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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 2503/2007

% ***Judgment delivered on 16th January, 2013***

Triveni Engineering and Industries Ltd. ..... Petitioners
Through: Mr.Sanjeev Anand, Advocate

versus

Union of India & Ors. ..... Respondents
Through: Mr.Sanjeev Sachdeva, Sr. Advocate with Mr.Ruchir Mishra, Adv for respondent no.1 & 2
Mr.Jayant Bhushan, Sr. Advocate with Mr.Rishi Agarwal advocate for respondent no.3

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J. (ORAL)

WP(C) No. 2503/2007

1. The present petition has been filed under Article 226 of the Constitution of India and is directed against the IEM dated 04.04.2006 issued to respondent no. 3 by the Union of India.
2. The brief facts of the case as set out in the petition are that the petitioner no. 1 is a public limited company registered under the Companies Act, 1956 and is stated to be engaged in the business of manufacture of sugar. In exercise of its powers under section 29B of the Industries (Development and Regulation) Act, 1951 (hereinafter referred as *"IDR Act*"), the Central Government vide notification No.477(E) dated 25.07.1991, exempted certain industrial undertakings from the operation of sections 10, 11 (a) and 13 of the IDR Act subject to fulfilment of

certain conditions. These provisions relate to the registration of existing industrial units and requirement of license for setting up a new industrial undertakings or for effecting substantial expansions. The said notification was issued in press note no. 9 dated 2.08.1991. One of the conditions imposed by the said notification dated 25.07.1991 required the exempted industrial undertaking to file a memorandum in a prescribed form with the Union of India *(respondent no. 1 herein)* for which a receipt would be acknowledged and reference number will be given. The relevant portion of the notification reads as under:

> **"6. FILING OF MEMORANDA**
>
> *In respect of new projects for manufacture of articles not covered by compulsory licensing or their substantial expansions the only requirement would be that the industrial undertaking shall file a memorandum in prescribed form to the Secretariat for Industrial Approvals (SIA) in the Ministry of Industry. Such a memorandum will also have to be filed by those industrial undertakings to be engaged in non-scheduled industries, i.e., those not covered under I(D&R) Act. The memorandum will be accompanied by a crossed demand draft for Rs. 1000/- in favour of the Pay and Accounts Officer, Department of Industrial Development, Ministry of Industry, payable at State Bank of India, Nirman Bhawan, and New Delhi 110011. The receipt of the memorandum will be acknowledged by the SIA and a reference number will be given. Industrial undertakings should quote this reference number in all future correspondence, if any, with the SIA.*
>
> *The industrial undertakings shall also file another memorandum in prescribed form with the SIA at the time of commencement of commercial production. No payment will accompany this memorandum."*

3. The sugar industry was one of the scheduled industries under the IDR Act. Vide press note no. 12 dated 31.08.1998, however, the Central Government decided to delete the sugar industry from the list of industries

requiring compulsory licensing under the provisions of the IDR Act. The press note reads as under:

> *".....in order to avoid unhealthy competition among sugar factories to procure sugarcane, a minimum distance of 15 kms would continue to be observed between an existing sugar mill and a new mill by exercise of powers under Sugarcane (Control) Order, 1966."*

4. It was also mentioned in the press note that the entrepreneurs who wish to avail themselves of the delicensing of sugar industry would be required to file an Industrial Entrepreneurs Memoranda (IEM) with the respondent no. 1 as laid down for all delicensed industries in terms of the press note dated 2.08.1991. The sugar industry was delicensed vide notification no. S.O. 808 (E) dated 11.09.1998 issued under section 29B of the IDR Act. Vide notification dated 10.11.2006, the Central Government amended the Sugarcane (Control) Order, 1966 and inserted clauses 6(A) to 6(E) which reads as under:

> **" TO BE PUBLISHED IN THE GAZETTE OF INDIA, EXTRAORDINARY, PART II, SECTION 3, SUB-SECTION (ii)]**
>
> Government of India
> Ministry of Consumer Affairs, Food and Public Distribution
> (Department of Food and Public Distribution]
>
> New Delhi, dated 10th November, 2006
>
> **O R D E R**
>
> S.O. 1940 (E):-In exercise of the powers conferred by section 3 of the Essential Commodities Act, 1955 (10 of 1955), the Central Government hereby makes the following Order further to amend the Sugarcane (Control) Order, 1966, namely :-

1. (1) This order may be called the Sugarcane (Control) (Amendment) Order, 2006.

   (2) It shall come into force on the date of its publication in the Official Gazette.

2. In Sugarcane (Control) Order, 1966, after clause 6, the following clauses shall be inserted, namely;

   "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 distance not less than 15 kms for different regions in their respective States."

   Explanation 1: An existing sugar factory shall mean a sugar factory in operation 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 and Public Distribution, Ministry of Consumer Affairs, Food and Public Distribution for implementation of the Industrial Entrepreneur Memorandum within the stipulated time of extended time as prescribed 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 irrevocable letter of credit with suppliers;
(c) commencement of civil work and construction of building for the factory;
(d) sanction of requisite term loans from banks or financial institutions;
(e) any other step prescribed by the Central Government, in this regard through a notification.

6B. Requirements for filing the Industrial Entrepreneur Memorandum:

(1) Before filing the Industrial Entrepreneur Memorandum with the Central Government, the concerned persons shall obtain a certificate from the Cane Commissioner or Director (Sugar) or Specified Authority of the concerned State Government that the distance between the site where he proposes to set up sugar factory and adjacent existing sugar factories and new sugar factories is not less than the minimum distance prescribed by the Central Government or the State Government, as the case may be, and the concerned persons shall file the Industrial Entrepreneur Memorandum with the Central Government within one month of issue of such certificate failing which validity of certificate shall expire.

(2) After filing the Industrial Entrepreneur Memorandum, the concerned person shall submit a performance guarantee of rupees one crore to Chief Director (Sugar), Department of Food and Public Distribution, Ministry of Consumer Affairs, Food and Public Distribution within thirty days of filing the Industrial Entrepreneur Memorandum as a surety for implementation of the Industrial Entrepreneur

Memorandum within the stipulated time or extended time as specified in clause 6C failing which Industrial Entrepreneur Memorandum shall stand de-recognized as far as provisions of this Order are concerned.

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 and Public Distribution, Ministry of Consumer Affairs, Food and Public Distribution on the recommendation of the concerned State Government, may give extension of one year not exceeding six months at a time, the implementing the Industrial Entrepreneur Memorandum and commencement of commercial production thereof.

6D. Consequences of non-implementation of the provisions laid down in clause 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.

6E. Application of clauses 6B, 6C and 6D to the person whose Industrial Entrepreneur Memorandum has already been acknowledged:

(1) Except the period specified in sub-clause (2) of clause 6B of this Order, the other provisions specified in clauses 6B, 6C and 6D shall also be applicable to the person whose Industrial Entrepreneur Memorandum has already been acknowledged as on date of this

notification but who has not taken effective steps as specified in Explanation 4 to the clause 6A.

(2) The person whose Industrial Entrepreneur Memorandum has already been acknowledged as on date of this notification but who has not taken effective steps as specified in Explanation 4 to Clause 6A shall furnish a performance guarantee of rupees one crore to the Chief Director (Sugar).

Department of Food and Public Distribution, Ministry of Consumer Affairs, Food and Public Distribution within a period of six months of issue of this notification failing which the Industrial Entrepreneur Memorandum of the concerned persons shall stand de-recognized as far as provisions of this Order are concerned."

5. The Government of Uttar Pradesh in order to promote investment in the sugar industry issued a New Sugar Industry Promotion Policy, 2004 which provided various rebates/exemptions and remissions to the industrial entrepreneurs who invest more than Rs. 350 crores on establishment of new sugar mills, expansion of the existing sugar mills and/or establishment of allied industry.

6. The Petitioner no. 1 decided to set up some new sugar mill, expand the existing sugar mill and establish an allied industry. A site was identified at Village Milak Narayanpur, Tehsil Swar, District Rampur, U.P. On 2.8.2005, petitioner no. 1 filed its IEM with respondent no. 1 which was duly acknowledged vide acknowledgment no. 3676/SIA/IMO/2005. The said site was chosen by petitioner no. 1 ensuring that it was not within 15 kms of any existing sugar factory or any site in respect of which a Letter of Intent (LOI) has been issued by respondent no. 1 or an IEM has already been filed. Pursuant to the filing of the IEM, petitioner no. 1 started taking effective steps like identification of land for setting up the sugar mill, negotiations with growers for purchase of sugarcane, placing purchase

orders for plant, machinery & equipment, submission of application seeking permission of UP Government for purchase of 100 acres of land and finalising the financial arrangements.

7. Vide letter dated 17.05.2006, petitioner no. 1 requested the respondent no. 1 to raise the capacity of the sugar mill under construction from 5000 TCD to 6000 TCD as per the provisions of press note no.7 dated 20.07.1998. Vide acknowledgment letter dated 17.5.2006, respondent no. 1 amended the aforesaid IEM from 5000 TCD to 6000 TCD.

8. On 04.04.2006, respondent no. 3, M/s Rana Sugars Limited, filed an IEM vide acknowledgment no. 1737/SIA/IMO/2006 dated 04.04.2006 with respondent no.1 proposing to set up a sugar factory of 3500 TCD capacity at Village Ameer Khan Ka Mazra, Tehsil Swar, District Rampur, UP which is only at a distance of 10.297 kms from the site of petitioner no. 1. Respondent no. 3 claims to have also acquired land at Village Ameer Khan ka Mazra to set up its new sugar mill. On learning the aforesaid fact, petitioner no. 1, vide letter dated 25.05.2006, apprised respondents no. 1 and 2, Union of India and Chief Director (Sugar), Ministry of Consumer Affairs, Govt. Of India respectively, of the various steps being taken by respondent no. 3 for setting up of the sugar mill and requested respondents no. 1 and 2 to cancel the IEM issued to respondent no. 3 in respect of its proposed site at Village Ameer Khan ka Mazra. On 05.06.2006, petitioner no.1 reiterating its request for the cancellation of IEM issued to respondent no.3 and also brought certain additional facts to the notice of respondents no.1 and 2.The petitioner no.1 vide another letter dated 14.9.2006 again apprised respondents no.1 and 2 about certain additional steps taken towards establishing a factory and requested the respondents no.1 and 2 to cancel the IEM of respondent no.3 or alternatively stay the operation/ implementation of the aforesaid IEM

during pendency of the matter but no action was taken by the respondents no.1 and 2 which has led to filing of the present writ petition.

9. It is contended by counsel for petitioner that the respondent no. 1 has laid down a stipulation while delicensing the sugar industry vide Press Note no. 12 dated 31st August, 1998 that a minimum distance of 15 kms is to be ensured between an existing sugar mill and a new sugar mill which is being set up. Pursuant to IEM acknowledgment no. 1737/SIA/IMO/2006 dated 04.04.2006, Respondent no. 3 started proceeding to set up a sugar mill at a site which is only 10.297 kms from the site where the petitioner no. 1 has set up his sugar mill for which acknowledgment dated 02.08.2005 has been issued and therefore, the IEM issued to respondent no. 3 is violative of the policy of respondent no. 1. The counsel also contends that the action of respondent no. 3 infringes upon the petitioner no. 1's right to carry on business as guaranteed under the Constitution of India and is violative of the legal rights conferred upon petitioner no. 1 by the policy laid down by respondent no.1.

10. It is further contended by counsel for petitioner that since the proposed site of respondent no. 3 is only 10.297 kms from the site of petitioner no. 1, the IEM issued to respondent no. 3 has no legal sanctity and is void ab initio. It is the contention of the counsel that the IEM issued to respondent no. 3, being in violation of the mandatory guidelines issued vide press note dated 31.08.1998 and the Sugarcane (Control) Order 1966 as amended on 10.11.2006, cannot be implemented and if implemented, it would lead to unhealthy competition between the two mills for procurement of cane thereby defeating the very object behind the minimum 15 kms distance policy besides being detrimental to public interest in general and the entire sugar industry in particular.

11. The counsel for petitioner has strongly urged before this court that since the IEM of petitioner no. 1 is prior in time to the IEM of respondent no. 3, the IEM issued to respondent no. 3 being subsequent in time is of no consequence and deserves to be cancelled/withdrawn. The counsel next submits that, in view of the fact that the IEM of petitioner no. 1 is prior in time, only petitioner no. 1 has the right to set up the sugar mill at the proposed site and that the respondent no. 3 is liable to be injuncted/restricted from setting up the mill.

12. It is claimed that on 9.3.2007, the sugar mill of petitioner has achieved the status of an 'existing factory' after taking steps as detailed below:

    (a) On 30.3.2006 petitioner no.1 made an application to appropriate Government seeking approval for purchase of 100 acres of land in Village Milak, Naryanpur, Teshi Swar, District Ram Pur, U.P.

    (b) The State Government vide letter no.1162/8/-11(2005-2006) dated 23.5.2006 granted permission to purchase 38.796 hectares (approximately 96 acres) for setting up the sugar mill.

    (c) After obtaining the said permission the petitioner no.1 purchased about 72 acres of land Village Milak, Naryanpur, Teshi Swar, District Ram Pur, U.P. from 25.5.2006 to 27.5.2006.

    (d) From the month of February, 2006, petitioner no.1 invited quotations from various suppliers/manufacturers of the sugar machinery and equipments and had several meetings pursuant to which petitioner no.1 placed orders for purchase of entire plant, machinery and equipment.

(e) Vide letter dated 15.4.2006, petitioner no.1 applied to U.P. Pollution Control Board, Lukhnow, for issuing a 'No Objection Certificate' for setting up the new sugar mill. The certificate was granted on 1.6.2006.

(f) In response to a circular no.1180/C/KRAY/SUR dated 25.4.2006 issued by the Cane Commissioner, U.P., the petitioner no.1 vide letter dated 18.5.2006, submitted cane requirements of 108 lakh quintals for 180 days crushing during the crushing season 2006-2007 on the basis of installed capacity of 6000 TCD.

(g) The Cane Commissioner was again informed by petitioner no.1 vide letter dated 12.6.2006 about the details of the orders/LOIs placed on the various supplier for purchase of plant, machinery and equipment upto 30.5.2006.

(h) The Cane Commissioner after notifying the cane requirements of 65.76 lac quintals vide order dated 27.9.2006 allotted 15010 hectares cane area, having an estimated cane production of 87.01 lac quintals to petitioner's no.1 new sugar mill vide order no.60/KRAY/SUR dated 16.10.2006.

(i) From February, 2007, the petitioner no. 1 started testing and trials of the installed plant and machinery and crushing operations started with effect from 09.03.2007. the commercial operations commenced in the factory from 16.03.2007.

(j) Part B of the IEM dated 19.03.2007 was filed with the respondent no. 1 who acknowledged the same vide acknowledgment dated 26.03.2007.

(k) On 17.03.2007, petitioner no. 1 applied to respondent no. 2 for a short Name and Code Number for its new established mill for the purposes of free sale allocation of sugar from the month of April 2007.

(l) It is claimed that the status of the petitioners' sugar mill as on 10th November, 2006 was under:

a. The petitioners had purchased 28.951 hectare (72 acres) of land

b. It has placed orders for plant and machinery worth Rs.108.85 crores and negotiations with respect to the remaining required plant and machinery, discussions were at final stage. The petitioner had paid –

   i. Advance of Rs.35.050 crores; and

   ii. Other payments against supply of Rs.30.39 crores.

c. The petitioner had completed 100% of civil work required for commissioning of plant.

d. The petitioner had made financial arrangements. It had been sanctioned loans and part of the funds were to come from the internal accruals of the petitioner no.1.

e. Petitioner is in production since 2007.

On the other hand, respondent no.3 had as on 10th November 2006–

a. purchased 4.86 hectare (12 acres) of land despite having the permission to purchase over 18 hectares (45 acres) of land from the Commissioner, Moradabad Division.

b. Only 5% of civil work of Cane Carrier and Mill House station had been done, only for name sake.

13. It is further the contention of counsel for petitioner no. 1 that the sugar mill of respondent no. 3 is not entitled to be defined as a 'new factory' since respondent no. 3 has failed to take effective steps as required under Explanation 4 to Clause 6A of the Sugarcane (Control) Order, 1966 and therefore, petitioner no. 1 is entitled to protect its 15 kms periphery from being encroached by respondent no. 3. It is next submitted that respondent no. 3 having failed to take effective steps and was required to fulfil other conditions laid down in the notification dated 10.11.2006 and having failed to do so, its IEM stood de-recognised and thus, respondent no. 3 cannot proceed to set up its sugar mill at the proposed site.

14. The counsel next submits that the petitioner no. 1 has a fundamental right to carry on business profitably and in its best interest. The petitioner has already invested Rs. 179 crores in the setting up of the new sugar mill and has altered its position to its disadvantage and if the respondent no. 3 is not stopped from setting up the sugar mill, it would seriously prejudice the business of the petitioner as there is shortage of sugarcane in the area and there is every chance of unhealthy competition between them for procuring sugarcane.

15. It is further contended by counsel for petitioner No.1 that respondent No.1 ought to have taken action against the respondent No.3 for having violated the mandatory requirement of ensuring a distance of 15 kms from the petitioner's site and ought to have withdrawn/cancelled the IEM issued to

the respondent No.3 and restrain them from proceeding with the setting up of the mill, since it has been specifically provided that the entrepreneurs who are intending to set up sugar mill would not only maintain a distance of 15 kms from an existing sugar factory but would also maintain a distance of 15 kms between the two new factories and thus in the 15 kms periphery of the petitioners' new sugar mill, no new sugar factory can come up.

16. It is next submitted by Mr.Anand, learned counsel for the petitioner that when the proposed action of respondent no.3 came to the knowledge of the petitioners, petitioners had written letters dated 25.5.2006, 5.6.2006 and 19.9.2006 to the respondent No.1 requesting the cancellation of the impugned IEM dated 4.4.2006 of respondent No.3 and consequently the respondent No.3 stopped the activities for establishment of a new sugar mill at the proposed site and abandoned the project. After the petitioners' new sugar mill has been set up and has got the status of an existing factory by starting the crushing operations w.e.f. 9.3.2007 the respondent No.3 has again started taking some steps towards setting up of the new proposed sugar mill in utter violation of law and with mala fide intentions.

17. *Per contra,* it is contended by counsel for respondent No.3 that the present petition has been filed by the petitioners seeking to perpetuate a monopoly in the sugar industry and that the petitioners have not approached the court with clean hands as they have not disclosed their own actions and misdeeds. It is brought to the notice of the court that the petitioners have applied for 26 IEMs across the State of U.P. and most of these IEMs are at a distance of 2-5 kms from each other and were deliberately applied so that no other person intending to set up a sugar mill in the said area would have an opportunity of doing so.

18. Counsel for respondent no. 3 submits that the present writ petition deserves to be dismissed on the ground of laches of the petitioner in filing the writ petition and allowing respondent no. 3 to make investments as well as alter its position without any hindrance prior to the filing of the writ petition. Reliance has been placed on ***Ramana Dayaram Shetty v. International Airport Authority of India*** reported at (1979)3 SCC 489 and more particularly at para 35 which reads as under:

> "Moreover, the writ petition was filed by the appellant more than five months after the acceptance of the tender of Respondents 4 and during this period, Respondents 4 incurred considerable expenditure aggregating to about Rs 1, 25,000 in making arrangements for putting up the restaurant and the snack bars and in fact set up the snack bars and started running the same. It would now be most inequitous to set aside the contracts of Respondents 4 at the instance of the appellant. The position would have been different if the appellant had filed the writ petition immediately after the acceptance of the tender of Respondents 4 but the appellant allowed a period of over five months to elapse during which Respondents 4 altered their position. We are, therefore, of the view that this is not a fit case in which we should interfere and grant relief to the appellant in the exercise of our discretion under Article 226 of the Constitution."

19. Further reliance is placed on ***State of MP v. Nandlal Jaiswal*** reported at (1986)4 SCC 566 at para 23 which reads as under:

> "**23.** We may first consider the question of laches or delay in filing the writ petitions because that is the question which has been decided by the High Court against the petitioners and the petitioners have challenged the correctness of the finding reached by the High Court on this point. The policy decision impugned in the writ petitions was taken on December 30, 1984. The Letter of Intent was issued in favour of each of Respondents 5 to 11 on February 1, 1985 and the Deed of Agreement was executed on February 2, 1985. Each of Respondents 5 to 11 thereafter proceeded to purchase land

where the new distilleries were to be located and incurred large expenditure in purchase of such land and security deposit in a fairly large amount was also paid by each of Respondents 5 to 11. Thereafter civil construction work for putting up the distillery buildings was entrusted to reputed builders and various steps were taken by each of Respondents 5 to 11 for obtaining requisite permission/consent from Madhya Pradesh Pradushan Nivaran Mandal. The construction of the distillery buildings was started and in many cases considerable progress was made in the construction. Each of Respondents 5 to 11 also placed orders for plant and machinery and this too involved considerable amount of expenditure. All this had to be done with quick despatch because the distilleries were required to be ready for production by April 1, 1986. Each of Respondents 5 to 11 worked indefatigably, ceaselessly and in all earnestness and spent considerable time, energy and resources in setting up the distilleries at the new sites and by the time the writ petitions came to be filed each of Respondents 5 to 11 had spent at least Rs 1.5 crores if not more, on acquisition of land, purchase of plant and machinery, construction of distillery buildings and other incidental and ancillary expenses. The first writ petition was filed by Nandlal Jaiswal on November 28, 1985 about 11 months after the date of the impugned policy decision, while the second writ petition came to be filed by Sagar Agarwal even later on January 24, 1986 and the third writ petition of M/s Doongaji & Co. was filed when the hearing of the first two writ petitions was actually going on in the High Court. There can be doubt that the petitioners were guilty of gross delay in filing the writ petitions with the result that by the time the writ petitions came to be filed, Respondents 5 to 11 had, pursuant to the policy decision dated December 30, 1984, altered their position by incurring huge expenditure towards setting up the distilleries.

20. Reliance is also placed on ***Chairman & MD, BPL Ltd. v. S.P. Gururaja*** reported at (2003)8 SCC 567 at para 32 which reads as under:

> **"32.** In the facts and circumstances, we do not find that the Board and the State had committed any illegality which could have been a subject-matter of judicial review. The High Court in our opinion committed a manifest error insofar as it

> failed to take into consideration that the delay in this case had defeated equity. The allotment was made in the year 1995. The writ application was filed after one year. By that time the Company had not only taken possession of the land but also made sufficient investment. Delay of this nature should have been considered by the High Court to be of vital importance."

21. Further challenging the maintainability of the present writ petition, it is contended by counsel for respondent no. 3 that the present writ petition has been filed with a prayer to grant a writ of mandamus to respondent no. 1 to set aside the IEM of respondent no. 3. It is the case of respondent no. 3 that a mandamus is issued when there is a failure to perform a statutory duty and the petitioner has failed to show any statutory provision which mandates the Union of India to cancel the IEM of respondent no. 3. To substantiate his argument, the counsel has placed reliance upon ***Lekhraj Sathram Dass v. NM Shah*** reported at (1966)1 SCR 120 at para 5:

> "**5. .....**But even on the assumption that the order of the Deputy Custodian terminating the management of the appellant is illegal, the appellant is not entitled to move the High Court for grant of a writ in the nature of mandamus under Article 226 of the Constitution. The reason is that a writ of mandamus may be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge that statutory obligation. The chief function of the writ is to compel the performance of public duties prescribed by statute and to keep the subordinate tribunals and officers exercising public functions within the limits of their jurisdictions. In the present case, the appointment of the appellant as a Manager by the Custodian by virtue of his power under Section 10(2)(*b*) of the 1950 Act is contractual in its nature and there is no statutory obligation a between him and the appellant. In our opinion, any duty or obligation falling upon a public servant out of a contract entered into by him as such public servant cannot be enforced by the machinery of a writ under Article 226 of the Constitution."

22. Further reliance is placed on ***Union of India v. C. Krishna Reddy*** reported at (2003)12 SCC 627 at para 13 which reads as under:

> "13**.** It is well settled by a catena of decisions of this Court that a writ of mandamus can be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge the statutory obligation. The chief function of the writ is to compel performance of public duties prescribed by statute and to keep subordinate tribunals and officers exercising public functions within the limit of their jurisdiction. Therefore, in order that a mandamus may issue to compel the authorities to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance. [See *Bihar Eastern Gangetic Fishermen Coop. Society Ltd.* v. *Sipahi Singh*[1], AIR para 15, *Lekhraj Sathramdas Lalvani* v. *N.M. Shah, Dy. Custodian cum Managing Officer*[2] and *Umakant Saran (Dr.)* v. *State of Bihar*[3].]"

23. The counsel for respondent no. 3 next contends that the question as to which party has taken the effective steps earlier is a disputed question of fact which cannot be entertained by a Writ Court. In the absence of any opinion by respondent no. 1 in its affidavit as to which party first took the effective steps, no determination can be made on the said question without proper evidence.

24. It is next contended by counsel for respondent No.3 that the notification dated 11.9.1998 read with press note 12 had come up for consideration before this Hon'ble court in civil writ petition No.7123/2005, which was decided on 22.12.2005. Vide this judgment the Hon'ble court was pleased to observe that the prohibition contained in the notification and press note regarding set up of two sugar mills within 15 kms of each other

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[1] (1977)4 SCC 145 : AIR 1977 SC 2149
[2] AIR 1966 SC 334
[3] (1973)1 SCC 485 : AIR 1973 SC 964

was applicable only between an existing sugar mill and a proposed sugar mill. However, there was no prohibition for the grant of more than 1 IEM for an area where no sugar mill already existed and thus the grant of IEM dated 4.4.2006 to respondent No.3 after the petitioner had already been granted the IEM dated 2.8.2005 for an area which is within 15 kms of the area allotted to the answering respondent is perfectly legal and justified.

25. It is next submitted by the counsel for respondent No.3 that though the IEM was granted to the petitioner on 4.4.2006, the petitioner got its IEM amended on 17.5.2006 and got a fresh new IEM for an increased capacity of 6,000 TCD and therefore the respondent No.3's IEM dated 4.4.2006 is prior to the IEM of petitioner No.1 for all intents and purposes.

26. Counsel for respondent No.3 claims that respondent No.3 has taken various steps to implement the IEM dated 4.4.2006 and to bring its sugar mill in operation. It is claimed that in January, 2006 respondent No.3 placed purchase orders for the supply of machinery and vide letter dated 27.3.2006 informed the General Manager, District Industries Centre, Roshan Bagh Industrial Area, Rampur, U.P. and the district Cane Officer, Rampur about setting up of the new sugar plant at the proposed site. It is further claimed that the respondent No.3 has submitted an application for grant of a No Objection Certificate to the U.P. Pollution Control Board which has been granted on 15.9.2006. Vide sale deed dated 4.4.2006, respondent No.3 claims to have purchased an approximate area of 12 acres and has also entered into an agreement to sell in relation to 28 acres of land and thus has been able to procure 40 acres of land for its sugar mill. The civil construction work is also claimed to have commenced and the respondent No.3 has also moved an application under Section 154 clause 2 of the U.P.Z.L.&R at 1950 seeking permission for purchase of additional 12 acres of land which permission has been granted vide order

dated 9.6.2006. The respondent No.3 further claims to have received sale tax registration in his favour on 10.8.2006. It is next submitted by counsel for respondent No.3 that the last requirement that was necessary to start production was allocation of sugarcane which also stands complied with since the Sugar Cane Commissioner vide order dated 16.10.2006 fixed the requirement of respondent No.3 at 22.96 lakh quintals. It is further submitted that the inspection report dated 17.10.2006 given by the Deputy Cane Commissioner, Sugar has clearly stated that the civil work is complete and the necessary foundation work has also been completed.

27. The counsel for respondent No.3 has strongly urged before this court that the respondent No.3 has incurred an expenditure of approximately Rs.51,02,91,430/- towards purchase of land, machinery, civil work and other incidental expenses and is in a state to start commercial production from the next sugar cane season i.e. September-October, 2007. The counsel submits that equity stands in favour of respondent No.3 on account of large expenditure incurred by the respondent No.3 in setting up the sugar mill.

28. The counsel has vehemently argued that various representation were made to the Cane Commissioner against the malpractices resorted by the petitioner to create hindrance in the setting up of the sugar mill by respondent no. 3 and that respondent no. 3 also preferred a writ petition WP (C) No. 2408/06 in the Lucknow High Court which has been disposed off vide order dated 26.04.2006 with the direction to the Cane Commissioner to consider and dispose of the representations in accordance with law. The Cane Commissioner vide order dated 08.05.2006 disposed of the representations with the finding that he does not have jurisdiction to deal with the issues raised in the IEM.

29. While responding to the submissions made by counsel for respondent no.3, counsel for petitioner no.1 submits that the present writ petition is squarely covered by a judgement of the Hon'ble Supreme Court of India in the case of ***M/s Ojas Industries Pvt. Ltd. v. M/s Oudh Sugar Mills Limited & Others*** reported at (2007)4 SCC 723 in which the Supreme Court has considered the notification dated 10.11.2006 issued by the Central Government, the position of IEMs and the minimum distance of 15 kms. In the said judgement, the Apex Court has held that the said notification is clarificatory in nature and operates retrospectively to all cases, including those in which IEMs are pending. Relying on the aforesaid judgement, the counsel for petitioner no. 1 states that as the petitioner no. 1 has successfully completed its project and started commercial production in March 2007 and thus the IEM of respondent no.3 has become *non est*.

30. Refuting the contention of counsel for respondent no. 3 that by virtue of amendment to the IEM dated 02.08.2005, the IEM of respondent no. 3 is prior on time, it is contended by counsel for petitioner no. 1 that the amendment was sought only for the purpose of increasing the capacity of the sugar plant from 5000 TCD to 6000 TCD and it does not amount to grant of a fresh IEM in accordance with the policy of the Central Government permitting amendment of IEM where any of the project parameters are proposed to be changed.

31. Counsel for respondent no. 3 has conceded in his additional affidavit that petitioner no. 1 started its commercial operation prior to the respondent no. 3 but at the same time, he has argued that the test under the notification dated 10.11.2006 is not commercial production but taking of effective steps. It is argued by the counsel that the respondent no. 3 had taken effective steps to set up its sugar factory much prior to those taken

by petitioner no.1. It is also conceded by the respondent no. 3 that on having taken all effective steps by 10.11.2006 by both the petitioner no. 1 and respondent no. 3, sugar mills of both the parties have become "existing sugar factory" prior to notification dated 10.11.2006 and thus, the said notification prescribing a 15 kms distance between "existing sugar factory" and "new sugar factory" would not apply to the present case. The counsel next submits that the notification dated 10.11.2006 is retrospective only with respect to 'new sugar factories" which have not taken any effective steps and have merely filed their IEMs since it cannot be the intention of the legislature to nullify the huge investments made by the parties towards taking effective steps.

32. It is submitted by respondent no. 3 that the whole purpose of the limitation regarding 15 kms to be reserved between two sugar factories is only that supply of sugarcane is sufficient to sustain both the two sugar factories. It is next submitted that the cane controller has allotted sufficient areas by its order dated 16.10.2006 to both the parties in accordance with their crushing capacity and the said order has not been challenged by petitioner no.1 which shows that the petitioner no. 1 is not aggrieved of the supply of sugarcane and has filed the present writ petition only with the intention to deter respondent no. 3 from staring its manufacturing activities in competition with the petitioner.

33. A brief affidavit has also been filed by the Union of India and Chief Director (Sugar), *respondents no. 1 and 2 herein*. In the said affidavit, it is submitted that the sugar industry was delicensed vide press note no. 12 dated 31.08.1998 and while delicensing the sugar industry, the Government also decided that in order to avoid unhealthy competition among sugar factories to procure sugarcane, a minimum distance of 15 kms would continue to be observed between an existing and a new mill. It

is further stated in the affidavit that the IEM of petitioner no. 1 was acknowledged on 02.08.2005 and subsequently, the amendment sought by petitioner no. 1 to its IEM increasing the capacity of the sugar mill was acknowledged on 17.05.2006. It is the stand of respondents no. 1 and 2 that the amendment of an IEM does not change the date of filing of the IEM unless the amendment is for changing the proposed location and thus, has a prospective effect. The affidavit further states that the IEM of respondent no. 3 was acknowledged on 04.04.2005 for setting up sugar mills at Village Ameer Khan Ka Mazra, Tehsil Swar, District Rampur, UP.

34. Respondent no. 1 and 2 have further stated in their affidavit that both petitioner no.1 as well as respondent no.3 were called upon to submit an affidavit indicating the effective steps taken by them to implement their IEMs as on 10.11.2006 (the date of the notification) and as on 02.04.2007 (the date of decision of the Apex Court in M/s Ojas Industries, supra). The Cane Commissioner, UP was also called upon them to furnish the above information. Vide letter dated 10.07.2007, the Cane Commissioner, UP informed that while petitioner no. 1 had commenced its crushing operations from 09.03.2007 and had started commercial operations from 16.03.2007; the sugar mill of respondent no. 3 was still under construction.

35. I have heard counsel for parties and have perused the entire material placed on record. The present matter is squarely covered by the decision of the Apex Court in ***M/s Ojas Industries (P) Ltd. (supra)*** wherein the Apex Court gave interpretation of the press note 12 dated 31.08.1998 issued by Government of India and the notification dated 10.11.2006 amending the Sugarcane (Control) order, 1966 was also under consideration. In the aforesaid judgment, Ojas industries filed its IEM on

13.05.2004 and after four days, on 17.05.2005, Oudh Sugar Mills filed its IEM which led to a dispute between the two companies with regard to applicability of press note 12 and accompanying notification as the factories of the parties were at a distance of 7.2 kms from each other. The Division Bench of the High Court of Delhi held that the press note 12 read with accompanying notification prescribing the 15 km distance applied only to cases where a new mill (factory) was proposed to be set up within 15 km of an existing sugar mill. When the High Court decided the matter, the notification dated 10.11.2006 was not in existence. Holding the said notification to be clarificatory and thus, retrospective in nature, the Apex Court observed as under:

> "**26.** India has adopted the policy of economic reforms, free trade and liberalisation in 1991. The Government has taken several steps in that direction. The Licence Raj has been dismantled in phases. Sugar industry is accordingly liberalised. It has been delicensed. The object being to increase the production of sugar. The object being to make the sugar industry competitive in the world. The object being continuous supply of sugarcane to the entrepreneurs proposing to set up new sugar plants of viable capacities. The object being disciplined procurement of sugarcane and sufficient supply of sugarcane to the mills (factories). This last object is the basis of Press Note 12 dated 31-8-1998. If sugar mills are allowed to be set up in close proximity then the demand of sugarcane will be much higher than supply and in which event the existing sugar mills will be starved of the sugarcane and will become unviable; consequently, the farmers will also suffer.
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> **27.** Before the High Court one of the submissions made on behalf of Oudh was that the notification dated 11-9-1998 under Section 29-B(1) of the 1951 Act read with Press Note 12 dated 31-8-1998, did not provide for a bar for the subsequent IEM-holder in the face of the first IEM-holder taking effective steps within the specified time-limit. In the impugned judgment (vide para 65) the High Court has stated, while accepting the contention of Oudh, that the Central Government was free to amend Press Note 12

and provide for a bar for subsequent IEM-holders from setting up a sugar mill within 15 km of the place where the proposed sugar mill under the earlier IEM is proposed to be set up. When the High Court decided the matter there was no such express bar. However, by way of the Sugarcane (Control) (Amendment) Order, 2006 dated 10-11-2006 a bar is introduced vide clauses 6-A to 6-E for setting up a new sugar factory (mill) by a person taking effective steps after filing IEM. In other words, if the first IEM-holder or the earlier IEM-holder takes effective steps to implement its IEM then the subsequent IEM-holder cannot proceed with his IEM. If the first or earlier IEM-holder completes its projects successfully then the remaining IEMs for that area shall become non est. They shall, however, remain in suspense during stipulated period when the earlier IEM-holder takes effective steps for implementing its IEM. Therefore, the very basis of the impugned judgment is now eliminated. Hence, we are not required to examine once again the validity of the said judgment.

28. Suffice it to state, that the Sugarcane (Control) (Amendment) Order, 2006 shall apply retrospectively to all cases, including the present cases in which IEMs are pending.

29. In this connection, the question which arises for determination is: firstly, whether the Sugarcane (Control) (Amendment) Order, 2006 operates retrospectively and if so whether the effective steps enumerated in Explanation 4 to clause 6-A are adequate. In this connection, we have to keep in mind the conceptual difference between the distance certificate, the concept of effective steps to be taken by an IEM-holder and the question of bona fides.

30. The Sugarcane (Control) (Amendment) Order, 2006 inserts clauses 6-A to 6-E in clause 6 of the Sugarcane (Control) Order, 1966. It retains the concept of "distance". This concept of "distance" has got to be retained for economic reasons. This concept is based on demand and supply. This concept has to be retained because the resource, namely, sugarcane, is limited. Sugarcane is not an unlimited resource. "Distance" stands for available quantity of sugarcane to be supplied by the farmer to the sugar mill. On the other hand, filing of bank guarantee for Rs 1 crore is only as a matter of proof of bona fides. An entrepreneur who is genuinely interested in setting up a sugar

mill has to prove his bona fides by giving bank guarantee of Rs 1 crore. Further, giving of bank guarantee is also a proof that the businessman has the financial ability to set up a sugar mill (factory). Therefore, giving of bank guarantee has nothing to do with the distance certificate.

31. As far as effective steps are concerned we may point out that apart from the steps enlisted in the earlier notification dated 11-9-1998 read with Press Note 12 dated 31-8-1998, the Sugarcane (Control) (Amendment) Order, 2006 has laid down such steps like purchase of required land in the name of the factory (mill), placement of a firm order for purchase of plant and machinery for the factory, payment of advance or opening of letter of credit with suppliers, commencement certificate of civil work and construction of building, sanction of requisite term loans from the banks or financial institutions and any other step prescribed by the Central Government in this regard. In our view clauses 6-A to 6-E have been introduced in clause 6 of the Sugarcane (Control) Order, 1966. In our view clauses 6-A to 6-E are clarificatory in nature. There are certain norms mentioned in the accounting standards of the Institute of Chartered Accountants for setting up industries. They may be sugar mills, paper mills, textile mills, etc. When effective steps are enlisted in the Sugarcane (Control) (Amendment) Order, 2006 dated 10-11-2006 vide Explanation 4 to clause 6-A those in-built norms are made explicit, therefore, Explanation 4 to clause 6-A is clarificatory. Therefore, it is retrospective.

32. There is one more reason why we hold that the Sugarcane (Control) (Amendment) Order, 2006 is retrospective. The Central Government has taken note of various pending matters in different courts on the interpretation of the Sugarcane (Control) Order, 1966, Press Note 12 and the notification dated 11-9-1998 issued under Section 29-B(1) of the said 1951 Act to put an end to litigations and keeping in mind the concept of "distance certificate" as distinct from the concept of "effective steps", the Central Government has issued the Sugarcane (Control) (Amendment) Order, 2006. It is to plug the loophole that the said order has been issued on 10-11-2006. In our view, therefore, the Sugarcane (Control) (Amendment) Order, 2006 is retrospective. In all pending cases the Central Government now seeks to put a bar for setting up new sugar factory (mill) for a limited period

during which the former or earlier IEM-holder is required to take effective steps. The said order of 2006 is not putting a ban on setting up of new units. It is only giving a priority in the matter of setting up of new units. Therefore, the said 2006 order operates retrospectively. It will not apply to mills which are already functioning. The said 2006 order will apply only to cases where IEMs are pending in disputes in various courts. The said 2006 order will also apply after our judgment to those cases which are under dispute and where milling has not commenced or permitted to commence.

33. On behalf of Ojas certain suggested modifications to Explanation 4 in clause 6-A have been indicated. They are stated hereinabove. They are worthy of considerations by the Central Government. It is for the Central Government to incorporate such modifications as it deems fit keeping in mind the availability of sugarcane in a given area, the crushing capacity of the unit, the installed capacity of the plant and machinery, the nexus with the availability of sugarcane and the capacity utilisation of the mill (factory).

34. Before concluding on this issue we may reiterate that raising of resources and application of resources by a unit is different from the condition of distance. The concept of "distance" is different from the concept of "setting up of unit" in the sense that setting up of a unit is the main concern of the businessman whereas a concept of "distance" is an economic concept which has to be taken into account by the Government because it is the Government which has to frame economic policies and which has to take into account factors such as demand and supply."

The Apex Court further observed as under:

"**38.** We hold that the Sugarcane (Control) (Amendment) Order, 2006 imposes a bar on the subsequent IEM-holders in the matter of setting up of new sugar mills (factories) during the stipulated period given to the earlier IEM –holders to take effective steps enumerated in Explanation 4 to clause 6-A the Sugarcane (Control) (Amendment) Order, 2006 dated 10.11.2006. We further hold that the said 2006 Order operates retrospectively."

36. The counsel for respondent no. 3 has sought to contend before this court that though the IEM of petitioner was acknowledged on 02.08.2005 but by subsequently amending its IEM on 17.05.2006, the IEM dated 04.04.2006 of respondent no. 3 is prior in time. I find no force in the aforesaid submission of the counsel for respondent no. 3 in light of the

letter dated 28.06.2007 wherein the Department of Industrial Policy and Promotion has clarified that an amendment of an IEM for change of any of the parameters does not change the date of filing of the IEM unless the amendment is for changing the proposed location of the sugar factory. Thus, the amendment dated 17.05.2006 does not change the seniority of the IEM dated 02.08.2005 of the petitioner.

37. In ***Ojas Industries (supra),*** the Apex Court has categorically has laid down that if the earlier IEM holder takes effective steps to implement its IEM, then subsequent IEM holder cannot proceed with his IEM and if the earlier IEM holder successfully completes its projects, the remaining IEMs for that area shall remain suspended. The petitioner has started its crushing operations w.e.f 09.03.2007 and commercial production from 16.03.2007. The fact that the petitioner started its commercial production prior to that of the respondent no. 3 has not been disputed by counsel for respondent no.3. A perusal of the counter-affidavit filed by the Union of India, respondent no.1 herein, makes it further clear that when the petitioner's sugar mill has commenced its crushing operations and had started with its commercial production, the sugar mill of respondent no. 3 was still under construction which fact is corroborated by the report of the Cane Commissioner dated 10.07.2007. Further, it has also not been disputed by counsel for respondent no. 3 that the sugar mill of the petitioner has achieved the status of an '*existing sugar factory'.* In the written submission filed by the learned senior counsel for respondent no. 3, it has been stated that the up till the interim order dated 25.04.2007 of this Court; the said unit of respondent no. 3 was included in the balance sheets of respondent no. 3 as "work in progress" since vie order dated 25.04.2007, this Court had made it clear that any further steps taken by the parties would not create any equities in their favour. The judgments

sought to be relied upon by counsel for respondent no.3 are not applicable to the facts of the present case, more particularly when the petitioner has been opposing the issuing of the IEM in favour of respondent no.3 since the year 2006 itself.

38. Thus, in view of the observations made above and the law laid down by the Apex Court in ***M/s Ojas Industries (Supra)***, and the stand taken by respondents no.1 and 2 in the counter affidavit, the writ petition of the petitioner is allowed. Respondent nos.1 and 2 shall comply with the terms of the Sugarcane (Control) (Amendment) Order, 2006 and the directions as per paragraph 38 of the judgment of the Supreme court in the case of ***M/s.Ojas Industries (Supra).***

G.S.SISTANI, J.

JANUARY 16, 2013
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