

(1998) 11 MP CK 0057

In the Madhya Pradesh High Court

Case No : Writ Petition No. 2949 of 1997 (J)

M/s Bastar Oil Mills and Industries Ltd. and Another

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 17-11-1998

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Madhya Pradesh Van Upaj ke Kararon ka Punrikshan Adhiniyam, 1987 — Section 3, 5

Citation : (1999) 2 MPJR 622

Hon'ble Judges : D.M. Dharmadhikari, J

Bench : Single Bench

Advocate : Ravindra Shrivastava, for the Appellant; S.L. Saxena, A.G. with Mr. R.K. Thakur, Dy. A.G., Mr. V.K. Tankha, Advocate, For intervenor, for the Respondent

Final Decision : Allowed

Judgement

D.M. Dharmadhikari, J.

The petitioner no. 1 is a company engaged in the business of manufacture of Sal oil and has, as claimed by it, set up its factory in Bastar tribal area of Madhya Pradesh on the invitation and concessions declared by the State of MP. with aim to provide employment to tribals as labours for collection of Sal seeds.

The State of Madhya Pradesh through Governor of the State has entered into a formal agreement with the petitioner-company dated 6th of September, 1991 valid for a period of 12 years to assure supply of Sal seed to the industry of the petitioner on terms and conditions and rates mentioned in the terms of the agreement.

The other industries dealing in Sal seeds and having similar oil extraction plants with no agreement with the State Government for assuring supply of sal seed on agreed rates, questioned the policy of the State Government of granting concessions to industries like the petitioner located in tribal areas of the State.

The writ petitions filed in this Court went up in appeal to the Supreme Court of India and the agreement dated 6th September, 1991 (under consideration in this petition) was upheld by the Supreme Court in Civil Appeals Nos. 4312 and 4313 of 1997 (M.P. Oil Extraction Ltd. and another v. State of M.P. and K.N. Oil Industries and others v. State of M.P. decided on 9th July 1997. M/S Hanuman Minor Oils Limited which is intervener in this petition claiming right to purchase Sal seed on competitive price with the petitioner (who is now made as respondent no. 5 in this petition under orders of this Court) had also made intervention in appeal in the Supreme Court, but such intervention was rejected by the Supreme Court by order made on 4.2.1997, a copy of which is on record as Annexure-P/4. The Supreme Court did not accept the contentions of other Sal seed oil industries that the contract or promise to supply Sal seed on agreed rates to industries established in tribal areas was unfair and discriminatory. The Supreme Court in repelling the grievance of discrimination, held as under:

It has been held by the High Court that the industrial units which were commissioned on the invitation of the State to undertake oil extraction operation on the assurance of supply of sal seeds by the State, stand on a separate footing. Such decision of the High Court though challenged before this Court, has not been upset. The distinctive features between the industrial units set up at the instance of the State Government and old existing units are based on objective criteria. Therefore, the said two classes of industries are not similarly circumstanced. Article 14 prohibits discrimination amongst the equals but it should be appreciated that Article 14 has inbuilt flexibility and it also permits different treatment to unequals. It may also be noted here that Bastar Oil Mills is situated at Jagdalpur which is admittedly a backward and tribal area. The special treatment given to Bastar Oil Mill by assuring supply of 20,000 M.T. of sal seeds under the impugned agreement cannot be held to be per se illegal and arbitrary. Classification on the basis of geographical situation has a rational basis and has been recognised by this Court as indicated in the decisions referred to hereinbefore.

The Supreme Court also held that distribution of largesse by the State, may be by public auction, or even by negotiations, depending upon the policy evolved by the State Government, is a protective measure to promote and assist certain industrial units. The following observations of the Supreme Court are pertinent:

Although to ensure fair play and transparency in the state action, distribution of largesse by inviting open tenders or by public auction is desirable, it cannot be held that in no case distribution of such largesse by negotiation is permissible. In the instant case, as a policy decision protective measure by entering into agreements with selected industrial units for assured supply of sal seeds at concessional rate has been taken by the government. The rate of royalty has also been fixed on some accepted principle of pricing formula as will be indicated hereafter. Hence, distribution or allotment of sal seed at the determined royalty to the respondents and other units covered by the agreements cannot be

assailed. It is to be appreciated that in this case, distribution by public auction or by open tender may not achieve the purpose of the policy of protective measure by way of supply of sal seeds at concessional rate of royalty to the industrial units covered by the agreements being selected on valid and objective considerations.

In the case before the Supreme Court the revised rate of royalty was fixed on the basis of "weighted average formula" which was affirmed by the Supreme Court. The "weighted average formula" has been explained to be average of price received in sale of sal seeds at different occasions in different parts of Madhya Pradesh for the preceding 12 months period on comparable basis of quantum of seeds sold at those occasions to arrive at the true marked price.

From the decision of Supreme Court, the agreement of supply of sal seed entered into between the State and the present petitioner as industrial unit in tribal area is beyond challenge. The only question raised is whether the petitioner has a right under the contract to insist on supply of sal seed on rates to be revised and fixed strictly in terms of the agreement of it is open to the State to demand revised price of sal seeds fixed on the basis of "weighted average formula" or the average market price.

I have heard Shri Ravindra Shrivastava, learned counsel appearing for the petitioner/company. He relies on the decision of the Supreme Court, part of which has been quoted above. He contends that the demand of royalty at the revised rate of Rs. 4180/- per metric tonne from collection centre and Rs. 4680/- from godown is not in accordance with the terms of the agreement and such demand based on "weighted average formula" or godown market price is in breach of the conditions of supply agreed by the Government. He therefore, seeks quashing of the communication and demand notice at the above rate contained in Annexure-P/1 dated 15.7.1997 with letter dated 20.8.1997 (Annexure-P/13) and order dated 3.9.1997 (Annexure-P/14).

On behalf of the State and its concerned forest department, the Advocate General Shri S.L. Saxena assisted by Deputy Advocate General Shri R.K. Thakur, in the midst of hearing of the case insisted on being granted further time to file detailed return to the petition to explain the method by which the rate of sal seed proposed to be supplied to the petitioner in the supply season in question has been worked out. This Court despite insistence firmly declined the request because the order sheets of the case would show that in spite of repeated opportunities being granted to the State, the concerned facts and files about fixation of revised rates were not made available to this Court. This petition was filed on 27.7.1997. On the first hearing on 31.7.97 the Advocate General on behalf of the State appeared. From August 1997 time was being taken to submit reply to the petition. Certain replies have already been filed by the State and they are on record. On number of occasions, this Court heard the parties on interlocutory applications with regard to grant of stay and amendment of the petition and detailed orders have been passed by the Court after hearing the

parties. With the consent of the parties, the final hearing of the case was fixed for 30.9.1997 as is apparent from the order dated 26.9.1997. It was then adjourned to 13.10.97 and thereafter continued to be listed on several interim prayers made by the parties. After disposing of such interim applications, on 16.4.1998 the case was listed for final hearing on 27.4.1998 and continued to be listed for final hearing on several dates. On none of the above dates, the Government came up with any additional reply. On 16.9.1998, the Court ordered that no formal orders on admission of the case are necessary in view of the fact that on earlier occasion the parties agreed to finally argue on the merits of the petition. The case was then listed for final hearing on 18.9.1998. On 21.9.1998, at the instance of the State, the case stood adjourned to 27.10.1998. Despite so many opportunities, neither any additional reply was given nor any document was filed to show the exact method adopted by the Government in arriving at the figures of revised price of sal seed. In the above circumstances, when there were already replies filed by the State on the question of revised rates, this Court considered it unnecessary to grant any further time to the State, more so when the matter of supply of sal seed is required to be decided expeditiously to avoid undue loss of quantity of sal seed and want of raw material to the industrial units. Sal seed is a perishable commodity which loses its quality and is subject to deterioration with lapse of time. The counsel for the petitioner, therefore, insisted on early decision of the petition.

Before advertng to the stand of the State as already condained in its replies on record, it is necessary to state few facts brought on record by the petitioners. Under the terms of the agreement, the Clauses relevant on the subject of revision of price of sal seed are Clauses 5, 6 and 7 which read as under:

5. The price payable by the purshaser for the Sal seeds supplied under this agreement shall consist of:

(a) royalty at the rate of 400/- (Rupees four hundred) per tonne for the initial two years, of this agreement, and

(b) All expenses incurred by the Governor each year, till the delivery of the Sal seeds to the purchaser, which shall include the cost of collection, and/or the purchaser price paid to growers, as well as handling and supervision charges, omission to agent, cost of storage, transportation etc.

At the end of two years, reckoned from the date of commencement of this agreement the Govenrnor shall revise the rate of royalty, mentioned in clause 6 (a) after increasing 5% and the revised rate shall operate for the block of two years. Subsequent revision shall also be for blocks of two years by increasing the royalty of the previous block by 5% till the period of expiry of the agreement. Thus the rates so revised shall become operative immediately from the date when it becomes due for revision, irrespective of the date when it is communicated to the purchaser.

Supply of Sal seeds shall be made to the purchaser against advance payments as

given below :

At the beginning of each working season, not later than 1st April each year, the conservator(s) of Forests of the Circle (s) mentioned in Schedule "A" shall intimate to the purchaser the price payable as per clause 6 above. The purchaser shall pay the same in the following manner:

(i) The amount of royalty as per clause 5(a) shall be deposited initially (not later than 30th April each year) for 500 quintals of Sal seeds through a crossed bank draft or a call Deposit receipt in favour of the concerned Divisional Forest Officer(s). This initial payment shall be replenished by the purchaser every week or immediately after delivery of the quantity paid for, whichever is earlier.

Provided, that in case of a short fall in the supply of Sal seeds for any such payment, the amount paid for the Sal seeds not actually supplied shall be adjusted towards the subsequent payment.

(ii) Advance payment on account of collection costs and/or the purchaser price as specified in clause 5 (b) above shall be made in cash simultaneously and separately for the quantity mentioned above and as laid down above to such officer who may be authorised by the concerned DFO in this behalf.

In terms of the agreement, on 21.5.1997 (Annexure-P/5), the petitioner was informend that for the supply season 1997-98 the rates of royalty is revised to Rs. 2299/- from collection centres and Rs. 2643/- per metric tonne from godown with bags.

The petitioner raised some protest against above rates intimated. The petitioner was then given details of the charges towards royalty and collection as revised by the Nationalised Forest Produce Inter-Departmental Committee of the State in its 208th meething held on 15.5.1997. The break-up of the charges is to be found in the communication dated 9.6.97 (Annexure-P/9). From the break-ups mentioned in the above communication what is to be noted is that the price of sal seed consists of several components. The royalty is to be charged along with collection charges. The collection charges consist of several components including commission, godown charges, transportation, pakage and security charges. It is to be further noted from the note given below the communication dated 9.6.97 that collection charges, commission for the Samiti and commission for Fad Munshi are communicated as finally fixed and only other items such as godown charges, office expenses, package, transport and security charges have been expressed to be ad-hoc meaning thereby that on actual cost or expenses they were subject to revision. The collection charges communicated on 9.6.1997 were confirmed by letter dated 4.7.1997 (Annexure-P/6) whereby the petitioner's protests were rejected and it was diricted to the petitioner to take the supplies as the rates have been fixed after due deliberations. The appeal pending in the Supreme Court against the agreement with the petitioner was dismissed on 9.7.1997.

It is only thereafter that the State Government issued another letter which is under challenge in this petition dated 15.7.1997 raising the price to Rs. 4180/- per M.T. at collection centre and Rs. 4680/- per M.T. without package from godown. The petitioner protested against further increase in price of sal seed and filed this petition on 22.7.1997. Thereafter, during pendency of the petition, by communication dated 7.8.87 (Annexure-P-11) the impugned revision of price of sal seed communicated by letter dated 11.7.1997 was withdrawn or cancelled and thereby it revived the price communicated on 21.5.1997 (Annexure-P/5) i.e. Rs. 2299/- per M.T. from collection centre and Rs. 2643/-per M.T. from godown without package and Rs. 2770/- with package.

For reasons now sought to be explained by the government, the letter dated 7.8.1997 (Annexure-P/11) of withdrawal of higher revised price communicated by letter dated 11.7.97 was further withdrawn by letter dated 20.8.1997 (Annexure-P/13). The net result of this was that the higher rates as communicated under Annexure-P/1 dated 15.7.1997 have been revived and reiterated with demand of revised price at the rate of Rs. 4180/- per M.T. at collection centre and Rs. 4680/- per M.T. without package ex-godown. It is alleged that the State Government took a summersault by giving a communication by its letter dated 3rd September 1997 (Annexure-P/14) that the earlier rates notified and communicated to the petitioner were ad-hoc and have, therefore been finally revised as mentioned above. The Conservator of Forests, Jagdalpur then, by his notice dated 17.9.1997, insisted the petitioner for lifting of the sal seed at the revised rates failing which the same shall be disposed of to other units.

From a closer examination of terms of contract -agreement contained in clauses 5 and 6 quoted above, the royalty rate was subject to revision at 5% for every block of two years and collection charges actually incurred are liable to be demanded every year along with the royalty. Clause 5 (b) read with Clause 7 of the agreement provides that at the beginning of each working season, not later than 1st April each year, the Conservator of Forests shall intimate to the purchaser the price payable i.e. royalty together with revision in every block of two years in terms of Clause 6 and collection charges of every year in terms of Clause 5 (b). The quantity has to be lifted by the purchaser on making payment of enhanced price in the manner laid down in the agreement.

On behalf of the State, before examining the correctness of its stand regarding revision of price, a preliminary objection was raised which needs to be decided at the outset. It is pointed out that the agreement contained an arbitration clause i.e. Clause 23 according to which the dispute is to be referred to Secretary of Government of Madhya Pradesh, Forest Department. It is alleged that since the alternative remedy of arbitration has not been resorted to, this Court should decline to grant relief.

For more reasons than one such preliminary objection deserves to be rejected. In a similar dispute of revision of rate, objection based on arbitration clause was

rejected by a Division Bench of this Court to which I was one of the members i.e. M.P.No.1653 of 1988 decided on 3.1.1990. In the price fixation through inter-departmental Committee, the Secretary of the concerned department to whom the dispute can be referred, is ex-officio member and in any case, he takes part in the price fixation process. The remedy of arbitration, therefore, before one of the governmental authorities, is not likely to be efficacious. The petitioner has assailed the validity of the action of the State on the touch-stone of Article 14 of the Constitution of India. The remedy of arbitration cannot, therefore, bar the jurisdiction of this Court and its discretion to entertain the petition. As disclosed from the order-sheets discussed above, the petitioners have addressed this Court on merits on several occasions while seeking interim directions for disposal of existing stock of Sal seed. It would not, therefore, be proper to relegate the petitioner to remedy of arbitration. The preliminary objection, therefore, is overruled.

Coming back now to the merits of the case, in order to find whether the revision of price or royalty as contained in Annexures-P/1 and P/14 is justified or not, reference may be made to the specific stand taken in the reply filed by the State which is on record. The State has disclosed in its reply that revised prices have been fixed on the basis of market price determined by inviting offers through open tenders. The State has also tried to wriggle out from specific terms of the agreement with regard to revision of price of sal seed. It is stated that the terms of the contract are opposed to public policy as the petitioner's unit cannot be given supplies at lower rates than the rates charged from other industrial units, thus creating an unfair and unhealthy competition and loss of revenue. The revision is said to have been made, as disclosed in paragraph 18 of its return filed with affidavit, on 24th September, 1997 which reads thus :

The petitioners' contention that the rate of Rs.4180/- and Rs. 4680/- is highly speculative and fanciful is not accepted as these rates have been worked on the basis of the offers received through open tenders by the State Government and even the supplies are being made at these rates.

The terms of the agreement entered with the petitioner which has been upheld by the Supreme Court have also been questioned by stating in paragraph 2 of the reply as under:

The answering respondents submit that the respondent is a welfare state which cannot discriminate between the citizens. The respondent cannot fix two prices for one commodity sold in one season i.e. to say he cannot provide two rates and sell the sal seeds worth around Rs. 4200/- per M.T. for 2700/- add. It cannot be further done because it will amount to exercising the powers opposed to the public policy. Any term on the agreement which is opposed to the public policy is violative of section 23 of the Indian Contract Act and such condition cannot be acted upon.

The State in its reply has also made reference to the provisions of MP. Van Upaj

Ke Kararon Ka Punrikshan Adhiniyam, 1987. The above part of the reply submitted in the case clearly gives out the stand of the State that it is no longer bound to act under the terms of the agreement in the name of public interest and public revenue. It is also admitted that the revised price of sal seed has not been fixed strictly in terms of the agreement but has been fixed on the basis of open market price determined on the basis of offers received through open tenders from different units in the State.

On behalf of Hanuman Minor Oil Limited (now respondent no. 5) the stand of the Government has been supported by Shri V.K. Tankha, learned counsel appearing for it who strenuously urged that this Court should relieve the State from the contractual obligations under the agreement entered with the petitioner as the terms agreed are discriminatory and favourable to the petitioner giving rise to imbalance in the business and loss of revenue to the State.

A mention only has been made in the return of the State, in the course of argument by the parties, to the provisions of MP. Van Upaj ke Kararon ka Punrikshan Adhiniyam, 1987. The above act of 1987 has been specially enacted to relieve the State Government from unreasonable or unfair contractual terms of any agreement regarding sale of forest produce by the State. u/s 3 of the Act, the State Government has been empowered, by a gazette notification, to add or substitute or delete any agreement entered into by the State in relation to forest produce prior to or after the commencement of the Act. u/s 5, the State Government is empowered to terminate any agreement for alleged breach by the purchaser. There termination of agreement has, however, to be made only after grant of opportunity to show cause to the purchaser.

Admittedly, in this case the agreement in question sought to be enforced by the petitioner has been entered into much after the commencement of the Act of 1987 in the year 1991. The State Government was fully alive to the provisions of the Act of 1987 and has not invoked its power either u/s 3 or Section 5 of the said Act.

As has been seen above, the method of price revision as agreed to between the parties is contained in Clauses 5 and 6 of the agreement (quoted above). Under Clause 6, the royalty is subject to increase by 5% in every block of 2 years. The other components of price under items of expenses towards handling, supervision, commission, storage, transportation, security, etc. are to be calculated and fixed for demand every year along with royalty in terms of Clause 5 (b) read with Clause 7. Under Clause 7, every year "not later than 1 st April" the concerned forest authority has to indicate to the purchase the price payable as per Clause 6 read with Clause 5 (b) regarding royalty and other expenses mentioned above.

Admittedly, as stated in the return of the State, the price revision initially was made in terms of the contract clauses discussed above. The final price fixation under Annexure-P/1 with letter dated 11.7.1997 and demand consequent

thereupon under impugned communication Annexure-P/14 dated 3rd September, 1997 has been made after alleged ascertainment of market price by inviting offers from willing purchasers all over the State. The State has thus openly expressed its intention to be relieved of the price fixation method contained in Clauses 5 and 6 of the agreement. This is said to have been done in the interest of revenue of the State and to ensure fair competition among those trading in sal seed.

As has already been pointed out above, the Supreme Court has upheld the agreement in question and also repelled the objections made by other industries of any so called favorable treatment in supplies of sal seeds made to the petitioner and other industrial units in tribal areas. The charge against State of discrimination was not accepted by the Supreme Court on the ground that the units established in tribal areas and promoted by the State constitute a distinct class for somewhat favorable treatment as compared to other holder units or industries not covered by any written agreement for supply.

The agreement Clauses 5,6 and 7 contain the method of revision. The State having entered into a contract must in all fairness be held bound by its terms. Only on compelling, lawful and just reasons can it be allowed to wriggle out of the terms of an agreement solemnly entered into by the parties formally in accordance with Article 299 of the Constitution. When supplies are made to units in tribal areas promoted by the State under written agreement, and to the others by mode of auction or tender, sudden change to uniform method of price revision which is said to be a policy decision of the State is clearly breach of the terms of the agreement entered with the petitioner. As has been already stated above, the State Government has not invoked its powers u/s 3 and 5 of the Act of 1987. Clauses 5 and 7 of the agreement Annexure-P/2 do not in any manner appear to be in breach of any provisions of the Act of 1987. The State in its discretion and with its eyes wide open agreed for revision of price of sal seed in the manner laid down in Clauses 5 to 7 of the agreement. In the above situation, merely because for the available quantity of sal seed in the supply season under consideration other traders and industrial units in open market are willing to pay higher price cannot be said to be a valid justification to refuse supply to the petitioner under the terms of the contract which is a unit promoted by the State in tribal area. Permitting the State, in the manner as has been done by it, to wriggle out of contractual terms agreed by it and contrary to the provisions of the Act of 1987, would result in shaking the credibility and confidence of the traders and industrial units set up on the basis of the agreements and undertakings given by the Government. In the name of public interest and public revenue, the State cannot be permitted to commit breaches of its own agreements. The sudden shift from the agreed policy of revision of price, and by insisting on supplies to be made on competitive marked price is bound to starve the units in tribal areas for want of raw material on reasonable price and defeat the object of the agreement. A long term 12 years" agreement for supply was reached with a particular method of revision of price. The industrial policies framed by the State in order to ensure

fairness in dealing with citizens should not be allowed to be changed frequently and suddenly in the manner as has been done. That is the difference between the relationship of State and a citizen and inter se relationship of two industries or businessmen. Public revenue is only one valid consideration before the State while distributing its largesse but that cannot be the sole basis when wider public interest as contemplated and laid down in the agreement was to guarantee supply of raw material at reasonable rates on long basis to industries promoted by the State itself in tribal areas to indirectly benefit the tribals engaged as labours in the sal seed industry. It is further to be noted that the revision of price has not been made, as contemplated by the agreement, in due time before 1 st of April of the year and the revision of rates under challenge in this petition was made after much delay resulting in retrospective revision of price with demand of difference of price from a back date in relation to supplies already made and raw material consumed in the industry.

In entering into the agreement in question, the lesser financial ability of units in tribal areas was in contemplation of the Government while comparing them with industrial units in other areas with better financial resources. Fixation of competitive market price in the manner as has been done by the State might completely jeopardise the existence of the units in tribal areas. The sudden shift or change of policy by State in revision of price of sal seed to be supplied is subversive of their own earlier industrial policy and the contract entered into on that basis. "Fairness of action" which is a mandate of Article 14 of the Constitution to the State forbids the State from acting unfairly in breach of contract in the so called name of public revenue and public interest. The State while entering into contracts and in the field of business is expected to be consistent and fair in its relationship with citizens or Association of citizens. That is the difference between dealings with the State and ordinary self interested businessman. Any action of the State which is not informed by fairness and reason is constitutionally invalid on the touch-stone of Article 14 and merely because the right sought to be enforced by a citizen is based on a contract is no ground to refuse him constitutional remedy under Article 226 of the Constitution.

Consequently, the petition succeeds and is hereby allowed. The final price revision made by letter dated 11.7.1997 (attached to Annexure-P/1) dated 15.7.1997 and the consequent demand under letter dated 3rd September, 1997 (Annexure-P/14) are hereby quashed. The price revision made and communicated under communication dated 21.5.1997 (Annexure-P/5) and the expenses revised under communication of the Inter-departmental Committee meeting of 15.5.1997 dated 9.6.1997 (Annexure-P/9) are hereby maintained. The State Government is directed through their authorities, respondents nos. 1 to 4, only to re-determine the expenses, as components of price, towards handling and supervision charges as contained in items nos. 4 to 12 mentioned therein which were stated to be on the date of communication as "ad-hoc". The State shall, according to the above direction revise its demand and thereafter make recoveries strictly in accordance with the terms of the agreement

(Annexure-P/2). In the circumstances, I leave the parties to bear their own costs.