether the eligibility criteria as laid down under the OTS policy is satisfied. It appears that respondent No. 2 has acted on the basis of the un-amended policy failing to take note of the amended policy where profit making company has been defined as one which is earning profits over different years and having reserves and surpluses appropriated from the profit and loss account as per the audited balance sheet as on 31.3.2008. This is apparent from the communication addressed by respondent No. 2 rejecting the OTS proposal of the petitioner dated 12.5.2010 where the earlier clause has been reproduced. When it is stated that a company should be earning profit 'over different years', the use of the plural phraseology would imply that it should be earning profit for more than one year i.e. at least two years. It should also have reserves and surpluses appropriated from profit and loss account. In the case of the petitioner, there was no occasion of submitting the profit and loss account as it had never commenced production. Thus, the situation as per the balance sheet as on 31.3.2008 is that both the requirements (i) not earning profits over different years and (ii) having no reserves and surpluses appropriated from profit and loss account stands satisfied, so that the petitioner cannot be categorised as a profit making company. If the petitioner is not a profit making company as per balance sheet as on 31.3.2008 then it is eligible as per the eligibility criteria laid down under the OTS policy.

We are thus, of the view that the impugned communication dated 12.5.2010 cannot be sustained and is hereby quashed. The subsequent sequitur letter dated 22.6.2010 is also quashed. Respondent No. 2 is directed to examine the case of the petitioner on merits as per the amended OTS policy assuming it to be eligible as per the eligibility criteria. If the petitioner meets the other norms as per the OTS policy then the case of the petitioner would have to be considered on the basis of the initial 15% amount already deposited and the balance amount will be paid as per the schedule laid down under the OTS policy working it from the date of acceptance of the proposal.

Learned counsel for the petitioner submits that the petitioner should not suffer the burden of interest since the OTS proposal has been wrongfully rejected. However, simultaneously we have to take note of the fact that the payments have also not gone from the petitioner during this period of time. Thus, though, the cut-off date may be the date of acceptance of the proposal, for the integrum period of time interest would be payable by the petitioner, but as per the rates specified under the OTS policy i.e. 10% per annum.

The respondent No. 2 to take a necessary decision within one month from today.

Petition is allowed in the aforesaid terms leaving the parties to bear their own costs.

(SANJAY KISHAN KAUL)  
CHIEF JUSTICE

(AUGUSTINE GEORGE MASIH)  
JUDGE

9.10.2013  
sjks