
(2005) 09 MP CK 0017

In the Madhya Pradesh High Court

Case No : Writ Petition No"s. 1380 and 882 of 2005

Som Distilleries Pvt. Ltd.

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 26-09-2005

Acts Referred:

Constitution of India, 1950 — Article 226
Madhya Pradesh Excise Act, 1915 — Section 62

Citation : (2006) 1 MPLJ 540

Hon'ble Judges : Rajendra Menon, J

Bench : Single Bench

Advocate : R.D. Jain, Ravindra Shrivastava, with Kunal Verma and Ku. Pragya Renwal, for the Appellant; Brajesh Sharma, Government Advocate for State, for the Respondent

Final Decision : Allowed

Judgement

Rajendra Menon, J.

As common questions are involved in both the petitions and as the grounds raised are also similar, they are being disposed of by this common order.

For the sake of convenience, the documents filed and referred to in Writ Petition No. 882 of 2005 are referred to in the order.

M/s Som Distilleries a company incorporated and registered under the Companies Act feel aggrieved by action of the Respondents in not issuing the "no dues certificate" and "satisfactory performance certificate" so as to enable the petitioner to participate in the tender process for issuance of licence for the period 2005-06 for the purpose of bottling and supply of country liquor. petitioner is also aggrieved by the process initiated and action taken for recovery and the imposition of penalties being made for the financial year 2004-05 during which period, the petitioner has been awarded contract for the purpose of bottling and supply of country liquor in various areas in the State of Madhya

Pradesh.

For the purpose of carrying out the activities of bottling and supply of country spirit in the State of M.P. tender notice dated 2nd April, 2004 (Annexure P/3) was issued by the State Government petitioners submitted their tender for various supply areas and even though, the petitioner was the lowest tenderer in fifteen supply areas but due to a maximum eligibility clause they were awarded tender only for seven supply areas i.e. in the areas of Guna, Dewas, Khargone, Dhar, Bhopal, Vidisha and Chhindwara. It is case of the petitioner that the tender was accepted by the Excise Commissioner Gwalior on 25/26th April, 2004, the quantity of country liquor to be supplied and the rates for the same were fixed strictly in accordance with the tender conditions and the provisions of M.P. Country Spirit Rules, 2005.

Acceptance letter issued to the petitioners by the Excise Commissioner, Gwalior is Annexure P/4 dated 25/26-5-2004. petitioners, it is stated continued to supply spirit as per the supply figures indicated in the tender notice Annexure P/3 which was in conformity with the declared probable quantity of spirit to be supplied for the supply areas in question. Grievance of the petitioner started when in spite of the continuous supply, payments in time were not released in various areas. Case of the petitioners is that they had supplied the requisite quantity as per the request indicated in the contract, in fact, the supply made by petitioner is said to be in excess of the fixed quantity. Payments for the month of March, April and May, 2004 were received in the month of June and since August, 2004, payments were not made in time. According to the petitioners, the continued non-payment and non-co-operation with regard to supply made in various areas resulted in financial imbalance in the petitioner's establishment and the petitioners started facing serious problem for want of funds. According to the petitioners, statement Annexure P/5 indicates the details of the supply made which according to the petitioners is in excess of the tender quantity in the four supply areas i.e. Bhopal, Chhindwara, Guna and Vidisha. The demand in other three areas of Dhar, Dewas and Khargone being as per the tendered quantity, the petitioners were able to fulfil the requirement as per the tender condition. By taking me through the statement Annexure P/5 and the representation submitted vide Annexure P/6 on 28-12-2004 Shri Ravindra Shrivatava learned Senior Counsel for the petitioner emphasized that even though the petitioners were fulfilling their part of the contract as per the terms and conditions, the Respondents committed default in the matter of payment and a amount of more than Rs. 3,14,30.152/- (Rs. three crores, fourteen lacs, thirty thousand, one hundred and fifty two only) was not paid till December, 2004.

It is, case of the petitioners that in spite of continuous supply of the tendered quantity of spirit/country liquor, the department adopted a attitude of non-co-operation and started harassing the petitioner by issuing notice. By filing areawise statement of the supply made from June, 2004 to June, 2005 Annexure P/5, petitioner has tried to establish the fact that against the agreed quantity as

per the tender, the petitioner had made supply in excess thereby confirming and fulfilling their obligation. In spite of this, it is stated that the excise department issued show cause notice Annexure P/1 dated 10-11-2004 with regard to each supply areas, inter alia pointing out to the petitioners that they are not making supply as per the requirement mentioned in the tender, this notice is issued on the basis of information given by respective District Excise Officers in each supply area, however, the case of the petitioners is that the so called information given by the respective collectors or Distt. Excise Officers on the basis of which Excise Commissioner, Gwalior had issued the show cause notice dated 10-11-2004 was neither supplied to the petitioner nor did it form part of the show cause notices. The show cause notice indicated the fact that due to failure of supply by the petitioners, supply in the respective area is being maintained by procuring liquor from other distilleries and petitioner was directed to show cause as to why, action be not taken for detachment of the petitioner's supply area and attaching it to some other distilleries in accordance with the provisions of Rule 5(4)(b) of the M.P. Country Liquor Rules.

It is submitted by the petitioners that similar notice in the same format were issued for various supply areas and petitioners immediately submitted their reply vide Annexure P/11 dated 18-11-2004 refuting the contention mentioned in the show cause notice and ventilated their grievance by submitting that the payment of Rs. 3,14,30,152/- (Rs. three crores, fourteen lacs, thirty thousand, one hundred and fifty two only) is being illegally withheld, that apart, in the reply, petitioner's gave a monthwise supply statement from each warehouse and it was asserted by the petitioners that supply made by them was as per the demand and lifting, it was pointed out that the supply was made against all pending challans up to October and November, 2004 and this was duly supported by certificates of the warehouse officers. It is stated in the petition and it was emphasized by Learned Counsel for the petitioners Shri Ravindra Shrivastava that in spite of specific reply and details being given supported by the facts and figures of supply made no orders were passed on the show cause notice issued, payment of the accumulated amount was not released to the petitioners and in spite of certain orders passed by Board of Revenue on 7-12-2004 vide Annexure P/7, no action was taken for releasing the payments to the petitioners in spite of the fact that the petitioner has submitted representation on 3-1-2005 for releasing the payment as per the order of Board of Revenue Annexure P/7. petitioners contend that they have submitted representations Annexures P/8 and P/9 on 3-1-2005 and 10-2-2005 requesting the District Collectors to take action in accordance with the directives contained in the order passed by the Board of Revenue but till date, no action has been taken. On the contrary, show cause notice dated 10-11-2004 Annexure P/10 was issued to the petitioner which was replied to as indicated hereinabove.

It is the case of the petitioner that without deciding the allegations levelled in the show cause notice on the basis of explanation submitted by the petitioners, Excise Commissioner in an arbitrary manner issued orders to various District

Collectors to purchase country spirit from other distilleries on exorbitantly higher rates ranging from Rs. 12.74 (Rs. twelve and seventy four paise) to Rs. 24/- (Rs. twenty four only) per proof litre. According to the petitioners, the rate fixed for purchase of country liquor from other distilleries was very much on the higher side. By taking me through the documents available on record, the rate agreed to by the petitioners as per the contract, the rate fixed for other suppliers like Gwalior Distillers Ltd, Gwalior, Great Gallion Ltd. and Oasis Distilleries, Shri Ravindra Shrivastava pointed out that in an arbitrary manner, purchases were made from these distillers at exorbitant rates. Taking me through the statement in this regard as Shri Shrivastava tried to demonstrate that the rates agreed to by the petitioners in various areas were much less than the one which was granted to the other distilleries. It was stated that even though, the Gwalior Distillers Ltd. were granted contract at the approved rate of 2.97 and 2.75 in certain areas but when purchases were made from them the rate granted was in the range of 12.74 to Rs. 24 per proof litres. By taking me through this statement Annexure P/10 and P/11 filed in W.P. No. 1380 of 2005. Shri Ravindra Shrivastava wanted to emphasise that even though the approved rates for various areas were much on the lower side but purchases were made from these distilleries without inviting any tender, without their being any formal agreements, rates in the range as indicated hereinabove were approved for payment in a arbitrary manner which resulted in huge loss to the department. It is the case of the petitioners that not only their payments were withheld but in a arbitrary manner, in spite of supply being maintained by the petitioner on the ground that the petitioners are not able to supply liquor as per the tendered quantity illegal purchases were made from other distilleries at exorbitantly higher price than the approved price.

Accordingly, it was case of the petitioners that without following the statutory procedure as contemplated in Rules 4 and 5 of the M.P. Country Spirit Liquor Rules, 1995, action taken for making purchases from other suppliers was illegal and consequential action for recovery of this difference from the petitioners is also illegal.

By taking me through various documents available on record and the provisions of M.P. Country Spirit Rules, 1995, the points canvassed by the petitioner in this petition can be crystallized as under:

- (i) Without any justification payments to the petitioners for the supply made were not released in time;
- (ii) Even though, the petitioners had maintained supply in each areas as per the tendered quantity and in some area even though the supply was in excess of the tender quantity, arbitrary purchases were made from private distilleries;
- (iii) The rates at which, the purchases were made from these private distilleries were higher than the approved rate;
- (iv) No orders were passed on the show cause notice issued to the petitioner and

without considering the representations submitted by the petitioners, Excise Commissioner directed various Excise Officers and Collectors to make recovery of the amount incurred in making purchase from other distilleries;

(v) Penalty has been imposed without hearing the petitioner and in violation of the statutory rules;

According to the petitioner, the action taken for recovery of the amount in the aforesaid manner is illegal and the petitioner has prayed for quashing the recoveries being effected in such a manner. Accordingly, prayer made in Writ Petition No. 1380 of 2005 is to the effect that the action of the Respondents in making recovery from the petitioners be quashed, so also to quash the orders passed by the Distt. Excise Officers for recovery of the amount with regard to supply made by other private distilleries from the petitioners.

In Writ Petition No. 882 of 2005 grievance made by the petitioners is that on the ground that the petitioners have not made proper supply and have not paid the amount as per the recovery being proposed to be made, the Excise Commissioner is not issuing "no dues certificate" and "satisfactory purchase certificate" to the petitioners to enable them to participate in the further tender process for the current financial year i.e. 2005-06. In this petition, prayer made is that Excise Commissioner be directed to issue "no dues certificate" and "satisfactory performance certificate" on the basis of the certificate issued by the respective Distt. Excise Officer.

As indicated hereinabove, Shri Ravindra Shrivastava learned Senior Counsel taking me through various documents emphasized that the action taken for recovery of the amount is arbitrary and illegal. No recovery can be made from the petitioners. The petitioners are entitled for payment of all the outstanding dues and further they be issued "no dues certificate" and "satisfactory performance certificate" to enable them to participate in the tender process for the year 2005-06. During the course of hearing, it was also emphasized by Shri Ravindra Shrivastava learned Senior Counsel that on the ground that the supplies have not been made in time, action has been taken for imposition of penalty under Rule 12 of M.P. Country Spirit Rules, whereas, no penalty can be imposed on the basis of the aforesaid Rules as the same is deleted vide amendment to the statutory rules affected with effect from 11th May, 2005, it was also emphasized by him that no penalty can be imposed in such circumstances. The contention of learned Senior Counsel for the petitioners is that entire action in the facts and circumstances mentioned is arbitrary, unreasonableness and in violation of statutory rules and therefore, unsustainable.

Shri Brajesh Sharma, learned Government Advocate for the Respondent/State has submitted that against the action taken, petitioner has a remedy of filing appeal in accordance with the rules framed for filing appeal and revisions u/s 62 of the M.P. Excise Act and as petitioners have not exhausted the remedy of appeal, a petition directly before this Court is not maintainable. It is also stated

by him that as disputed questions of fact are involved in the matter, therefore, interference in the matter, in a petition under Article 226 of the Constitution is not warranted. By bringing on record an order passed by the Supreme Court in Civil Appeal No. 14921 and 14926 of 2001, State of M.P. v. M.V. Vyavsay and Company, Shri Brajesh Sharma argued that no case for interference is made out. It was submitted by the Respondents in the return that "no dues certificate" and "satisfactory performance certificate" cannot be issued as a huge recovery is to be made from the petitioners pursuant to the purchase made by the department due to failure to make supply as per the quantity tendered, so also recovery of penalty imposed by Collector, Excise. It is stated that till dispute with regard to outstanding dues is not settled, the certificates cannot be issued. It was also emphasized by the Respondents that the petitioner having failed to make supply of the tendered quantity of liquor as per the statutory rules, competent authority has made purchases from the other distilleries at market rate as provided in the M.P. Country Liquor and Spirit Rules, 1995 and as Excise Commissioner was entitled to make purchase at the prevalent market rate in accordance with sub-rule 4A of Rule 5, action taken does not call for any interference. Accordingly, Respondents have tried to justify their action.

During pendency of this petition, it is seen that the orders of recovery issued by various Distt. Excise Officers were challenged by the petitioners by filing appeal before the Board of Revenue and the records indicate that the Board of Revenue by various orders passed on 21-3-2005 and on various other dates in more than nine cases has rejected the appeals on the ground that the matter is to be agitated before the Excise Commissioner. During the course of hearing, Shri R.D. Jain Senior Advocate submitted that when Distt. Excise Officers and Collectors started initiating coercive process for recovery of the amount, in the revisions filed before the Board of Revenue, initially stay orders were passed by Board of Revenue but finally, the Board of Revenue has dismissed the revisions by holding that against the action of "recovery initiated by Collectors concerned, petitioners should approach the Excise Commissioner by way of appeal. It was pointed out by Shri Ravindra Shrivastava and Shri R.D. Jain Senior Advocates during courses of hearing that the same Excise Commissioner who had indulged in the arbitrariness complained in this petition was holding the post of Member, Board of Revenue, he has himself dealt with the cases and rejected the appeals.

The aforesaid fact was pointed out to show bias and arbitrariness in the matter. Accordingly, the orders passed by the Board of Revenue rejecting the revisions of the petitioners have been challenged by the petitioners in W.P. No. 2887 of 2005 and W.P. No. 288 of 2005 which are also listed for hearing on admission today.

From the aforesaid narration of facts, it is clear that there is serious dispute between the parties with regard to the supply made by the petitioners whether it is in conformity with the tendered quantity or is less than the tendered quantity, the said question has not been determined by any competent authority. Even though, show cause notices were issued to the petitioners by the Excise

Commissioners and the petitioners had submitted their reply, for reasons which remain unexplained, Excise Commissioner has not decided the matter and it seems that the District Excise Officers have proceeded to make recovery without there being adjudication of the dispute between the parties by any competent authority. Normally, if a proper order was passed and the matter was decided after considering the explanation and reply submitted by the petitioners, this Court would have refused to interfere in the matter and would have directed the petitioner to file appropriate appeal or revision in accordance with the rules. But the facts as have been indicated hereinabove, demonstrates that even though a show cause notice was issued by the Excise Commissioner to the petitioners and the petitioners had submitted their reply to the show cause notices and had explained the position by giving relevant datas, proper order on the show cause notice and the reply submitted were never passed. When no action was taken on the reply submitted by the petitioners by the Excise Commissioner, records indicate that on 31-3-2005, petitioner had approached the Principal Secretary, Commercial Tax Department, Government of M.P., Bhopal for redressal of their grievance but in spite of the representation to the State Government also, no action was taken. It is therefore, a case where action for recovery of the amount is being initiated against the petitioners without giving them proper opportunity of hearing and without passing a speaking order into the matter of recovery of dues from the petitioners. Even penalty is being imposed in the matter without issuing any show cause notice and without giving opportunity of hearing to the petitioners. In the matter of imposition of penalty, a Division Benches of this Court in the case of *Sharma and Company v. State of M.P.* reported in 1981 MPLJ 422 has held that the imposition of penalty without giving notice to the licensee and hearing is bad. The aforesaid view was followed in the case of *K. Durgaratnam v. State of M.P.* in M.P. No. 1819 of 1993 decided on 7-7-1999, wherein also, it has been held that imposition of penalty under the Excise Act cannot be ordered without issuing show cause notice and without hearing the licensee concerned. It is therefore, clear that action taken for imposing penalty and recovery of amount from the petitioners is without giving them proper opportunity of hearing, without passing appropriate orders after considering the explanation and figures submitted by the petitioners and without there being determination with regard to default in supply being made by the petitioner. Reliance placed by Learned Counsel for the State Government to the judgment of the Supreme Court in the case of *M/s M.V. Vyavsay* (supra) is clearly distinguishable. The aforesaid case does not deal with any recovery in the manner indicated in the present case. On the contrary, while considering the questions involved in that said case, Supreme Court itself by referring to various English judgments on the question of interference in a petition under Article 226 of the Constitution has held that the purpose of judicial review is to ensure that the individual receives fair treatment. After considering various judgments on the point, it has been held that where there are statutory violation or violation of the principles of natural justice, interference is permissible in the case of contract also. That being so, it is to be held that this petition cannot be dismissed merely

on the ground that the disputed questions of facts are involved.

From the facts and circumstances as indicated hereinabove, it is clear that the question of supply being less than the tendered quantity made by the petitioners and the rate at which purchases can be made by the Excise Department, is in dispute between the parties. Even though, a show cause notice was issued to the petitioners and the petitioners had submitted their reply along with the relevant data, the dispute was not adjudicated by the competent authority. Without their being adjudication of the dispute and without determining the liability and default if any, committed by the petitioners, action for recovery was initiated against the petitioners and penalty imposed. It is the considered view of this Court that even though the department is entitled to take action in the matter, but they were expected to act in a fair and reasonable manner. The question of inadequate or less supply being made by the petitioners, the rate at which, the purchase could be made by the Excise Department and the question of imposition of penalty should have been first determined and then only action taken for recovery of the amount. In the instant case, without adverting to this dispute and without recording any finding with regard to the irregularities committed by the petitioners, action taken for recovery of the amount and for withholding "no dues certificate" and "satisfactory performance certificate" is clearly illegal and cannot be sustained.

It is now settled in law that even in purely administrative proceedings when adverse consequences may result, the principles of natural justice would become applicable. In such cases, the authority must act fairly, that is to say, his action must be free from even any appearance of unfairness, unreasonableness and arbitrariness. While exercising power of judicial review in such matters, this Court can scrutinize whether the administrative action is reasonable or not. In the case of *Dr. Rash Lal Yadav v. State of Bihar and Ors.* reported in 1994 (4) SCC 267, it has been held that procedural fairness is an implied mandatory requirement to protect arbitrary action. In the aforesaid case, it has been observed by the Supreme Court as under:

If the statute confers drastic powers it goes without saying that such powers must be exercised in a proper and fair manner. Drastic substantive laws can be suffered only if they are fairly and reasonably applied. In order to ensure fair and reasonable application of such laws Courts have, over a period of time, devised rules of fair procedure to avoid arbitrary exercise of such powers. True it is, the rules of natural justice operate as checks on the freedom of administrative action and often prove time-consuming but that is the price one has to pay to ensure fairness in administrative action. and this fairness can be ensured by adherence to the expanded notion of rule of natural justice. Therefore, where a statute confers wide powers on an administrative authority coupled with wide discretion, the possibility of its arbitrary use can be controlled or checked by insisting on their being exercised in a manner which can be said to be procedurally fair. Rules, of natural justice are, therefore, devised for ensuring fairness and

promoting satisfactory decision making.

Even if discretion can be exercised in administrative action, it must be fair and reasonable and should be exercised in a rational manner. Action taken in the present case, if viewed in the light of aforesaid legal principles it would be seen that petitioners have not received a fair and reasonable treatment from the departmental authorities before taking action against them.

In such circumstances, this Court has no option but to hold that the Respondents have not acted in a manner known to law with regard to making recoveries from the petitioners and for withholding "no dues certificate" and "satisfactory performance certificate".

Having held so, the question that now requires consideration is as to whether, this Court should interfere on the merits and adjudicate the matter on merit or direct the authorities concerned to decide the question. The question of violation of tender condition by the petitioners and inadequate or less supply made contrary to the tendered quantity are disputed questions of fact and it is not appropriate for this Court to enter into this area of fact finding enquiry. In normal circumstances, it would have been appropriate to direct the Excise Commissioner to look into these matters and decide the same. However, during the course of hearing, the petitioners have made an apprehension that the Excise Commissioner may not act in a fair manner, in this regard and a request was made that the dispute be settled by a authority other than the Excise Commissioner who according to the petitioners has already decided the matter by directing for recovery. Keeping in view the aforesaid and taking note of the fact that the petitioners have already represented the matter to the State Government through the Principal Secretary, Commercial Tax Department, it is thought appropriate that the Principal Secretary, Commercial Tax Department be directed to decide the question and pass appropriate orders in the matter.

So far as issuance of "no dues certificate" and "satisfactory performance certificate" is concerned, it has been indicated to this Court that on the basis of tender submitted by the petitioners, contract for four supply areas have been made to the petitioners and petitioners are making supply on the basis of the orders issued to them. This arrangement need not be disturbed till the matter is finalized by the Principal Secretary, Commercial Tax Department. Accordingly, keeping in view the totality of the facts and circumstances of the case as has been indicated hereinabove, both these petitions are allowed and disposed of with the following directions:

(i) petitioners shall file a certified copy of this order along with detailed representation supported by facts and figures before the Principal Secretary, Commercial Tax Department, Government of M.P. Bhopal with regard to recovery being made against them and the outstanding payment which they are claiming in these petitions.

(ii) On the aforesaid being done, Principal Secretary, Commercial Tax

Department, shall decide the dispute with regard to recovery to be made from the petitioners, penalty to be imposed if any and payment if due to be made to the petitioners and pass appropriate orders in this regard.

(iii) Principal Secretary shall give due opportunity of hearing to the petitioners and shall also call for the requisite particulars or comment from the Excise Department and shall also give due opportunity to the Excise Department to give their say in the matter before taking a final decision.

(iv) Principal Secretary shall pass a speaking order in the matter and on the basis of the order that may be passed by the Principal Secretary, the Excise Commissioner, the District Excise Officers and Collectors shall be free to proceed to make recovery if any from the petitioners, till then no coercive recovery shall be made from the petitioners.

(v) Till the matter is decided, in accordance with the aforesaid direction the arrangement with regard to supply in the areas for which the contract is given to the petitioners for the year 2005-06, shall be continued subject however to the conditions that in case, for the said supply if petitioners are found to violate any of the terms of the contract or the statutory provisions, the authorities of the Excise Department are free to take action in that regard as per law and the pendency of the matter before the Principal Secretary, shall not come in their way for taking action in this regard. Petition stands allowed and disposed of, without any order as to costs.