

(2007) 02 KAR CK 0036

In the Karnataka High Court

Case No : Writ Petition No. 16459 of 2001

The Godavari Sugar Mills Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 15-02-2007

Acts Referred:

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

Citation : (2007) ILR (Kar) 1198 : (2007) 4 KCCR 2129

Hon'ble Judges : H.V.G. Ramesh, J

Bench : Single Bench

Advocate : P.S. Manjunath, for the Appellant; T. Rajaram, ACGSC, for the Respondent

Judgement

H.V.G. Ramesh, J.—The petitioner has sought for issuance of writ of mandamus or any other writ directing the respondent to refix the price of levy sugar delivered by the petitioner factory during the year 1997-98 at Rs. 997.96 per quintal and for the year 1998-99 at Rs. 1,017.58 per quintal and to issue a writ of mandamus directing the respondent to pay an additional price of Rs. 25.08 lakhs towards the levy sugar delivered for the year 1997-98 and Rs. 53.93 lakhs for the year 1998-99.

2. According to the petitioner, it is a sugar manufacturing unit manufacturing sugar by Vaccum Fan Process. It is declared as essential commodity under the provisions of the Essential Commodities Act, 1955. In exercise of the powers conferred u/s 3 of the Essential Commodities Act, the Central Government has been issuing orders during every sugar season called the Levy Sugar Supply (Control) Order fixing price at which the sugar manufacturers are required to sell certain percentage of sugar produced by them to the agencies specified by the Central Government or the State Government for distribution under the Public Distribution System. The power to fix price is exercised in view of Section 3(3C) of the Essential Commodities Act. The fixation of price is required to be done by the Government as per the principles laid down by the Tariff Commission and the

Sugar Industry Commission mainly on (1) fair price of cane fixed by the Government (2) cess or tax payable thereon (3) manufacturing cost (4) reasonable return on the capital employed.

3. In exercise of the power u/s 3 of the Essential Commodities Act, the Central Government has also promulgated an order called Sugar Control Order 1955 and Clause 5 of the said order also deals with the manner of determining the price of levy sugar. According to the petitioner, the factors mentioned in Clause 5 of the Sugar Control Order are substantially the same as has been mentioned in Section 3(3C) of the Essential Commodities Act; it signifies an effective expression of opinion which ends a controversy or dispute by some authority to whom it is submitted under valid law for disposal; the price for levy sugar fixed for one year will not be valid for the subsequent year in view of the fact that the minimum cane price payable is fixed by the Government of India under the Sugarcane Control Order each year by a separate notification; though the determination of price u/s 3(3C) is a legislative function, review of the subordinate legislation is permissible on the ground that it is unreasonable or repugnant to the general or some other statute; as such, in fixing the price of levy sugar u/s 3(3C), regard must be had to Clause 5A of the Sugarcane Control Order. According to the petitioner, mopping up of entire excess realization by sale of free sugar for determination of price of levy sugar is held to be incorrect as per Clause 5A as it would result in total denial of any return resulting in not even recovering the actual cost of production.

4. According to the petitioner, as per the decision reported in 1991 AIR SCW 1760 the price fixing on the zonal basis taking into account the average zonal cost is valid and as per the decision reported in Anakapalle Co-op. Agrl. and Industrial Society Ltd., Vs. Union of India (UOI) and Others, in Anakapalle Co-op Society once it is recognized that price could be fixed according to the zones, the cost schedule that have been worked out by the commission have necessarily to be different from each zone, various items which go into the cost differ from zone to zone and that it is not permissible to take only a few items and find discrimination disregarding of other items or components of costs on the basis of which price determination has to be made. Further, according to him, the determination of the levy sugar price on the basis of the zone is more practicable which has been upheld by the Supreme Court in Anakapalle's case as well as in other two cases noted above. The fixation of price separately for each sugar mill was not found to be workable, in so far as the negative adjustment of the molasses it should also be done on zonal basis and not on an All India basis as the production of molasses differs from zone to zone, area to area and period to period; the molasses having been decontrolled its price also varies for variety of reasons, as such, it is not possible to have uniform of All India figure for negative adjustment of molasses. Further according to him, negative adjustment is made not only in respect of molasses, hut also on account of Bagasse and Pressmud, on the actual cost data submitted by the sugar factories; even if the Pressmud is given tree of cost to sugarcane growers to earn goodwill, the sugar factories

cannot ask the Government to compensate them for the charitable act and notional value of Pressmud is required to be determined with negative adjustments notwithstanding the fact that the Pressmud is distributed free of cost to the farmers. According to the petitioner, fixation of the price based on All India basis is arbitrary and in violation of Article 14 of the constitution. The price of levy sugar was being determined by the Tariff Commission earlier and later from 1974 onwards this exercise was done by the Bureau of Industrial Costs and Prices(BICP) which was an independent body of experts. But for the years 1996-97 to 1998-99 the price of levy sugar has been fixed by the Cost Accounts Branch of the Ministry of Finance which according to the petitioner, is neither a body of experts nor an independent body. The BICP had submitted the cost schedules which were valid for three years from 1996-97 to 1998-99. The cost structure of sugar industry for recommending basic cost schedule for conversion charges to cover the subsequent three sugar seasons from 1999-2000 and 2001-02 was initially referred to Tariff Commission since it has not shown interest later the matter was referred to Cost Accounts Branch of Ministry of Finance; there is no justification for demanding that negative adjustment of the molasses made on All India basis and the same has to be done only on zonal basis. Switching over from All India basis to zonal basis is that negative adjustment would give a more realistic levy sugar price for the zone to avoid undue adjustment to sugar units where the molasses are significantly higher/lower than the all India weighted average price and that was the practice till 1995-96.

5. The respondent/authority has issued a notification on 21.11.97 called as the Sugar Price Determination for the year 1997-98 production order 1997 as per Annexure "A" As per the said order, the price per quintal of levy sugar in respect of the factories located at North West Karnataka was fixed at Rs. 972.27, in respect of sugar delivered into railway wagons and at Rs. 970.70 in respect of the sugar delivered into carts and lorries and other means of transport. Further, the said order has been amended vide order dated 17.7.98 by the Sugar Price Determination for 1997-98 Production Amendment Order 1998, under which the price of the levy sugar was fixed at Rs. 994.59 in respect of the sugar delivered into wagons and Rs. 993.02 in respect of sugar delivered into carts and lorries or other means of transport. According to the petitioner, during 1997-98 the petitioner's factory delivered to the respondent or its nominees about 5,07,787 quintals of levy sugar. Similarly for the period 1998-99 an order called the Price Determination for 1998-99 Season Production Order, 1998 dated 27.11.98 was issued wherein the price was fixed at Rs. 994.59 per quintal for the levy sugar in North West Karnataka delivered in railway wagons and in respect of levy sugar delivered through carts and lorries and other means of transport it was determined at Rs. 993.02 per quintals and the levy sugar price for 1998-99 was amended vide notification dated 29.11.99 as per Annexure "D" and during that period the petitioner has delivered to the respondent or its nominees 5,79,865 quintals of levy sugar. So, thus, according to the petitioner, up to 1995-96

determination of the cost of levy sugar and conversion of the levy sugar cost was depressed by taking credit for income realized by sale of molasses and by product, at the zonal average realization of molasses. The grievance of the petitioner is that while determining the price of levy sugar for different zones for the years 1997-98 and 1998-99 were depressed by All India average realization from molasses instead of zonal realization for the first time, as a consequence, there is an unjustified depression of price of levy sugar which has resulted in the heavy sugar loss to the petitioner's sugar factory and other factories located in the North West Karnataka. In determining the ex-factory levy sugar price for the year 1997-98 in respect of North West Karnataka the respondent has determined the cost of levy sugar per quintal as, cane price Rs. 695.79 per quintal, conversion cost Rs. 201.96 per quintal, return of the capital employed 120.29 per quintal, totaling to 1,018.04 per quintal; this amount was depressed by realization of sale molasses which is taken for the first time as uniform throughout the country at Rs. 25.02 per quintal whereas, the realization on sale of molasses on zonal basis as it was being hitherto done was at Rs. 20.08 per quintal, as such, the levy price of sugar for the year 1997-98 season determined in respect of North West Karnataka at Rs. 993.02 per quintal which is lower than the actual cost per quintal of Rs. 997.96. Even for the year 1998-99 season, the cost of levy sugar was similarly calculated by the respondents at Rs. 1,066.69 per quintal. It was also on the basis of All India Average of uniform amount of Rs. 58.41 per quintal from realisation of sale of molasses and ex-factory price was determined in respect of North West Karnataka at Rs. 1008.28, whereas, the average realization from the sale of molasses in North West Karnataka for 1998-99 was Rs. 49.11. According to them, the cost of levy sugar has been reduced from Rs. 9.30 per quintal and the cost of levy sugar ought to have been fixed at Rs. 1,017.58 and there is a loss of Rs. 9.30 per quintal. Thus, calculating the supply of levy sugar by the petitioner for the year 1997-98 and 1998-99 calculated the total loss suffered at Rs. 79.01 lakhs. The petitioner although made a demand of refixing the price of the levy sugar for the period 1997-98 and 1998-99 by taking only the realisation from molasses on the zonal basis and refixing the price of the levy sugar and to pay to the petitioner an additional amount of Rs. 25.08 lakhs and Rs. 53.93 lakhs for the period 1997-98 and 1998-99, the same has not been considered by the respondent.

6. In the statement of objections filed on behalf of the respondent it is stated that under the dual policy for sugar presently 15% of the total production of each factory is procured by Government controlled by ex-factory levy sugar prices for distribution through the public distribution system at a uniform retail issue price and the balance production is allowed to be sold in the open market as free sale sugar through the mechanism of monthly releases. The ex-factory price of levy sugar is fixed as per the provisions of Section 3(3C) of the Essential Commodities Act, 1955 having regard to the statutory minimum price notified for sugar cane, manufacturing cost of sugar i.e., conversion cost, the duty or tax if any payable or paid thereon, securing reasonable return on the capital employed. The

computation of levy sugar price is done as per the formula recommended by the expert body to whom the cost investigation of the sugar industry is entrusted from time to time. The cost schedule submitted by the Bureau of Industrial Costs and prices in January 1997 were valid for three sugar seasons from 1996 to 1999. The BICP has undertaken the investigation of the cost structure of sugar industry for recommending the basic cost schedules for the conversion charges to cover the subsequent three sugar seasons, but since the said committee expressed its inability, the matter was referred to Cost Accounts Branch, Ministry of Finance which is also equally professionally competent to take up such studies. This Cost Accounts Branch for conducting cost and pricing studies is the agency of the Central Government having a repository experience in cost and management and financial accountancy rendering professional assistance to the different ministries and Government agencies, as such there is no basic difference between the BICP and CAB. According to the respondent, the BICP has recommended the price adjustment factor on All India basis of Rs. 0.44 per quintal on sugar for every one rupee variation in the prices of molasses for adjustment in the levy price fixation the same was accepted by the Government of India and the sales realization from the molasses was adjusted on All India Basis at the time of levy price fixation for the year 1997-98 and 1998-99 seasons. For every one rupee per quintal realization from the sale of molasses, the levy price will be reduced by Rs. 0.44 paise per quintal of levy sugar. According to the respondent the Ministry had collected the data from the sugar factories regarding realization made by them during the sugar season from sale of molasses and there is a significant inter-se variation in the price of molasses from zone to zone. BICP said to have clarified as to variations in the recovery of molasses and their realizations amongst the various zones are concerned and there were differences not only from zone to zone, but also factory to factory within various zones. In that view of the matter an all India factor for every one rupee of molasses was given in the report sent to the Ministry of Food during January 97, as such, the adjustment for realization from molasses was made by adopting all India factor of Rs. 0.44 for the years 1997-98 and 1998-99 and the said report has been approved by the Cabinet Committee for Economic Affairs. The Cost Accounts Branch during February 2000 recommended the negative adjustment factor for molasses sales realization on zonal basis and the said report has been accepted by the Government and accordingly, the levy price for the year 1999-2000 and 2000-2001 sugar seasons have been fixed based on the negative adjustment of molasses realizations on zonal basis.

7. Heard the learned Counsel for the petitioner and the learned Addl. Central Government Standing Counsel representing the respondent.

8. In reiterating the averments made in the pleadings and in support of his arguments, the learned Counsel for the petitioner relied upon several decisions rendered by the Apex Court to contend that the isolation made in fixing the levy sugar price on the negative adjustment of the molasses sales realization for the period 1997-98 and 1998-99 on all India basis is against the settled principles

and the cost of molasses fixed per rupee is without any basis as there will be variation from factory to factory, area to area and zone to zone. Similarly the Central Govt. Standing Counsel in support of his argument reiterates the averments made in the statement of objector.

9. In the light of the arguments advanced, let me consider whether the fixation of levy sugar price for the period 1997-98 and 1998-99 on negative adjustment of realization of molasses on all India basis, contrary to the prevailing zonal basis, requires interference?

10. In the decision reported in Shri Malaprabha Co-op. Sugar Factory Ltd. Vs. Union of India and Another, in paragraph 36 of the judgment it is held thus:

36. Though in Sita Ram case AIR 1991 SCW 1760 (supra) the Court refused to reopen the earlier decisions it was on the ground that no material was brought to the notice of the Court to establish that the Central Government had not applied its mind to the price fixation. However, that decision does lay down that the price fixation could be challenged on the ground of unreasonableness or arbitrariness. In so far as the entire State of Gujarat was placed in a Zone along with Maharashtra and Goa without regard to the relevant conditions of yield recovery and availability of sugarcane as they materially differ, the price fixation must be held to be arbitrary. Even in Gujarat there are two Zones. The units in Saurashtra are to be placed in low recovery zones while those in South Gujarat are to be grouped in high recovery zones. Further, the capital cost of establishment of these units also materially differ. The High Court of Gujarat failed to appreciate this important aspect of the matter. In actualities, the cane growers were paid a higher price than the statutory minimum price. This is because the appellant-society had to pay harvesting and transport charges. This important factor ought to have been taken note of by the Government.

Further, in paragraph 68 it is held thus:

68 In M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others, it was observed thus:

Price fixation is in the nature of a legislative action even when it is based on objective criteria founded on relevant material. No rule of natural justice is applicable to any such order. It is nevertheless imperative that the action of the authority should be inspired by reason. Saraswati Industrial Syndicate Ltd. and Others Vs. Union of India (UOI), The Government cannot fix any arbitrary price. It cannot fix prices on extraneous considerations....

(d) It could be held that mere is sufficient compliance with Section 3(3C) if the Government had applied its mind to the factors mentioned in Clauses (a) to (d) of the said sub-section. What is essential is, the Government must apply its mind which is relevant to the determination of prices with due regard to the norms laid down in the said sub-section.

In the decision reported in Anakapalle Co-op. Agri. and Industrial Society Ltd.,

Vs. Union of India (UOI) and Others, it is held thus:

The fair price has to be determined in respect of the entire produce ensuring to the industry a reasonable return on the capital employed in the business of manufacturing sugar. The loss alleged to have resulted to some of the sugar producers cannot be attributed to the prices having been fixed zonewise. Further it is held therein that, the basis of a fair price will have to be built on a reasonably efficient and representative cross section on whose working cost schedules will have to be worked out and price determined by the Government u/s 3(3C) of the Act. The cost schedule must be such as would do justice to the weak and strong alike. There can thus be no doubt that there was ample and abundant justification for continuing and sustaining the zonal system.

In the decision reported in M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others, it is held that, "price is to be arrived at by a process of costing with reference to a reasonably efficient and economic representative cross section of manufacturing units and that it is imperative that the action of the authority in fixing the price should be inspired by reason, the Government cannot fix any arbitrary price and it cannot fix prices on extraneous considerations."

11. In the instant case, petitioner said to have suffered a loss to the tune of Rs. 79 lakhs and odd for having adopted the calculation on all India basis in fixing the levy sugar price for the period 1997-98 and 1998-99 and according to him, if the Central Government had adopted a policy on zonal basis to calculate the price of the levy sugar he would have gained an amount of Rs. 79 lakhs and the all India average of realization of molasses for determining the levy sugar price works out hardship to certain of the zones and after realising the mistake for the period 1999-2000 onwards the respondent has once again reverted to fix the levy sugar price on the negative adjustment of the molasses sales realization on zonal basis.

12. After determining the price of levy sugar per quintal produced, the said price is not reduced by the price of molasses realized per quintal but for every one rupee realized from the sale of molasses and the levy price is reduced by a factor called molasses factor and the figure fixed is at Rs. 0.44 for one rupee on all India basis. According to the petitioner, on zonal basis the figures works out to Rs. 0.39 for one rupee and there will be loss of about 5 paise per rupee when it is calculated on all India Basis. The BICP in its report during 1997 has recommended for the negative adjustment of molasses from zonal basis to all India basis and later on receipt of various representations from the apex bodies the matter was referred back to the BICP to recommend the negative adjustment factor for molasses sales realization on zonal basis as recommended earlier during the report of 1994. Later the Cost Accounts branch in its report for February 2000 recommended the negative adjustment factor for molasses sales realization on zonal basis. As submitted by the learned Counsel for the petitioner, the idea of switching over from all India basis to zonal basis, the negative

adjustment realization of molasses would give a more realistic levy sugar price and adopting the calculation on all India basis worked out hardship to him and also caused loss to the tune of Rs. 79 lakhs for the period 1997-98 and 1998-99 and the respondent/authority having realized the mistake has taken a decision to calculate the levy sugar price on negative adjustment of realization of sale of molasses on zonal basis from 1999-2000 onwards.

13. In the ratio laid down by the Apex Court in the decisions noted above any criteria that is adopted would not result in the loss to the units although the price fixation of levy sugar is in the nature of legislative action nevertheless the action of the authority should be inspired by reason when it is found that there is a variation from unit to unit. The ex-factory levy sugar price worked out by the respondent for the year 1997-98 and 1998-99 is said to be after taking into account the negative adjustment factor for realization of molasses on all India basis on such recommendation/approval by CAB and by the Cabinet Committee. It appears, the respondent/authority has taken a policy decision for the period 1997-98 and 1998-99 to calculate the levy sugar price on all India basis and subsequently after realizing that it does not work out practical solution, switched on to zonal basis from 1999-2000 onwards. Of course, such a decision taken by the apex bodies is on the basis of the report of the BICP and CAB respectively. If on the basis of policy matter to maintain uniformity in the country such a decision was taken for the said period to adopt all India basis and then on realising the mistake if the same is switched over to zonal basis as it worked out practical solution, when the petitioner is claiming that he suffered a loss to the tune of Rs. 79 lakhs for the period 1997-98 and 1998-99 and that has to be reimbursed to him, rather it would be difficult to say whether it squarely falls within the purview of the writ jurisdiction to consider the case of the petitioner to extend the prayer when such a policy decision has been taken as a matter of experiment on the uniformity basis and also as a matter of legislative action without there being any discrimination or arbitrariness. According to the respondents, when there is said to be no basic difference between BICP and CAB and CAB being the agency of the Government doing professional assistance to the different ministries and Government agencies, question of holding that report of CAB was considered by the respondents for the said period cannot be held to be bad or unreasonable.

14. Might be that some hardship would have been worked out to the petitioner during the said period. But, it may not be possible to issue direction to the respondent/authority to make good the loss caused to the petitioner based on the different decision taken by the respondent from time to time as it was a policy decision and also in the form of legislative action, unless it is shown that such a decision is wholly unreasonable. However, it is for the respondent/authority to consider the case of the petitioner, if permissible, in accordance with law.

15. Accordingly, petition is disposed of.