

(2012) 10 DEL CK 0376

In the Delhi High Court

Case No : Writ Petition (C) No. 1394 of 1983

Hari Nagar Sugar Mills Limited and Another

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 19-10-2012

Acts Referred:

Essential Commodities Act, 1955 — Section 3, 3(2)(f), 3(3C)

Citation : (2012) 195 DLT 172 : (2013) 133 DRJ 661

Hon'ble Judges : Vipin Sanghi, J; Sanjay Kishan Kaul, J

Bench : Division Bench

Advocate : Jayant Bhushan with Mr. Atul Shanker Mathur, Mr. R.K. Aggarwal, Mr. D.N. Chhagar, Ms. Smita Rajmohan and Mr. Aseem Chaturvedi, for the Appellant; Rajeeve Mehra, ASG with Mr. Ruchir Mishra, Sanjiv Kumar Saxena, Ashish Virmani and Mr. Mukesh Kr. Tiwari, for the Respondent

Final Decision : Disposed Off

Judgement

Sanjay Kishan Kaul, J.—Hari Nagar Sugar Mills Limited, petitioner No. 1, is a company incorporated and registered under the Companies Act, 1956 of which petitioner No. 2 is a shareholder. Petitioner No. 1 owns a sugar factory at Hari Nagar in the District of West Champaran, Bihar. The present writ petition filed under Article 226 of the Constitution of India raises a dispute qua the fixation of the price of Levy Sugar for 1982-83 season. It has been averred that sugar is an essential commodity as defined under the Essential Commodities Act, 1955 (hereinafter referred to as the "said Act"). The production, supply, distribution and price of sugar has, thus, been subject to statutory control which even pre-dates the said Act by the Sugar and Sugar Products (Control) Order, 1942. The history of the sugar industry has seen periods of de-control and control. u/s 3 (2) (f) of the said Act, the Central Government has the power to direct any manufacturer of sugar to sell sugar in whole or specified part of the stock to the Central Government or a State Government or to an officer or agent of such Government or to such other person or class of persons for purposes of making available sugar at a fair and remunerative price. This is called Levy sugar. The

price payable for such Levy sugar is fixed by the Central Government by an order made u/s 3 (3C) of the said Act. Such Levy sugar price is fixed from year to year.

2. The petition goes on to state that for the season in question of 1982-83, the percentage of sugar specified as Levy sugar was fixed by the Central Government at 65 per cent and the remaining 35 per cent was allowed to be sold as free sugar in the open market. Qua the Levy sugar price u/s 3 (3C) of the said Act, the price had to be fixed keeping in mind the minimum sugarcane price, if any, fixed for sugarcane by the Central Government u/s 3 of the said Act, the manufacturing cost of sugar, the duty or tax as paid or payable and securing a reasonable return on the capital employed in the business of manufacturing sugar. By an Order dated 27.1.1983 known as the Sugar (Price Determination for 1982-83 Production) Order, 1983 u/s 3 (3C) of the said Act, the Central Government determined the levy price of different grades of sugar. This price did not include duty of excise, additional duty of excise in lieu of sales tax and the special duty of excise which the sugar factories could recover at the rates in force at the relevant time but included transport charges from factory godown and loading into Railway wagons or buyer's carts, lorries, etc. The price of levy sugar so fixed has been challenged on the ground that it is wholly arbitrary, unreasonable, unfair and ultra vires u/s 3 (3C) of the said Act for the following reasons:

i. The average minimum cane price fixed by the Central Government as well as the one fixed by the State Government, which was higher, forms part of the cost of sugarcane paid by the sugar manufacturers and this was only reduced at the end of the season i.e. by 4.05.1983 which, in turn could not impact or alter the cost of production of sugar. The higher cane price had to be paid by the sugar factories as a result of the pressure and direction of the State Government.

ii. No sugar factory could go against the directions of the State Government in the matter of payment of cane price even though the minimum cane price fixed by the Central Government is much lower.

iii. The price for levy sugar fixed by the Central Government only took into consideration the minimum cane prices fixed by it and the consequences of the State Advised Price (for short "SAP") being higher than the minimum price fixed by the Central Government, was not examined.

iv. The manufacturing cost of sugar is vitally dependent on the duration of the crushing season and the recovery of sugar from cane, which factor had been ignored.

v. The Bihar Finance Act, 1981 effective from 1.4.1981 had imposed a purchase tax @ 8 per cent and surcharge @ 1 per cent on sugarcane purchased by the sugar factories situated in the State of Bihar, which would form a part of the cost of manufacture but the Central Government failed to take its effect into account.

vi. Bihar Agricultural Produce Market Act, 1960, requires all sugar factories to

pay 1 per cent by way of market fee on sugarcane purchased which was also not taken into account by the Central Government.

vii. Increase in transport charges including Railway freight, cost of diesel and petrol, spare parts for vehicles, wages of the workers engaged in loading and unloading the cane, transportation cost from the cane purchasing centre to the factory has been ignored and the maximum rebate of 32 Paise per quintal has remained constant despite this tremendous increase in transport costs.

viii. Salaries and wages of the workmen employed in sugar mills impact the cost of production of sugar and statutory provisions qua fixing these were ignored.

ix. Power, fuel, stores, repairs, maintenance, etc. have been ignored while determining the manufacturing cost of sugar.

x. Interest on Loans and advances obtained by the manufacturers of sugar from Banks are factors which ought to have been taken into account.

xi. A reasonable return on capital employed should have been calculated taking into consideration the SAP.

3. The petitioners have sought a writ of prohibition against the respondents for acting on the basis of 1983 Order being contrary to Section 3 (3C) of the said Act and for a direction in the nature mandamus to respondent nos. 1 to 4 for re-fixation of the Levy sugar price.

4. The writ petition has been contested by the respondents and various pleas have been taken in the counter affidavit. It is, however, not necessary for the purposes of the present adjudication to examine these aspects in greater detail. There were a number of petitions filed and interim orders were passed in C.W. No. 1390/1983 on 8.08.1983, which were also made applicable to the present petition.

5. It appears that while other writ petitions were decided, this writ petition somehow remained pending and was ultimately dismissed for non-prosecution on 10.2.2005. The application for restoration was filed in the year 2009, which was dismissed by the Division Bench on 12.1.2010. However, this order was set aside by the Supreme Court by an Order dated 30.04.2010 observing that in the facts of the case the application ought to have been allowed. That is how the writ petition has come up for final disposal.

6. We may notice that there are various pronouncements rendered from time to time qua different years in question.

7. It was the say of learned senior counsel for the petitioners that in view of the judgment of the Supreme Court in Mahalakshmi Sugar Mills Co. Ltd. and Another Vs. Union of India (UOI) and Others, , the present writ petition was liable to be allowed. However, he conceded that the said position does not prevail now in view of Essential Commodities (Amendment & Validation) Act, 2009 (hereinafter referred to as the "Amending Act") which in effect changed the law

retrospectively and sought to deny the benefit which would ensue to the petitioner and other sugar mills in view of the judgment in Mahalakshmi Sugar Mills case (supra). The validity of this Amending Act which sought to change the law retrospectively was challenged and that matter is pending consideration before the Supreme Court.

8. In view of the aforesaid position we had put to Learned Counsels for the parties as to whether the petition could be disposed of with the direction that fate of the present writ petition would abide by the decision to be rendered in the challenge laid to the aforesaid Amending Act. This was so as learned senior counsel for the petitioners conceded that if the challenge to the Amending Act failed, he could get no relief in the present petition while if the challenge succeeded the petitioner was entitled to the benefit of the directions contained in Mahalakshmi Sugar Mills case (supra).

9. However, the aforesaid position was contested by the learned ASG appearing for the respondents. The principal reason for the same was that according to the respondents so far as the issue of pricing of levy sugar qua 1982-83 is concerned, the same had become final in view of the judgments of the Supreme Court in AIR 2000 3499 (SC) ; Modi Industries Limited Vs. Union of India (connected matter) and Bharat Sugar Mills Vs. Union of India & Ors. (also a connected matter). It was, thus, the submission that the petitioner was not entitled to the benefit of the judgment in Mahalakshmi Sugar Mills case (supra) which pertained to the year 1983-84. In this behalf reliance was also placed on the judgment of the learned Single Judge of this Court in WP (C) No. 2452/2001 titled M/s. Saraswati Industrial Syndicate Ltd. & Anr. Vs. Union of India decided on 29.1.2007 pertaining to the year 1982-83.

10. The respondents in their additional written submissions have raised a further plea that for the year 1982-83 there was no "mopping up" of the profits from the sale of free sugar and that forms the basis of the rejection to the challenge for fixation of the price of levy sugar for that year by the Supreme Court. The concept of "mopping up" is sought to be explained as the process by which monetary realization from sale of free sugar by sugar factories is taken into account for fixation of the final price of levy sugar, i.e. a lower final price for levy sugar is fixed since profits were being made by the sugar industries from the sale of free sugar resulting in mopping up of profit from the sale of free sugar. This plea is stated to have been raised in the additional affidavit filed by the Union of India in Modi Industries Ltd. case (supra). The rational for non-interference in the levy price of sugar for 1982-83 is stated to be this reason.

11. We may notice that during the oral submissions no such plea was at all advanced but is now sought to be slipped in through the additional written submissions. On a perusal of the counter affidavit also we do not find a specific plea in this behalf though there is an averment in para 25 that the realization made by sugar mills on the sale of non-levy sugar should also have been taken into account to determine whether sugar industry has earned a reasonable return

or not. Not only that, it appears that the respondents merely on the basis of the averments contained in their additional affidavit seem to suggest that there is an imprimatur of the Supreme Court on this aspect while coming to the conclusion that the said case was not covered by the decision of the Supreme Court in *Shri Malaprabha Co-op. Sugar Factory Ltd. Vs. Union of India and Another*, . In our view no such conclusion can be drawn, more so when the subsequent judgment in *Mahalakshmi Sugar Mills case (supra)* has clearly set out the necessity of taking the SAP into account.

12. Learned senior counsel for the petitioners did concede that the levy price for sugar for the year 1982-83 had undoubtedly been upheld but despite that claim, the benefit of *Mahalakshmi Sugar Mills case (supra)* can be derived by the petitioners. The sole basis for such a plea is that the petitioners had specifically raised the issue of the consequences which would flow from fixing the levy price for sugar by the Central Government on account of the SAP being higher than the minimum price fixed for sugarcane by the Central Government, which aspect has not been examined in any of the matters pertaining to determination of price for 1982-83. This aspect had been examined only in *Mahalakshmi Sugar Mills case (supra)* albeit for the year 1983-84 where it was held that this is a factor to be taken into account while determining levy sugar price. The relevant observations are as under:

55. *Modi [Modi Industries Ltd. v. Union of India, (1999) 9 SCC 245]*, *Bharat Mills (2) [(1999) 9 SCC 246]* and *AIR 2000 3499 (SC)]* dealt with sugar year 1982-1983 only. It proceeded on the basis that in that year, the mopping up having not been done and levy in terms of Clause 5-A had not been applied, the factors laid down u/s 3(3-C) stood complied with. It is for the aforementioned limited extent, *Shri Malaprabha Co-op. Sugar Factory Ltd. Vs. Union of India and Another,]* was distinguished. No reason has been assigned in support of its decision. Rival contentions had not been noticed. The effect of payment of additional price as also SAP effect in determining the price did not fall for consideration therein. *Godavari (2009) 17 SCC 685 : JT (2001) 10 SC 527]* as noticed hereinbefore, was decided on the same line, particularly, having regard to the fact that the prayers made by the appellant therein are sought to be amended which was not allowed.

56. It is in the aforementioned situation, *Shri Malaprabha Coop. Sugar Factory Ltd. Vs. Union of India (UOI) and Another,]* assumes significance. It not only explained the ratio laid down in *Shri Malaprabha Co-op. Sugar Factory Ltd. Vs. Union of India and Another,]* but also took into consideration *Modi Industries [Modi Industries Ltd. v. Union of India, (1999) 9 SCC 245]* as also fresh arguments advanced on behalf of the Central Government. All contentions of the Central Government were specifically rejected.

57. The decision in *Shri Malaprabha Coop. Sugar Factory Ltd. Vs. Union of India (UOI) and Another,]* that while taking into consideration the unfavourable factor, the Central Government cannot refuse to consider the factor which is favourable

to the mill owner assumes significance. We say so for two reasons - (1) it is possible that while confining mopping up to the extent of 50%, the fact of additional price paid in terms of Clause 5-A of the Order would be neutralised or adjusted but the same would not mean that the exercise shall not be carried into effect; and (2) the effect of payment of an extra amount in terms of State advisory price cannot be refused to be taken into consideration.

58. We are not unmindful of the fact that the Learned Counsel for the appellant in Mahalakshmi before the High Court confined its case only to SAP but then in Hari Nagar Sugar Mills the Delhi High Court accepted the contentions which have been raised before us.

59. When the legislative policy is reflected in a statutory provision, the court, while being called upon to determine as to whether the same has been complied with or not, must apply the rule of purposive construction. It is idle, in a case of this nature, to contend that as the element of additional price paid under Clause 5-A of the Order and SAP had not been specifically provided for in Section 3(3-C), they should be kept out of consideration for the purpose of determination of the price of levy sugar. If the actual price payable to the cane growers is absolutely relevant for determining the price of levy sugar, we have no doubt in our mind that consideration of the said elements would come either under clause (b) or clause (d) of Section 3(3-C) of the Act. It was so held in Malaprabha (1) [(1994) 1 SCC 648]. It is interesting to note that the Constitution Bench of this Court in U.P. Co-operative Cane Unions Federations Vs. West U.P. Sugar Mills Association and Others etc. etc., rejected a contention raised by the parties that in the event the State is held to have the legislative competence to impose the same, it will have an adverse effect on the price of levy sugar required to be determined u/s 3(3-C) of the Act as noticed supra.

...

66. Reliance placed by the learned Additional Solicitor General on Malaprabha Coop. Sugar Factory Ltd. and Indian Sugar Mills Association and Another Vs. Union of India (UOI) and Another, is not apposite. this Court therein found the action of the Central Government to be not an act of contempt presumably because the directions were held to have been substantially complied with. We are not exercising any contempt jurisdiction. Contempt is a matter between the court and the contemnor. We are herein called upon to determine as to which view of the Delhi High Court in Hari Nagaror Mahalakshmi is correct. We cannot refuse to lay down the law having been called upon to do so. We must lay down a law for the future. We, therefore, while directing the Central Government to refix the price of levy sugar, would keep this direction confined only to the parties before us including the interveners. The reason therefor is that the other mill owners were not aggrieved thereby. The parties before us are fighting their grievance for more than 22 years. They should not be allowed to go empty handed.

67. We are, therefore, of the opinion that Mahalakshmi has wrongly been decided whereas Hari Nagar has correctly been decided.

(emphasis supplied)

13. In substance, the plea of the petitioners is that other petitioners before this Court while challenging the levy price for sugar for 1982-83 had not raised the issue of non-consideration of SAP, as is obvious from the adjudication qua matters of that year and the petitioners cannot be deprived of the benefits of this plea for the default of other petitioners not having raised this plea.

14. It is not in dispute before us that while upholding the price for 1982-83 the issue of non-consideration of SAP does not form part of any adjudication at least of the Supreme Court as shown to us. We have even examined the records of WP (C) No. 2452/2001 decided on 29.01.2007 and have found that the ground regarding non-consideration of higher SAP has not been raised in the writ petition.

15. The question which, thus, arises for consideration is whether the petitioners should be deprived the benefit of the consequences which flow from Mahalakshmi Sugar Mills case (supra) qua non-consideration of the effect of the SAP.

16. Learned senior counsel for the petitioners has relied upon judgments of the Supreme Court in Municipal Corporation of Delhi Vs. Gurnam Kaur, and State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, to contend that the principles of sub silentio would come into play. The relevant observations in those two judgments at paras 11 and 41 respectively, read as under:

11. Pronouncements of law, which are not part of the ratio decidendi are classed as obiter dicta and are not authoritative. With all respect to the learned Judge who passed the order in Jamna Das case [Writ Petitions Nos. 981-82 of 1984] and to the learned Judge who agreed with him, we cannot concede that this Court is bound to follow it. It was delivered without argument, without reference to the relevant provisions of the Act conferring express power on the Municipal Corporation to direct removal of encroachments from any public place like pavements or public streets, and without any citation of authority. Accordingly, we do not propose to uphold the decision of the High Court because, it seems to us that it is wrong in principle and cannot be justified by the terms of the relevant provisions. A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. So far as the order shows, no argument was addressed to the court on the question whether or not any direction could properly be made compelling the Municipal Corporation to construct a stall at the pitching site of a pavement squatter. Professor P.J. Fitzgerald, editor of the Salmond on Jurisprudence, 12th Edn. explains the concept of sub silentio at p. 153 in these words:

A decision passes sub silentio, in the technical sense that has come to be

attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio.

41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. "A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind." (Salmond on Jurisprudence 12th Edn., p. 153). In *Lancaster Motor Company (London) Ltd. v. Bremith Ltd.* [(1941) 1 KB 675, 677 : (1941) 2 All ER 11] the Court did not feel bound by earlier decision as it was rendered "without any argument, without reference to the crucial words of the rule and without any citation of the authority". It was approved by this Court in *Municipal Corporation of Delhi Vs. Gurnam Kaur*,] The bench held that, "precedents sub-silentio and without argument are of no moment". The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decidendi. In *B. Shama Rao Vs. The Union Territory of Pondicherry*, it was observed, "it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein". Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law.

17. In effect the plea is that since this is a ground never raised earlier in the other petitions, and those other petitions not being filed by the petitioners herein, the petitioners are not precluded from raising this plea. This is more so since the plea is not sought to be raised by even amending the writ petition on account of the subsequent development of law but forms a part of the original challenge laid to the order fixing the levy price of sugar.

18. Once again, though no submissions in this behalf were made during the

course of hearing on behalf of the respondent on the aforesaid aspect, some arguments are sought to be slipped in through the written submissions. A reference has been made to the judgment of the Supreme Court in Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, where the observations in Cassel & Co. Ltd. Vs. Broome (1972) AC 1027 were cited with the approval. The Court of Appeal found that label of per incuriam is relevant only to the right of an appellate court to decline to follow one of its own previous decisions and not to its right to disregard a decision of the higher appellate court or to right of a Judge of the High Court to disregard a decision of the Court of Appeal.

19. However, in order to appreciate the plea we would like to expound the principles of per incuriam and sub silentio. A decision should be considered per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. The Latin expression per incuriam means through inadvertence. On the other hand sub silentio is a phrase used, in the technical sense, when a particular point of law involved in a decision is not perceived by a court or present to its mind. The abovementioned principles have been discussed and explained in the Gurnam Kaur case (supra) at para 11. In the present case the impact of SAP was not even urged when the issue of pricing was decided for the year 1982-83 as possibly that was not a plea taken in the pleadings. However, 1983-84 such a plea was taken and found favour in Mahalakshmi Sugar Mills case (supra). The petitioners in the present case have taken a specific plea as distinct from the other cases where the plea of SAP was not taken and, thus, cannot be bound by a judgment where the plea which the petitioner seeks to advance has never been examined.

20. We are of the view that since the petitioners have raised a specific plea qua the importance of SAP being higher than the price fixed by the Central Government for procurement of sugarcane and that is an aspect which has been held to have a material bearing on the price fixation by the Central Government in view of the judgment of the Supreme Court in Mahalakshmi Sugar Mills case (supra), the petitioners cannot be precluded from raising this plea merely on the ground that other petitioners while challenging the pricing of 1982-83 had not raised this plea and the challenge having been repelled by the Hon'ble Supreme Court, it is not open to the petitioners to raise such a plea. We are of the view that clearly all principles of sub silentio would apply.

21. We see no reason for the apprehension expressed on behalf of the respondents that such a course of action would open a Pandora's Box as others would follow. However, if others have not raised this plea and apparently there are no other matters pending the benefit would only go to a party who has chosen to take such a plea from the beginning and whose petition is still pending. This is what was done in Mahalakshmi Sugar Mills case (supra) while granting relief only to petitioners therein. Thus, the effect of SAP would have to be examined by the Central Government in re-fixing the levy sugar price for the

year 1982-83 at least qua the petitioners.

22. We are conscious of the fact that such an occasion would only arise, an aspect conceded by learned senior counsel for the petitioners, if the challenge to the Amending Act succeeds as otherwise no relief whatsoever would flow to the petitioners. Thus, the two parties would have to await the judgment of the Supreme Court qua the challenge laid to the Amending Act and to that extent the interim arrangement envisaged in this petition would continue to enure for the benefit of the parties till such time as the Hon''ble Supreme Court renders its opinion on the challenge to the Amending Act.

23. It is in case the petitioners and other sugar mills succeeds in their challenge to the Amending Act would the question arise of giving effect to the directions contained as aforesaid for re-fixing the price of levy sugar for 1982-83 qua the petitioners by giving effect to the consequences of a higher SAP than the price fixed by the Central Government for procurement of sugarcane in terms of the judgment in Mahalakshmi Sugar Mills case (supra) though that judgment has been rendered for the pricing of 1983-84.

24. The third aspect which has also been sought to be slipped in through the written submissions is that a reference to a larger Bench of the Supreme Court is pending qua the question as to whether any State Advisory Price can be fixed by the State Governments over and above minimum support price fixed by the Central Government in Civil Appeal No. 7508/2005 titled West UP Sugar Mills Association Vs. State of Uttar Pradesh in terms of the order dated 17.1.2012. However, no details of the same have been pointed out to us nor any submissions made in this regard. As to what would be the ultimate impact of any adjudication in this behalf can be deciphered only when the final view is taken by the Supreme Court. The writ petition accordingly is disposed of leaving the parties to bear their own costs.