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Moser Baer Solar Limited vs.ministry of Electronics & Information Technology

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Court : Delhi

Decided On : Feb-25-2019

Appellant : Moser Baer Solar Limited

Respondent : Ministry of Electronics & Information Technology

Judgement :

\$~35 * IN THE HIGH COURT OF DELHI AT NEW DELHI + W.P.(C) 1876/2019 %
MOSER BAER SOLAR LIMITED

... Petitioner

Through: Mr Kamal Mehta, Advocate. versus MINISTRY OF ELECTRONICS & INFORMATION TECHNOLOGY Respondent Through: Mr Akshay Makhija, CGSC, Ms Seerat Deep Singh, Ms Nidhi Mohan Parashar, GP and Mr Sharma, Advocates. Pratyush CORAM: HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

2502.2019 VIBHU BAKHRU, J CM No.8791/2019 1. Allowed, subject to all just exceptions. W.P.(C) 1876/2019 2. The petitioner has filed the present petition, inter alia, impugning a letter dated 15.01.2019 (hereafter the impugned letter) issued by the Ministry of Electronics and Information Technology (the respondent). Further, the petitioner prays that this Court issue directions to the respondent to disburse the subsidy amounting to 269,70,00,000/- to the petitioner. W.P.(C) 1876

of 2019 Page 1 of 10 3. The petitioner is a company registered under the Companies Act, 1956 and is, inter alia, involved in the manufacture of Solar PV Cells and Modules. It is also engaged in the engineering, procurement and construction of solar power plants. The petitioner submits that it is entitled to subsidy under The Special Incentive Package Scheme to Encourage Investments for Setting up Semiconductor Fabrication and other Micro and Nano Technology Manufacture Industries (hereafter the Scheme), announced by the respondent vide a gazette notification dated 21.03.2007. The petitioner submits that even though insolvency proceedings initiated by one of its financial creditors are pending, it is entitled to the subsidy under the Scheme.

4. The petitioner applied to the respondent to be considered for the subsidy under the Scheme under the cover of a letter dated 10.12.2007. The petitioner submits that after the submission of certain documents, the respondent by a letter dated 11.02.2015 (No.24(4)/2007-IPHW Vol. XIII), approved an amount of 269,70,00,000/- to be disbursed to the petitioner as subsidy under the Scheme. The petitioner first filed a claim for disbursement of the incentive on 19.03.2015. Thereafter, between 24.06.2016 and 07.08.2017, there was a regular exchange of communication between the petitioner, the respondent and other auditing agencies.

5. On 19.03.2018, the National Company Law Tribunal (NCLT) appointed a resolution professional, commencing the procedure for insolvency under the Insolvency and Bankruptcy Code, 2016. The W.P.(C) 1876 of 2019 Page 2 of 10 same was done pursuant to an application filed by one of the petitioner company's financial creditors.

6. It is stated that the resolution professional so appointed approached the respondent on various occasions between March, 2018 and September, 2018 seeking disbursement of the subsidy. However, the respondent did not disburse the same.

7. Aggrieved, the petitioner preferred an application before the NCLT seeking directions be issued to the respondent herein to disburse the subsidy. However, the NCLT dismissed the application observing that the relief as prayed for is

beyond its jurisdiction.

8. Thereafter, the petitioner preferred a writ petition before this court captioned Moser Baer Solar Limited v. Ministry of Electronics and Information Technology: W.P. (C) 10696 of 2018, which was disposed of by this court on 21.01.2019, directing the respondents to communicate its decision regarding the issue of subsidy to the petitioner within a period of one week. In compliance with this order, the respondent issued the impugned letter rejecting the petitioners claim for subsidy.

9. Aggrieved by the same, the petitioner has filed the present petition.

10. The learned counsel appearing for the petitioner contended that the provision of subsidy was envisioned to provide the gap funding for the project. He submitted that in the circumstances, the subsidy could not be withheld on account of the petitioner being referred to NCLT since it had already taken steps to commence the project. He further submitted that the petitioner needs the subsidy as that would considerably enhance its prospects for being rehabilitated. Next, he contended that the decision of the respondents to decline disbursement of the subsidy on the ground that lease rentals were outstanding, was flawed. He submitted that even though lease rentals were outstanding, the same are considered as a capital cost of the project in terms of the relevant accounting standards. He submitted that although the said lease rentals were payable over a period of 20 years, the same could not be excluded from the project cost. He also submitted that the Net Present Value (NPV) of the project had been incorrectly recorded. Reasons and conclusion 11. The petitioner had applied for the incentives under the Scheme projecting a capital expenditure of 12,673 crores. However, that fell down to 1,489.31 crores as per the certificate issued by the statutory auditor. The Net Present Value (NPV) of the said capital expenditure was worked out to Rs.1011.12 crores, which was higher than the threshold of 1000 crores and, therefore, the petitioner was considered eligible for grant of subsidy. However, the auditors had reported that relevant details for the capital expenditure amounting to 96.95 crores were not available. It was also reported that long term liability towards financial lease was outstanding and had

remained outstanding since over ten years. In this view, the respondents concluded that the W.P.(C) 1876 of 2019 Page 4 of 10 petitioner had not made the capital investment that was necessary to cross the threshold of 1000 crores.

12. The second reason for not disbursing the subsidy as indicated in the impugned letter is that the petitioner is facing acute shortage of liquidity funds and, therefore, the subsidy if disbursed would be used for payment of lenders. The respondent has reasoned that object of providing any incentive was to assist viable units and not units in such distress. The respondent also noted that the resolution professional appointed by NCLT had also indicated that it is unlikely that there would be any bid of a significant amount acceptable to the creditors. The respondent is of the view that even with the provision of the subsidy, the petitioner will remain unviable and, therefore, it would not be prudent to release the same.

13. In view of the above, the first and foremost question to be addressed is whether the petitioner has made requisite capital investment for grant of subsidy.

In this regard it would be relevant to refer to the Scheme, notified on 21.03.2007

14. The relevant extract of the Notification dated 21.03.2007, which indicates the Special Incentive Package (the Scheme) offered by the respondents is set out below:-

"The Special Incentive Package is as under:

2. 1 The investment will be for the manufacturer of all semi-conductors and eco-system units, namely displays including Liquid Crystal Displays (LCD), W.P.(C) 1876 of 2019 Page 5 of 10 Organic Light Emitting Diodes (OLED), Plasma Display Panels (PDP), any other emerging displays; storage devices; solar cells; photovoltaics; other advanced micro and nano technology products; assembly and test of all the above products. 2.2 The Special Incentive Package, shall be for state of the art technology. 2.3 In the case of semi-conductor manufacturing (Fab units) products, the threshold Net Present Value (NPV) of investment will be Rs.2,500 crore and above. The threshold NPV of investment in manufacture of other eco-system products will be Rs.1,000 crore and above. This threshold value shall be taken as the Net Present Value (NPV) of investments made during the first 10 years of the project life and the discount rate will be @ 9%. 3.1 The Central

Government or any of its agencies shall provide incentive of 20% of the capital expenditure (as defined in sub-paragraph 3.3) during the first 10 years for the units in SEZ and 25% of the capital expenditure for non-SEZ units. Non-SEZ units shall be exempt from CVD. The incentives, if any, offered by the State Government or any of its agencies or local bodies shall be over and above this amount. Note: The customs notification exempting CVD for non-SEZ units will be issued separately by the Ministry of Finance. 3.2 The period of 10 years shall be the first 10 years of the project life from the start of the project and not with regard to the start of any subsequent phase of the project. W.P.(C) 1876 of 2019 Page 6 of 10 3.3 The capital expenditure will be the total of capital expenditure in land, building, plant and machinery and technology including R&D. The cost of land exceeding 2% of the capital expenditure shall not be considered for calculation in this regard. 15. It is clear from the above that the subsidy under the aforesaid Scheme was available to certain manufacturers whose capital investment had exceeded the threshold value. In the petitioners case that the threshold value for capital expenditure was a NPV of 1000 crores. The NPV being calculated by discounting the value of investment to be made during first ten years of the project life, at a discount rate of 9%.

16. It appears that the petitioner had acquired certain capital assets on financial lease and had capitalized the same in its books. However, the petitioner had not paid the lease rentals as is evident from the fact that the said lease rentals remained outstanding in its books. In the circumstances, the respondents view that the petitioner had not made the requisite investments cannot be faulted. Plainly, the petitioner cannot claim benefit of an investment that it has failed to pay for.

17. It was contended on behalf of the petitioner that the lease rentals are liable to be paid over a period of 20 years. In view of this submission, this Court had pointedly asked the learned counsel for the petitioner whether there was any default on the part of the petitioner in payment of the lease rentals. He could not respond in the negative. W.P.(C) 1876 of 2019 Page 7 of 10 The impugned order indicates that the lease rentals of 350.70 crores and 35.22 crores were outstanding since more than ten years. Since there appears to be no dispute that the petitioner had defaulted in payment of liabilities towards lease rentals related

to the assets, which are capitalized as investment, the decision that the petitioner has not made the requisite investment cannot be faulted.

18. It is also not disputed that the auditors appointed had submitted a report indicating that the investment to the extent of 96.95 crores could not be verified. It was contended on behalf of the petitioner that the said investment was duly reflected in the books and its accounts had been audited earlier and, therefore, the said investment could not be questioned, is unpersuasive. The respondents were entitled to verify the capital investments made by the petitioner and since the petitioner had failed to provide the necessary documents evidencing such investments, the same could not be considered by the respondents. This Court finds no infirmity with this decision. If the investment of 96.95 crores is excluded, the NPV of the investments made would fall within the threshold limit of 1000 crores and the petitioner would not be entitled for any subsidy under the scheme.

19. It was contended on behalf of the petitioner that subsidy was provided to defer the capital expenditure and therefore included in the capital investment required to be made. It was suggested that since the respondent had not disbursed the subsidy, the capital expenditure had fallen short of the threshold as initially envisaged. This contention is also unpersuasive. The opening paragraph of the Notification clearly W.P.(C) 1876 of 2019 Page 8 of 10 indicated that the subsidy was to help bridge viability gap due to lack of adequate infrastructure and ecosystem. Thus, the subsidy was required for sustaining the project and not necessarily incurring capital expenditure. More importantly, there is no material to indicate that the subsidy would be used for capital investment as originally envisaged that the same would result in the petitioner meeting the criteria of capital investment (NPV of 1000 crores).

20. The decision of the respondents to refuse disbursement of subsidy on the ground that the petitioners viability in question also cannot be faulted. Plainly, the object of the Scheme was to support eligible projects. In the given set of facts where the viability of the petitioners project is itself under serious question, the respondent cannot be expected to disburse any subsidy which was envisioned for long term benefits. The opening paragraph of the Scheme indicated that the same

was in expectation of return by way of contribution to the GDP of the country.

21. The petitioner had also contended that the method of calculating the NPV was erroneous and the said issue was covered in its favour in the decision of the Division Bench of this Court in Union of India & Anr. v. Indosolar Ltd.: L.P.A. 837 of 2015 decided on 10.04.2017. However, the petitioner could not dispute that even if the NPV was calculated on the basis as accepted in Indosolar (supra), the NPV of the petitioners capital investment would not exceed the threshold of 1000 crores if the outstanding lease rentals and the capital W.P.(C) 1876 of 2019 Page 9 of 10 expenditure amounting to 96.95 crores was excluded from such calculation.

22. In view of the above, the present petition is unmerited and, accordingly, dismissed. The parties are left to bear their own costs. VIBHU BAKHRU, J
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