
(1968) 03 MP CK 0014

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 416 of 1967

M/s United Excise, Ujjain

APPELLANT

Vs

State of Madhya Pradesh and another

RESPONDENT

Date of Decision : 26-03-1968

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1969) JLJ 626 : (1968) MPLJ 657

Hon'ble Judges : P.V. Dixit, C.J.; A.P. Sen, J

Bench : Division Bench

Advocate : K.A. Chitale and V.S. Dabir, for the Appellant; M. Adhikari and J.P. Dube, Govt. Advocate., for the Respondent

Final Decision : Dismissed

Judgement

P.V. Dixit, C.J.

This application under Article 226 of the Constitution for a writ of mandamus and certain directions to the Respondents, to be presently stated, has been filed in the following circumstances.

The Petitioner, M/s United Excise, Ujjain, a partnership firm, obtained from the State the privilege for the wholesale supply of country spirit in Ujjain Distillery area. Clause 4 of the deed, by which the privilege was granted to the Petitioner, conferred on it the exclusive right to supply country spirit wholesale at the warehouses mentioned in the schedule to the deed. It laid down that the plain spirit supplied by the Petitioner shall be a blend of fifty per cent Mahua based spirit and fifty per cent molasses spirit; and that the Petitioner-licensee shall be paid for such spirit according to the rates sanctioned by the State Government. It was further provided by clause-4 that the licensee shall purchase molasses based spirit from the Ratlam Alcohol Plant, Ratlam, for blending it with Mahua spirit and that the spiced (Masala) shall be manufactured at the Ujjain Distillery in accordance with the procedure shown in the annexure to the deed; and that the

licensee shall be paid according to the rate sanctioned by the State Government. Clause-6 of the deed, which is very material here, is in the following terms-

The licensee shall distil mahua based spirit within the State at Ujjain distillery. In case the licensee fails to supply spirit in the proportion of 50 per cent mahua based and 50 per cent molasses based on account of non-availability of mahua or any other special circumstances beyond his control and is required to supply pure mahua spirit or pure molasses spirit or blended spirit not in the prescribed proportion, he shall be entitled to the cost price as may be determined by the Excise Commissioner after approval of the State Government and such price shall be binding on the licensee. In case the licensee fails to supply spirit for any reason beyond his control he may be permitted by the Excise Commissioner to obtain spirit from any other distillery located within the State and in that case the licensee shall be entitled to the price determined by the Excise Commissioner.

The Petitioner says that the Ratlam Alcohol Plant is a State undertaking run by the State controlled Corporation constituted by the State Government. The Ratlam Alcohol Plant supplied to the Petitioner molasses based spirit at the rate of 45 paise per proof litre in accordance with the tender notice dated the 29th March 1967. According to the rate sanctioned by the Government, the Petitioner was paid for the supply of blended spirit at the rate of 79 paise per proof litre and at the rate of Rs. 1.45 per proof litre for the supply of spiced spirit. It is common ground that the Ratlam Alcohol Plant was unable to maintain supplies of molasses based spirit to the Petitioner. In the return filed by the Respondents, it has been stated that this inability on the part of the Ratlam Alcohol Plant was due to a general shortage of molasses and sugar throughout the country. The State Government, therefore, purporting to act under clause-6 of the deed of licence, communicated to the applicant, by a memorandum issued by the Excise Commissioner on 29th August 1967, its decision to supply 100% Mahua or Gur based liquor at the rate of Rs. 1.75 per proof litre.

In reply to the memorandum dated the 29th August 1967, the Petitioner addressed a letter to the Excise Commissioner on 4th September 1967 protesting against the fixation of the rate of Rs. 1.75 per proof litre for supply of 100% Mahua based liquor, and contending that as the failure to supply molasses based spirit was of the State Government, clause-6 of the deed of licence was not attracted to the situation; that the rate offered by the Petitioner for the supply of plain blended spirit was a composite rate and the State Government was not justified in fixing the new rate by splitting up the composite rate; and that in determining the rate for the supply of 100% Mahua based spirit, the prevailing price of Mahua should have been taken into account. The Petitioner did not get any redress from the Government. It has, therefore, filed this petition seeking a writ of mandamus to the Respondents to call fresh tenders for the supply of 100% Mahua based spirit. It has also been prayed that the Respondents be restrained from drawing supplies of Mahua based spirit from the Petitioner's warehouses, and that the Respondents be commanded to pay to the Petitioner at

the rate of Rs. 4 per proof litre for the supplies of 100% Mahua based spirit drawn by the Respondents. During the course of arguments, the Petitioner also claimed in the alternative that a writ of mandamus be issued to the Respondents to fix the "cost price" of 100% Mahua based spirit in terms of clause-6 of the deed of licence and that the Respondents be directed to pay to it that cost price for 100% Mahua based spirit that may be supplied by the applicant.

Before stating the arguments advanced on behalf of the Petitioner, it is necessary to refer in extenso to the reasoning on the basis of which the Excise Commissioner fixed the rate of Rs. 1.75 per proof litre for the supply of 100% Mahua based liquor. That reasoning is contained in paragraphs 4, 5, 6 and 7 of the communication which the Excise Commissioner addressed to the Petitioner on 29th August 1967. They are as follows-

4. Under the terms of the licence, liquor blended in proportion of 50:50 is required to be supplied by the distillery contractor i. e. half of the blended liquor would come from molasses-based spirit and the other half from Mahua-based spirit. It is clear, therefore, that the present cost price rate of blended liquor imposes a liability upon distillery contractor in regard to rate at which 50% supply of Mahua-based liquor is to be supplied. Since this is a contractual obligation entered into by the distillery contractor in the month of March 1967, the contractor cannot claim any review of rate on the basis, that the price of Mahua has since then gone up. For arriving at a fair cost price rate of 100% Mahua-based liquor, therefore, the only issue to be considered is as to what should be the price of the additional 50% Mahua-based liquor that he would be now required to supply in view of the revision of supply arrangement ordered earlier through this order.

Under the licence, the contractor receives ex-Ratlam, molasses-based liquor at the rate of Rs. 0.45 per proof litre. For transport and other expenses incurred by him, as also his profit, a sum of Rs. 0.13 which appears to be reasonable, may be assumed and may be added to the price at which the molasses-based liquor is available to him at Ujjain distillery site. This comes to Rs. 0.58 per proof litre. This figure would have to be divided by half, for arriving at the cost of 50% proportion of molasses-based liquor, which goes to compose one proof litre blended liquor. This comes to Rs 0.79. The cost price rate of blended liquor in this area is Rs. 0.79 per proof litre. Deducting the cost of molasses based liquor i. e. Rs. 0.29 from Rs. 0.79, the cost price of 50% Mahua based part of the liquor, comes to Rs. 0.50. This, therefore, reflects in monetary terms the contractual obligation of the contractor in regard to supply of 50% Mahua-based liquor.

The contractor would, however, under the revised supply arrangement be required to substitute even the remaining 50% molasses-based supply by Mahua-based supply. For determining the cost price rate of this additional Mahua-based liquor, it would be necessary, as also fair, to the contractor, to keep the existing supply conditions and the prevailing price of Mahua in view. According to the information given by the distillery contractors themselves, at present the price of

Mahua per quintal at distillery site comes to Rs. 70.00 per quintal. The contractors have also pointed out that there is possibility of further rise in prices of Mahua during the remaining part of the financial year. Therefore, an average price of Rs. 80.00 per quintal may be assumed. In March 1967, when the distillery contract was entered into, the prevailing price of Mahua was between Rs. 45.00 and Rs. 50.00 per quintal. The average of the then prevailing prices may, therefore, be assumed Rs. 48.00 per quintal. The price rise from between March 1967 and the remaining part of the current financial year has been in the proportion of 48.80 or 3.5. Since I have already arrived at the figure of Rs. 0.50 per half proof litre, as the price of Mahua-based liquor, the cost price of the remaining half proof litre of Mahua based liquor in the case of Seoni distillery area (which is higher i.e. Rs. 0.75) may be taken as basis to allow for the proportionate rise, the rise comes to, from Rs. 0.76 to Rs. 1.25 per half proof litre. The distillery contractor would, therefore, have to supply the remaining 50% of Mahua-based liquor at the rate of Rs. 1.25 per half proof litre.

The reasonable cost price rate of 100% Mahua-based liquor would therefore be Rs. 1.75 per proof litre i.e. Rs. 0.50 plus Rs. 1.25. The cost price rate of supply of 100% Mahua-based liquor is therefore fixed by me at Rs. 1.75 per proof litre under Clause 6 of the licence.

It was argued by Shri Chitale, Learned Counsel for the Petitioner, that clause-6 of the deed of licence had no applicability when the failure to supply spirit in the proportion of 50% Mahua based and 50% molasses-based was due to the failure of the State to supply molasses-based spirit and not on account of any fault of the Petitioner; that assuming that clause-6 was attracted, then on a true construction of that clause the power thereunder had to be exercised for determining the composite rate applicable to 100% Mahua-based spirit; and that the rate fixed under clause-6 could not be exproprietary and had to be the cost price in a changed context. It was said that in fixing the rate for 100% Mahua-based spirit, the Excise Commissioner erred in applying the norms worked out in the tender rate; that there was no justification whatsoever for supplying contract rate for 50% Mahua-based component under the initial grant or for applying the onerous conditions, which the Petitioner's tender entailed, in substitution and in lieu of the molasses-based component as well; that, at any rate, the molasses-based component had to be evaluated objectively with reference to the cost of Mahua flowers in the changed circumstances and the cost of manufacture and the other overhead charges and expenses; and that under the initial grant the licensee had got ready molasses-based spirit and had not suffered any cost of manufacture for it. It was, therefore, submitted that there was a complete failure on the part of the Respondents to determine the cost price for 100% Mahua-based spirit as contemplated by clause-6. Learned Counsel added that the State Government had exclusive right of manufacturing any country liquor; that the State was entitled, in the exercise of its "police powers", to regulate the manufacture of liquor; that, therefore, the lease by the State to the Petitioner of the privilege of manufacturing country liquor and to

fixation of the price of manufactured liquor were acts done by the State in exercise of its "police powers" and that, consequently, if the price of the manufactured liquor was not fixed by the State as envisaged by clause-6 of the deed, then the Petitioner was entitled to a writ of mandamus directing the State to fix the price in accordance with clause-6, and it could not be maintained that in seeking this relief the Petitioner was seeking a relief for the enforcement of a contractual obligation resting on the State. In support of his contentions, Learned Counsel referred us to Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others, , K.N. Guruswamy Vs. The State of Mysore and Others, , Ghaio Mall and Sons Vs. The State of Delhi and Others, and United Collieries Ltd. and Another Vs. Engineer in Chief, South Eastern Rly. and Others, .

In reply, Shri Adhikari, Learned Counsel appearing for the State, said that the writ of mandamus which the Petitioner was seeking, was really for enforcing contractual rights; and that if the Petitioner thought that there was a breach on the part of the State of clause-6 of the deed of lease by not fixing properly the cost price of 100% Mahua-based spirit, the Petitioner was at liberty to repudiate the contract and file a suit for damages. Learned Counsel pointed out that the lease deed did not require the State to call fresh tenders in the event of the licensee failing to supply spirit in the proportion of 50% Mahua-based and 50% molasses-based; that the State itself did not draw any supplies of spirit manufactured by the Petitioner from its warehouses; that the supplies were really drawn by the retail licensees; and that being so, the relief of a direction restraining the Respondents from drawing supplies of Mahua based spirit from the Petitioner's warehouses sought by the applicant or the relief for a direction to the State to pay Rs. 4 per proof litre for the supplies drawn was really unreal. Learned Counsel further argued that fixation of the price of 100% Mahua-based spirit in terms of clause-6 was not any act of the State done in the exercise of its "police powers"; that in fact the American doctrine of "police power" or "eminent domain" had no place in the construction of the Articles of our Constitution; that the operation of clause-6 was not restricted to the situation arising because of the Petitioner-licensee's own failure to supply spirit in the proportion of 50% Mahua-based and 50% molasses-based; that the clause came into play also when there was a failure on the part of the licensee to supply the blended spirit, whether on account of non-availability of Mahua or any other special circumstance beyond his control; and that, therefore, the State was justified in fixing the cost price for the 100% Mahua-based spirit under clause-6 when the Petitioner was unable to supply the blended spirit on account of the failure of the Ratlam Alcohol Plant to supply molasses-based spirit. It was submitted that the Excise Commissioner had properly fixed the cost price for the supply of 100% Mahua-based liquor at Rs. 1.75 per proof litre; and that in fixing that price the Excise Commissioner had taken into account all the factors that should have been considered. Learned Counsel for the State also relied on United Collieries Ltd. and Another Vs. Engineer in Chief, South Eastern Rly. and Others, and added

that the other cases relied on by the Petitioner had no application here.

On a consideration of the arguments presented by the Learned Counsel for the parties, we have reached the conclusion that this application must be dismissed. The main question that arises for determination in this case is, whether in fixing the cost price of 100% Mahua-based 6pirit at Rs. 1-75 per proof litre the State Government has infringed any right of the Petitioner under the deed of licence concluded between the Petitioner and the State with regard to the grant of the privilege of manufacturing country spirit. There is no dispute that the State purported to fix the price under clause-6 of the deed. The contention of the Petitioner that the Government had no right to fix any cost price under Clause 6 for 100% Mahua-based spirit when the Ratlam Alcohol Plant was not in a position to supply molasses based spirit is unsubstantial. The language of clause-6 is plain enough. It says that if the Petitioner fails to supply blended spirit, whether on account of "non-availability of Mahua or any other special circumstances beyond his control", and is required to supply pure Mahua spirit or pure molasses spirit, then it shall be entitled to that cost price which may be determined by the Excise Commissioner after approval of the State Government and such price shall be binding on it. Thus clause-6 comes into operation precisely when the inability of the Petitioner to supply blended spirit in the prescribed proportion arises not on account of any lapse of his but on account of a cause beyond his control, namely, "non-availability of Mahua or any other special circumstances beyond his control". When, therefore, the Petitioner was not able to obtain molasses-based spirit from the Ratlam Alcohol Plant for supplying blended spirit in the prescribed proportion, there was clearly a failure on the part of the Petitioner to supply the blended spirit on account of a circumstance beyond his control. In that situation, the Government was justified in exercising its right under clause-6 and requiring the Petitioner to supply 100% Mahua-based spirit at the cost price determined by the Excise Commissioner after the approval of the State Government. If, as contended by the Petitioner, Clause 6 had no applicability to the situation arising because of the inability of the Ratlam Alcohol Plant to supply molasses-based spirit, then, there being no other clause in the deed of licence covering the situation, it was open to the applicant to say that it was relieved of the obligation under the deed of supplying the blended spirit and that it was not bound to supply 100% Mahua-based spirit, and face the consequences resulting from such an attitude. There is no term in the deed of licence laying down that if the licensee is unable to supply blended spirit in the prescribed proportion on account of non-availability of molasses-based spirit from the Ratlam Alcohol Plant, then the State shall invite fresh tenders for the supply of 100% Mahua-based spirit.

In our opinion, clause-6 was rightly invoked by the Government in fixing the cost price for 100% Mahua-based spirit. That clause speaks of the determination by the Excise Commissioner of the cost price. The determination of the cost price by the Excise Commissioner altogethor rules out fixation of cost price after inviting tenders. It must be noted that the cost price determined under clause-6 of the

deed is in regard to the supply of pure Mahua spirit by the Petitioner and not by any one else. That being so, there can be no question of inviting tenders for supply of 100% Mahua based spirit. There could also be no question of the Petitioner being asked to quote the cost price at which it was prepared to supply pure Mahua spirit. The acceptance of any cost price quoted by the Petitioner would not be a "determination by the Excise Commissioner" of the cost price. That would be a settlement of the cost price by agreement of the parties. The use of the word "determined" and of the expressing "such price shall be binding on the licensee" clearly involve the determination of the cost price by the Excise Commissioner in his own judgment. It is in order to prevent the cost price of 100% Mahua-based spirit being dictated by the licensee taking advantage of the altered situation that the fixation of the cost price has been left to the "determination" of the Excise Commissioner and not made dependent on the price asked or quoted by the licensee for the pure Mahua-based spirit. There is, therefore, no substance in the contention of the Petitioner that the State Government should have invited fresh tenders for the supply of 100% Mahua-based spirit.

If as we think, the State Government was justified in resorting to clause-6 for fixing the cost-price of 100% Mahua-based spirit, then the question to consider is whether the price of Rs. 1.75 per proof litre fixed by the Excise Commissioner for pure Mahua-based spirit was in accordance with Clause 6. On this point, the grievance of the Petitioner is that the Excise Commissioner had not fixed the composite cost price of 100% Mahua-based spirit; that there was no justification whatsoever for fixing the price of half litre of 100% Mahua-based spirit on the basis of the contract rate for 50% Mahua-based spirit, and for fixing the price of the remaining half litre on the basis of that contract rate with certain additions. It was said that the molasses-based component had to be valued objectively with reference to the cost of Mahua flowers in the changed circumstances and the cost of manufacture and other overhead charges and expenses.

In our judgment, the rate of Rs. 1.75 per proof litre fixed by the Excise Commissioner for 100% Mahua-based liquor is in no way vitiated because of the method adopted by the Excise Commissioner in determining that rate and cannot be said to be arbitrary or ex-proprietary. The "cost price" contemplated by clause-6 is not the bare cost of manufacture of 100% Mahua-based spirit. It is the price which the State is required to pay to the licensee for the spirit, and clearly includes the profit of the licensee. Where the price is settled after accepting the licensee's tender, as was done initially in the present case for the blended spirit, then the cost price is the tender price. It is in this sense that the expression "cost price" has been used in some of the clauses of the deed. There is a distinction between "cost price" and the "issue price" for the supply of spirit to the retail licensees. The "issue price" is made up of the cost price plus the duty, now, while fixing the price for pure Mahua-based spirit at Rs. 1.75 per proof litre, the Excise Commissioner did take into account the cost of Mahua flowers as also the margin of profit the Petitioner should get. It is obvious from

the letter, which the Excise Commissioner addressed to the Petitioner on 29th August 1967, that what the Excise Commissioner did was first to determine the cost price of Mahua-based part of one proof litre of the blended liquor after deducting from the cost price of Rs. 0.79 per proof litre for the blended liquor the price of half litre of molasses-based liquor and the transport charges incurred in taking the molasses-based liquor from Ratlam to Ujjain. Thus he fixed the price of half litre of pure Mahua-based spirit at Rs. 0.50. As the Petitioner-licensee had undertaken to supply half litre of pure Mahua-based liquor in a litre of the blended spirit, there could be no variation in the cost price of half litre of pure Mahua-based liquor even when instead of being blended with half litre of molasses-based spirit, it is blended with an additional half litre of pure Mahua-based spirit. The Excise Commissioner was, therefore, justified in keeping the price of Rs. 0.50 per half litre of pure Mahua-based spirit intact and in adding to it the cost price of the extra half litre of pure Mahua-based spirit as arrived at by him having regard to the prevailing price of Mahua flowers and the reasonable margin of profit allowable to the Petitioner. That he took the prevailing price of Mahua flowers into consideration is patent from paragraph 6 of the communication addressed by him to the Petitioner, on 29th August 1967. On this basis, he fixed the price of the extra half litre of pure Mahua-based liquor at Rs. 1.25 per half proof litre. Thus the price for one proof litre of pure Mahua-based liquor was determined by adding the cost price of Rs. 1.25 per half proof litre of the extra pure-Mahua-based liquor, which the Petitioner was required to supply, to the price of Rs. 0.50 per half proof litre of Mahua-based liquor which the Petitioner had contracted to supply. In our opinion, this method adopted by the Excise Commissioner in determining the cost price of one proof litre of 100% Mahua-based liquor is not arbitrary, but is based on reason and logic. The Petitioner's real anxiety is to have the price of one whole proof litre of 100 % Mahua-based spirit fixed with reference to the prevailing price of Mahua. There can be no justification for this. If the supply of molasses-based liquor from the Ratlam Alcohol Plant had continued, then the Petitioner could not have clearly asked for raising the cost price of liquor on the ground that the price of Mahua had increased since the conclusion of the deed of licence between him and the State. A fortiori he cannot ask for a rise in the price of half litre of 100% Mahua-based liquor when, instead of blending it with half litre of molasses-based liquor, he is only required to add another half litre of Mahua-based liquor. Thus in determining the cost price for one proof litre of pure Mahua-based spirit under clause-6, what is really to be determined is the cost price for the extra half litre of Mahua-based liquor. This the Excise Commissioner did after taking into account all the relevant factors. It was said that the Excise Commissioner did not take into consideration the cost of manufacture and other overhead charges and expenses in the manufacture of 100% Mahua-based spirit. But the Petitioner did not point out to us how the cost of manufacture or overhead charges and expenses were higher in the manufacture of pure Mahua spirit than in the manufacture of the blended spirit.

In our view, the cost price for 100% Mahua-based liquor fixed by the Excise Commissioner is in conformity with clause-6. That being so there can be no question of the Excise Commissioner being asked to determine afresh the cost price. After all, the Excise Commissioner had to determine the price in his judgment and on certain principles, and the principles he adopted in fixing the cost price were not unreasonable. It is also noteworthy that under clause-6 the price determined by the Excise Commissioner after the approval of the State is binding on the Petitioner-licensee. The contract entered into by the Petitioner for obtaining the privilege of manufacturing and supplying country spirit contemplated the eventuality of the molasses-based spirit not being available for blending it with Mahua-based liquor, and provided for the alternative contained in clause-6. This condition was known to the Petitioner when he entered into the contract. He agreed to abide by this condition and other conditions of the licence in the counterpart of the agreement executed by him. He cannot, therefore, now question the determination of the cost price by the Excise Commissioner when it is on the face of it neither arbitrary nor ex-proprietary.

Even if according to the Petitioner's thinking, the determination of the price by the Excise Commissioner was in breach of clause-6 of the deed of licence, the Petitioner cannot be given any redress under Article 226 of the Constitution for the alleged breach. The fixation of price under clause-6 by the State cannot in any sense be said to be an act done by the State in the exercise of "police powers" as was suggested on behalf of the Petitioner. It is no doubt true that the State Government has exclusive right of manufacturing intoxicants or any country liquor. But the privilege, which the Petitioner obtained for the manufacture and supply of country liquor, is under a contract, namely, the deed of licence, demising to the Petitioner the Government's interest. That transfer of the right of the State of manufacturing liquor to the Petitioner is subject to the conditions of the deed of licence. This is clear from the decision of a Division Bench of this Court in *Nanhibai v. Excise, Commissioner*, M.P. 1963 MPLJ 526 . The dispute raised by the Petitioner is, therefore, really as to the construction of Clause 6 of the deed of licence and the nature and extent of the right given to it under clause-6. The directions, which the Petitioner is seeking are for the purpose of enforcing the terms of the contract, or to put it other way, for preventing a breach of the terms by the lessor, namely, the State. It is well settled that any dispute between the parties with regard to the rights and privileges under a contract must be litigated in the ordinary civil Courts, and not in proceedings under Articles 226 and 227 of the Constitution. Under those Articles, directions cannot be issued for enforcing or preventing a breach of the rights and obligations contractual in character. This is clear from a decision of this Court in *United Collieries Ltd. and Another Vs. Engineer in Chief, South Eastern Rly. and Others*, . The decisions in *K.N. Guruswamy Vs. The State of Mysore and Others*, and *Ghaio Mal & Sons v. State of Delhi* AIR 1957 S C 65 do not appear to us to be in point.

For the foregoing reasons, our conclusion is that the Petitioner-firm is not

entitled to the reliefs claimed by it. This petition is, therefore, dismissed with costs. Counsel's fee is fixed at Rs. 200.

The outstanding amount of security deposit shall, after deduction of costs, be refunded to the Petitioner.