

M/S OJAS INDS. (P) LTD.

v.

M/S OUDH SUGAR MILLS LTD. AND ORS.

APRIL 2, 2007

[DR. ARIJIT PASAYAT AND S.H. KAPADIA, JJ.]

Industrial (Development and Regulation) Act, 1951—Section 29B(1)—Sugarcane (Control) Order, 1966 as amended by Sugarcane (Control) Amendment Order, 2006—Clauses 6A, 6B, 6C, 6D & 6E—Notification issued de-licensing sugar industry under the Act—Distance requirement prescribed between an existing and a proposed sugar factory—Two Industrial Entrepreneur Memorandums (IEM) filed by two entrepreneurs with Central Government proposing to set up their sugar factories within the prescribed distance requirement—Central Government approving the IEM filed earlier and rejecting the IEM filed subsequently—Writ Petition by subsequent IEM holder challenging the decision of the Central Government was allowed by High Court holding that the prescribed distance requirement is between an existing and a proposed sugar factory and not between two proposed sugar factories—Amendment Order introduced prescribing the distance requirement between two proposed sugar factories also and setting up conditions for approved IEM holder for taking effective steps within stipulated period—Retrospective applicability of the Amendment Order—Held, the object of prescribing distance requirement is for disciplined procurement of sugarcane and sufficient supply of sugarcane to the sugar factories—Amendment Order is introduced by Central Government to put an end to several litigations and to plug loopholes in the Order—Hence, the Amendment Order is clarificatory and is applicable retrospectively.

Central Government issued a Notification under section 29B(1) of the Industrial (Development and Regulation) Act, 1951 de-licensing sugar industry. It prescribed a minimum radial distance of 15 kilometers between an existing sugar factory and a proposed sugar factory in order to avoid unhealthy competition among sugar factories to procure sugarcane. Appellant-company filed Industrial Entrepreneur Memorandum (IEM) with the Central Government for setting up a sugar factory. Thereafter, respondent-company also filed its IEM for setting up a sugar factory at a place which is

A only 7.2 kms from the proposed sugar factory of the appellant. The appellant filed a Writ Petition before High Court for setting aside the IEM filed by the respondent. The respondent also filed a Writ Petition for the same prayer against the appellant. The High Court disposed of both the Writ Petitions by directing the Central Government to look into the dispute between the parties. The Central Government approved the IEM filed by the appellant and disapproved the IEM filed by the respondent. The respondent filed a Writ Petition before the High Court challenging the decision of the Central Government. The High Court allowed the Writ Petition by holding that the minimum radial distance prescribed in the Notification is only between an existing sugar factory and a proposed sugar factory and not between two proposed sugar factories. The High Court, however, observed that the Central Government is free to amend the Notification and prescribe the minimum radial distance requirement between the two proposed factories also.

The Central Government issued a Sugarcane (Control) (Amendment) Order, 2006 inserting clauses 6A to 6E to the Sugarcane (Control) Order, 1966. Clause 6A of the Order provided that no new sugar factory shall be set up within the radius of 15 kilometers of any existing sugar factory or another new sugar factory in a state or two or more states. The Amendment Order further provided that a new sugar factory shall mean a sugar factory which has filed the IEM and has submitted a performance guarantee of rupees one crore with the Central Government for implementation of the IEM within the stipulated time. The Amendment Order further provided that an existing sugar factory shall also include a sugar factory that has taken all effective steps as specified in Explanation 4 to 6A of the Amendment Order to set up a sugar factory.

F In appeal to this Court, the appellant contended that the distance requirement from existing sugar factories provides full protection to inefficient existing sugar factories which was not the intention of de-licensing the sugar industry; that this will discourage new investments in sugar industry and would be a frustration of the policy of liberalization; that, if the judgment of the High Court is upheld, then any number of sugar factories would be set up in close proximity to each other which would make the demand for sugarcane much higher than its supply; that the minimum distance should be retained even between the IEM holders so that adequate supply of raw material is assured; that subsequent IEMs should be kept in suspense till the completion of the stipulated period during which the first IEM holder has to take effective steps; and that when effective steps are taken by the first IEM

H

holder, then the subsequent IEMs will become *non est*.

The respondents contended that the Sugarcane (Control) Amendment Order is prospective in effect and cannot be retrospective since it lays down new conditions such as filing of bank guarantee, filing of distance certificate and the effective steps of implementing the IEM; that before the Amendment Order was introduced, the distance requirement is between an existing sugar factory and a proposed sugar factory and not between two proposed sugar factories which filed IEMs.

Disposing of the Appeals and the Transfer Petitions, the Court

HELD: 1.1. The object of de-licensing sugar industry is to increase production of sugar. The object is 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. 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 even the existing sugar mills will be starved of the sugarcane and will become unviable consequently the farmers will also suffer.

[Para 16] [673-F-G]

1.2. The Sugarcane (Control) (Amendment) Order, 2006 shall apply retrospectively to all cases, including the present cases in which IEMs are pending. The 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. "Distance" stands for available quantity of sugarcane to be supplied by the farmer to the sugar mill. Under the Order, an entrepreneur who is genuinely interested in setting up a sugar mill has to prove his *bona fides* by giving a bank guarantee. Further, giving of bank guarantee is also a proof that the entrepreneur has the financial ability to set up a sugar mill and it has nothing to do with the Distance Certificate. Clauses 6A to 6E introduced in Clause 6 of the Sugarcane (Control) Order, 1966, are clarificatory in nature. The effective steps enlisted in Explanation 4 to Clause 6A of the Order are in-built norms which are made explicit. Hence Explanation 4 to Clause 6A of the Amendment Order is clarificatory and is retrospective. [Para 18] [674-E-G; 675-B-C]

1.3. The Central Government has issued the Amendment Order to put an end to litigations to plug the loophole. Hence, the Order is retrospective.

- A** In all pending cases, the Central Government seeks to put a bar for setting up new sugar mill for a limited period during which the Earlier IEM Holder is required to take effective steps. The Amendment Order 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 Order operates retrospectively. The Amendment Order applies only to cases where IEMs are pending in disputes in various courts. [Para 18] [675-E-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1730 of 2007.

From the Final Judgment and Order dated 22.12.2005 of the High Court of Judicature of Delhi at New Delhi in Writ Petition (C) No. 7123 of 2005.

WITH

C.A. Nos. 1731-1735 of 2007.T.P. © No. 421 of 2006, TP © No. 623 of 2006.

- D** Mohan Parasaran, ASG., Mukul Rohtagi, V.A. Mohta, Gaurab Banerjee, Shanti Bhushan, Soli J. Sorabjee, T.R. Andhियarujana, Jayant Bhushan, Vivek K. Tankha, Harish N. Salve, Arun Jaitely, Rakesh Dwivedi, A.M. Singhvi and Rajiv Dutta, Bhargava Desai, Uday Kumar, Sanjeev Kumar Singh, Hina Rizvi, Syed Shahid Husain Rizvi, Akhilesh Kalra, Mahesh Agarwal, Gaurav Goel, Ankur Chawla, Sanjeev Kumar, Vikram Bajaj (for M/s. Khaitan & Co.), Ankur Sharma, Nikhil Majothia, Joseph Pookatt, Prashant Kumar, Rajiv Dubey, Kamalendra Mishra, E.C. Agrawala, V.K. Verma, Sumit Goel, Gaurav Bhatia, S. Wasim A. Qadri, Kush Chaturvedi (for P.H. Parekh & Co.), Praveen Kumar, Navin Prakash, W.A. Qadri, Chidananda D.L., Vijay Goyal, R.S. Rana, V.K. Verma, Bhargava Desai, Gaurav Bhatia, Vijaylakshmi Menon, Indu Malhotra, Sanjeev Anand, Satish Vig, Parijat Sinha, and Manik Karanjawala for the appearing parties.

The Judgment of the Court was delivered by

KAPADIA, J. 1. Leave granted in petitions for special leave.

G 2. In this batch of matters we are required to interpret Press Note No.12 dated 31.8.1998 issued by Government of India, Ministry of Industry, concerning de-licensing of Sugar Industry.

H 3. For the sake of convenience we state the facts occurring in Civil

Appeal No. 1730 of 2007 arising out of S.L.P.(C) No.7690 of 2006 - M/s. Ojas Industries (P) Ltd. Versus M/s. Oudh Sugar Mills Ltd. & Others. A

4. Proliferation of Industrial Entrepreneur Memorandums to block competition is the cause of dispute.

5. On 31.8.98 Government of India (for short, 'GOI') decided to delete sugar industry from compulsory licensing under the Industries (Development and Regulation) Act, 1951 (For short, '1951 Act'). In that Press Note No.12, GOI clarified that in order to avoid unhealthy competition among sugar factories to procure sugarcane, a minimum distance of 15 KMs has to be observed between an existing sugar mill and a new mill (factory). Further, the entrepreneur who desires to avail of the de-licensing of sugar industry was required to file an Industrial Entrepreneur Memorandum (for short, 'IEM') with the Ministry of Industry. In the said Press Note it was further clarified that those entrepreneurs who have been issued Letter of Intent (for short, 'LOI') for manufacture of sugar need not file an initial IEM and in such cases, the LOI Holders shall file Part 'B' only of the IEM at the time of commencement of commercial production. B C D

6. The Notification dated 11.9.98 was issued under Section 29B(1) of the said 1951 Act. It had to be read with Press Note No.12 dated 31.8.98. It was issued to usher in the policy of de-licensing. E

7. After de-licensing 2232 IEMs were filed till July 2005 out of which 600 IEMs were filed in U.P.

8. On 13.5.04 M/s. Ojas Industries (P) Ltd. (for short, 'Ojas') filed its IEM for setting up a sugar mill at village Baisagapur, Distt. Lakhimpur Kheri, U.P. It was acknowledged by GOI. Ojas claims to have obtained permission for purchase of lands under U.P. Zamidari Abolition & Land Regulation Act. It claims to have placed orders for entire plant and machinery from M/s. S.S. Engineers, Pune in February 2005. It claims to have placed an order of the value of Rs.8.65 crores for construction of the factory building. It also claims to have made financial tie-ups with banks and other financial institutions for meeting expenses of more than Rs.20 crores. It claims to have approached U.P. Pollution Control Board for grant of NOC dated 28.4.05. It claims to have obtained such NOC. Ojas claims to have spent Rs.20 crores under various Other Heads. After four days on 17.5.04, M/s. Oudh Sugar Mills Ltd. (for short, 'Oudh') filed its IEM for setting up a sugar mill (factory) at village Saidpur, Khurd, Distt. Lakhimpur Kheri, U.P. within 7.2 Kms from the proposed F G H

A sugar mill of Ojas in Basaigapur. This has led to the dispute between the two companies.

9. On 23.4.05 Ojas filed its Writ Petition No.7123/05 before the Delhi High Court for setting aside the IEM filed by Oudh. On 28.5.05 Oudh filed a writ petition in Delhi High Court bearing No.9892/05 to set aside the IEM filed by M/s. Bajaj Hindustan Ltd. for setting up the sugar mill in Titarpur.

10. On 30.6.2005, pursuant to the Orders of the Delhi High Court, the matter was heard by Chief Director, Sugar, (GOI) who approved the IEM filed by Ojas. The IEM filed by Oudh was disapproved. Aggrieved by the decisions of the Chief Director, Sugar, (GOI), Oudh filed Writ Petition No.11748/05. On 26.7.05 Oudh filed another Writ Petition No.12078/05 challenging the IEM of M/s. Bajaj Hindustan Ltd. for setting up its sugar mill at village Khambarkhera.

11. Be that as it may, by the impugned judgment dated 22.12.05 the Division Bench of the Delhi High Court held that the Notification dated 11.9.98 read with the Press Note No.12 dated 31.8.98 prescribing 15 KMs distance between existing sugar mill and a new sugar mill did not operate to the prejudice of Oudh and that it was open to Oudh or any one else to establish a sugar mill beyond 15 KMs of an existing sugar mill. It was held that the Central Government had executive powers under Article 73 of the Constitution of India to issue the said Press Note No.12. It was further held that the said Press Note, however, applied only to cases where a new mill (factory) is proposed to be set up within 15 KMs of an existing sugar mill. According to the impugned judgment, therefore, in the absence of existing sugar mill the said Press Note No.12 dated 31.8.98 had no application. On facts, it was, therefore, held that Ojas cannot derive any benefit from the said Press Note No.12 dated 31.8.98. In the circumstances, by the impugned judgment it has been held that the said Press Note applies only when there is an existing sugar mill. Accordingly, by the impugned Writ Petition No.7123/05 filed by Ojas for setting aside the IEM filed by Oudh stood dismissed. Whereas Writ Petition No.11748/05 filed by Oudh was allowed and the orders passed by the Chief Director, Sugar, dated 30.6.05 was set aside. Consequently, by the impugned judgment Writ Petition No.12078/05 filed by Oudh challenging the IEM of M/s. Bajaj Hindustan Ltd. for Khambarkhera was also dismissed.

12. Aggrieved by the impugned judgment dated 22.12.05 Ojas have come to this Court by way of civil appeals.

13. Before proceeding further we may point out that in the impugned

judgment vide para '63', the High Court observed that it was always open to the Central Government to amend Press Note No.12 dated 31.8.98 and provide that if an IEM is filed by one party, then the subsequent IEM for setting up a sugar mill within 15 KMs of the place indicated by the Earlier IEM will not be entertained. This is now precisely done by Union of India. It has issued Sugarcane (Control) (Amendment) Order, 2006 on 10.12.06 *inter alia* laying down the effective steps which the applicant is required to take. The said Sugarcane (Control) (Amendment) Order, 2006 has inserted Clauses 6A to 6E into Sugarcane (Control) Order, 1966. We quote hereinbelow the newly added clauses which read as under:

*"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 distances 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 or extended time as specified in clause 6C.

Explanation 3.- The minimum distance shall be determined as measured by the Survey of India.

A *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 (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;
- C (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.

D 6B. *Requirements for filing the Industrial Entrepreneur Memorandum*—.

E (1) Before filing the Industrial Entrepreneur Memorandum with the Central Government, the concerned person 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 person shall file the Industrial Entrepreneur Memorandum with the Central Government within one month of issue of such certificate failing which validity of the certificate shall expire.

F (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 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.

G

H

6C Time limit to implement Industrial Entrepreneur Memorandum.- A

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: B

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, for implementing the Industrial Entrepreneur Memorandum and commencement of commercial production thereof. C

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

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

- (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. F
- (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 the 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 G
H

A notification failing which the Industrial Entrepreneur Memorandum of the concerned person shall stand de-recognized as far as provisions of this Order are concerned.”

14. Learned counsel appearing on behalf of Ojas submitted that the interpretation placed by the Division Bench of the Delhi High Court on the expression “existing sugar mill” in the Press Note No.12 will lead to discrimination. In this connection, it was submitted that if in a given case there exists a sugar mill, whose performance is poor, even then, no new sugar mill (factory) can be set up within an area of 15 KMs thereof. According to the learned counsel, this was not the intention while introducing de-licensing.

C Learned counsel further submitted that the impugned judgment was erroneous in interpreting the said Press Note. It was urged that in a case, even if there is no existing sugar mill any number of sugar mills can be set up. According to the learned counsel, such an interpretation would not only result in discrimination under Article 14 of the Constitution of India but it would provide protection to inefficient existing mills at the cost of the interest of the farmers in the area. Learned counsel submitted that if the impugned judgment is upheld then the existing sugar mills will get full protection. They will be assured of continuous supply of sugarcane whereas the entrepreneurs proposing to set up new sugar plants of higher capacities will not get adequate sugarcane for their sugar mills. Learned counsel submitted that the impugned judgment will discourage the new investments in the sugar industry and the result would be frustration of the policy of liberalisation. Learned counsel submitted that such an interpretation will completely desist the entrepreneur from setting up a sugar mill in a new area. Learned counsel submitted that the impugned judgment should not be upheld since it would lead to disastrous consequences. In this connection, it was submitted that according to the impugned judgment unless and until the sugar mill becomes an existing sugar mill the said entrepreneurs shall have no protection from business rivals who can set up sugar mills in close proximity creating difficulties for such entrepreneurs for procurement of basic raw material. Learned counsel submitted that under the provisions of the Sugarcane (Control) Order, 1966 and under the provisions of U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953, the Cane Commissioner has been entrusted with the object of ensuring adequate supply of sugarcane to the sugar mills. Learned counsel urged that by reason of the impugned judgment any number of mills can be set up in close proximity to each other which would make the demand for sugarcane much higher than its supply and in such a situation allocation by the Cane Commissioner would become very difficult as he would not be in a position

H

to allocate the sugar mills adequate cane for the mills. Learned counsel urged that under Clause 6 of the Sugarcane (Control) Order, 1966 framed under Section 3 of the Essential Commodities Act, 1955, the Central Government has been empowered to issue directions for regulation, distribution and movement of sugarcane to ensure continuous supply of sugarcane to sugar mills. In order to avoid unhealthy competition among the sugar mills and to ensure procurement of sugar in a systematic manner, the Central Government has been issuing Policy Directives from time to time in the form of press note prescribing a minimum distance between two sugar mills. In this connection, it was pointed out that a perusal of various press notes issued by the Central Government from time to time would show that the minimum radial distance between two sugar mills has always been retained in the past depending upon the cane availability. Under the impugned Press Note No.12, the stipulation was 15 KMs. Therefore, according to the learned counsel, it was necessary to retain the minimum radial distance between two sugar mills so that a given sugar mill having an IEM in the first instances is assured of adequate supply of raw material. Learned counsel submitted that reading of various Press Notes issued by GOI shows that the distance between two sugar mills has a direct relationship with the availability of sugarcane. Learned counsel urged that these aspects have not been taken into account in the impugned judgment. Learned counsel submitted that the High Court erred in holding that Press Note No.12 would apply only in cases where there is a mill in existence (existing mill). It was submitted that such an interpretation would lead to chaos. It was submitted that the result of the impugned judgment would be that the sugar mills would be allowed to be set up in close proximity leading to unhealthy competition and starvation of basic raw material which would make the mills unviable. Learned counsel submitted even after de-licensing it was necessary to retain the condition of radial Distance, namely, sufficient distance between two sugar mills having nexus with the availability of sugarcane in an area. In this connection, it was pointed out that "Distance" has been a relevant Condition for last 20 years. It was urged that this Condition has got to be retained even after de-licensing. As regards IEMs, it was submitted that under Notification dated 25.7.91 issued under Section 29B of the 1951 Act, industries exempted from de-licensing had to file IEMs. Learned counsel submitted that the same concept has been continued even after de-licensing. Learned counsel pointed out that after de-licensing, industrial licence was not required but the Condition of filing IEM embodied in Notification dated 25.7.91 has been retained and, therefore, it has legal sanctity and validity. Learned counsel, therefore, urged that the Distance Condition should be maintained not only between existing and proposed mill but also

A

B

C

D

E

F

G

H

A between two proposed mills. Learned counsel urged that an IEM gives an entrepreneur a right to take steps for setting up a sugar mill and without an IEM one cannot proceed to set up a sugar mill. Therefore, according to the learned counsel, Part 'A' of the IEM was equated with LOI and Part 'B' of IEM was equated with industrial licence in terms of the Press Note No.12 dated 31.8.98. According to the learned counsel, the High Court has failed to appreciate that in respect of two sugar mills, proposed to be set up in a new area, mere filing of IEM was not sufficient but filing of IEM coupled with the effective steps was necessary. According to the learned counsel, IEM plus effective steps to implement such IEM, were the twin requirements enunciated in the impugned Order passed by the Chief Director, Sugar, which has been

C wrongly set aside by the High Court. Learned counsel urged that an IEM filed first in point of time, should be given primacy over IEM filed subsequently subject to the condition that effective steps have been taken by the First IEM Holder within reasonable time. Learned Counsel urged that where effective steps have been taken by the First IEM Holder, all other IEMs filed thereafter and falling within 15 KMs from that location should be kept in suspense and

D if the First IEM Holder fails to take effective steps then priority should be given to the Second IEM Holder and so on and so forth. This, according to the learned counsel, has not been appreciated by the Court below. Applying the above tests to the facts of the present case, learned counsel submitted that Ojas filed its IEM on 13.5.04 for setting up a sugar mill at Baisagapur, it had taken effective steps to implement its IEM and, therefore, according to

E the learned counsel, the Subsequent IEM filed by Oudh, should have been declared as non est by the High Court. For the above reasons, learned counsel submitted that the impugned judgment needs to be set aside.

15. On the other hand, learned counsel appearing on behalf of Oudh

F submitted that prior to the Sugarcane (Control) (Amendment) Order, 2006 dated 10.11.2006, the only restriction was with regard to Distance as contained in Press Note No.12 dated 31.8.98. That Distance was of 15 KMs required to be maintained between an existing sugar mill and a new sugar mill (factory). It was not from one IEM to another IEM. Learned counsel submitted that

G under Press Note No.12 in order to preclude a new sugar mill from being set up there has to be an existing sugar mill within 15 KMs of the proposed sugar mill. It is urged, in Order, for a mill to be regarded as an existing sugar mill, a mere IEM or effective steps to implement such IEM were not sufficient but the mill should have become an existing sugar mill. Therefore, according to the learned counsel, this view taken by the Delhi High Court was the correct

H interpretation of the law existing before 10.11.06. Learned counsel urged that

the Sugarcane (Control) (Amendment) Order, 2006 by which Clause 6A to 6E stood inserted in the Sugarcane (Control) Order, 1966 was not retrospective because it lays down new conditions such as filing of bank guarantee, filing of distance certificate and also it lays down effective steps of implementing of IEM. Therefore, according to the learned counsel, the said Sugarcane (Control) (Amendment) Order, 2006, cannot affect the position as it obtained before 10.11.06. In the alternative, learned counsel urged that if this Court is of the view that the aforestated Sugarcane (Control) (Amendment) Order, 2006 constitutes a bar for setting up new sugar mill in the sense of the First IEM Holder taking effective steps for its implementation qua the Subsequent IEM Holders then, according to the learned counsel, one has to decide as to what are these effective steps and what would be the relevant date for determining whether the effective steps have been undertaken. Learned counsel submitted that the effective steps to be taken by the IEM Holder are set out in Explanation 4 to Clause 6A. Learned counsel has suggested in addition thereto certain other effective steps which an applicant should take so that unscrupulous persons are prevented from blocking the sites. These are-purchase of minimum 50 acres of land for the factory (mill), placement of firm order for purchase of plant and machinery for the factory, payment of requisite advance or opening of letter of credit with suppliers, investment of at least 25 acres on civil work, sanction of term loans from banks/financial institutions, submission of Project Report for sugar factory with details of fund resources and a timeframe within which effective steps should be taken failing which the IEM would lapse.

16. India has adopted the policy of economic reforms, free trade and liberalization in 1991. Government has taken several steps in that direction. The Licence Raj has been dismantled in phases. Sugar industry is accordingly liberalized. It has been de-licensed. 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 No.12 dated 31.8.98. 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.

17. Before the High Court one of the submissions made on behalf of the Oudh was that the Notification dated 11.9.98 under Section 29B(1) of the 1951

- A Act read with Press Note No.12 dated 31.8.98, 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 No.12 and provide
- B for a bar for Subsequent IEM Holders from setting up a sugar mill within 15 KMs of the place where the proposed sugar mill under the Earlier IEM is proposed to be set up. When High Court decided the matter there was no such express bar. However, by way of Sugarcane (Control) (Amendment) Order, 2006 dated 10.11.06 a bar is introduced vide Clause 6A to 6E for setting
- C 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
- D 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.

18. Suffice it to state, that the Sugarcane (Control) (Amendment) Order, 2006 shall apply retrospectively to all cases, including the present cases in
- E which IEMs are pending. 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 6A are adequate. In this connection, we have to keep in mind the conceptual difference between the distance certificate, the
- F concept of effective steps to be taken by an IEM Holder and the question of bona fides. Sugarcane (Control) (Amendment) Order, 2006 inserts Clauses 6A to 6E 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
- G 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 has 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
- H financial ability to set up a sugar mill (factory). Therefore, giving of bank

guarantee has nothing to do with the Distance Certificate. As far as effective steps are concerned we may point out that apart from the steps enlisted in the earlier Notification dated 11.9.98 read with Press Note No.12 dated 31.8.98, 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 6A to 6E have been introduced in Clause 6 of Sugarcane (Control) Order, 1966. In our view Clauses 6A to 6E are clarificatory in nature. There are certain norms mentioned in the Accounting Standards of Institute of Chartered Accountants for setting up industries. They may be sugar mills, paper mills, textile mills etc. When effective steps are enlisted in Sugarcane (Control) (Amendment) Order, 2006 dated 10.11.06 vide Explanation 4 to Clause 6A those in-built norms are made explicit, therefore, Explanation 4 to Clause 6A is clarificatory. Therefore, it is retrospective. 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 Sugarcane (Control) Order, 1966, Press Note No.12 and the Notification dated 11.9.98 issued under Section 29B(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 10.11.06. 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. On behalf of Ojas certain suggested modifications to Explanation 4 in Clause 6A 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

- A 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 utilization of the mill (factory). 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.

I.A.No.2 of 2007 in T.P.(C) No.421

19. This I.A. pertains to matters pending in Allahabad High Court (Lucknow Bench). I.A. No.2 of 2007 has been filed by M/s. Balrampur Chini Mills Ltd. (for short, 'Balrampur'). It is for grant of milling permission to its factory at Kumbhi, Distt. Lakhimpur Kheri (U.P.), which is complete. It is submitted on behalf of Balrampur that the sugarcane crushing season continuous upto 15th May every year. The factory is ready to start milling. Even a Cane Reservation Order has been made in its favour. The factory (mill) is ready. Balrampur has made a huge investment of Rs.213 crores. According to Balrampur, the IEM of Ojas is filed for Bhogotipur, only in order to block the IEM filed by Balrampur. Therefore, they pray that milling permission should be granted to Balrampur and that this Court should permit them to obtain and implement such milling permission. According to Balrampur, this Court should grant such permission as it would be in the interest of cane growers, shareholders and general public. According to Balrampur no prejudice will be caused to Ojas if they are given such milling permission. According to Balrampur, they are setting up two mills in Kumbhi and Guleria and if Ojas is unable to set up two mills in Bhagotipur and in Bijuwa which are within 15 KMs. from Kumbhi and Guleria respectively, then they can still go ahead and set up other mills in Distt. Lakhimpur and, therefore, no prejudice will be caused to Ojas. Balrampur claims to have spent 213 crores at Kumbhi and 152 crores at Guleria. The Kumbhi unit is complete. It is ready for milling activity.

20. On behalf of Ojas it has been vehemently argued that Balrampur took the risk of making investment in the Kumbhi and Guleria Projects despite pendency of matters in the High Courts. It is urged that by interim orders

Balrampur was put to notice that they are free to implement their above two Projects at Kumbhi and Guleria subject to the outcome of the pending writ petitions. It is urged that due to deference to the courts, Ojas did not proceed further for implementation of their programme whereas Balrampur has proceeded to implement their Projects at Kumbhi and Guleria at their own risk and, therefore, they should not be allowed to take advantage of *fait accompli*.

21. We are of the view that out of two Projects at Kumbhi and Guleria, Balrampur can be given milling permission for its factory (mill) at Kumbhi. In our present judgment we have taken the view that the Sugarcane (Control) (Amendment) Order, 2006 operates retrospectively. We have also taken the view that in applying the said 2006 Order there will be a bar on Subsequent IEM Holders during the specified period when the Earlier IEM Holder is taking effective steps. At the same time, we find that in the case of Kumbhi substantial investment has been made by Balrampur. Their Projections are better than Units proposed to be set up by Oudh. Moreover, the sugarcane crushing season ends on 15th May, 2007, we do not want the cane growers to suffer. Therefore, we grant milling permission only to Kumbhi Project. I.A. No.2 of 2007 is made absolute. However, Guleria Project shall be governed by the principles laid down in this judgment, as indicated above.

TO SUM UP:

22. 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 6A of the Sugarcane (Control) (Amendment) Order, 2006 dated 10.11.2006. We further hold that the said 2006 Order operates retrospectively. We have cleared the Kumbhi Project. All other Projects falling in various writ petitions in the Allahabad High Court (Lucknow Bench) will be decided by the High Court in accordance with the principles laid down in this judgment.

23. All civil appeals, transfer petitions and interlocutory applications accordingly stand disposed of with no order as to costs.

B.S. Appeals, petitions and applications disposed of.