

(2004) 04 KAR CK 0005

In the Karnataka High Court

Case No : Writ Appeal No's. 7352, 7354 and 8220 of 1999

Ugar Sugar Works Limited (Distillery Unit)

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 16-04-2004

Acts Referred:

Karnataka Excise (Manufacture and Bottling of Arrack) Rules, 1987 — Rule 17, 31
Sale of Goods Act, 1930 — Section 9, 9 (1), 9 (2)

Citation : (2004) 5 KarLJ 525

Hon'ble Judges : Tirath S. Thakur, J;Huluvadi G. Ramesh, J

Bench : Division Bench

Advocate : G.V. Shantharaju, for Kesvy and Company in W.A. No. 8220 of 1999, Jayakumar S. Patil, in W.A. No. 7352 of 1999, Kaleemlla Shariff and Honnappa, in W.A. No. 7354 of 1999, for the Appellant; A.N. Jayaram, General, for the Respondent

Judgement

Tirath S. Thakur, J.—These writ appeals arise out of an order passed by a learned Single Judge of this Court whereby writ petitions filed by the petitioners-appellants have been dismissed and the demand raised against them upheld. The controversy arises in the following backdrop:

2. The appellants are carrying on business in the manufacture of Rectified Spirit in the distilleries established by them for that purpose. The spirit manufactured by the appellants is almost entirely used for the manufacture and bottling of arrack which is in turn regulated by the Karnataka Excise (Manufacture and Bottling of Arrack) Rules, 1987. Apart from the said Rules, the provisions of Karnataka Excise (Distillery and Warehouse) Rules, 1967 also makes several provisions regulating allotment of Rectified Spirit, its transportation, storage etc., Rule 31 of the said later set of Rules empowers the respondents to allot Rectified Spirit to the arrack manufacturers who take the delivery of the allotted quantity from the distilleries and use the same for the manufacture and bottling of arrack. The State has also been exercising the power to fix the price of Rectified Spirit supplied to the arrack manufacturers. In order however to rationalise the fixation

of price payable for the spirit supplied to the arrack manufacturers, the Government engaged the services of Sri G. Sudhakar Rao, a Chartered Accountant who was required to study the details and recommend an appropriate price structure for sale and purchase of Rectified Spirit and to submit a report in that regard. The Chartered Accountant appears to have selected three distilleries in the State which were according to him representative in character for purposes of determining the cost elements involved in the manufacture of Rectified Spirit. On the basis of the data collected by the Chartered Accountant, he submitted a report in which it was pointed out that the average cost of production of rectified spirit worked out to Rs. 6.01/- which left enough margin of profit to the units. The report submitted by the Chartered Accountant accordingly recommended that in the case of sugar units with captive distilleries manufacturing Rectified Spirit where transportation cost of molasses and sales tax on the same was not incurred, the Government could fix the price of Rectified Spirit at Rs. 5 per litre. In cases where distilleries manufacturing Rectified Spirit had to depend on supply of molasses from other sugar mills involving additional cost of transportation and sales tax on the molasses purchased by them, the price could go upto Rs. 6/- per litre.

3. Based on the above recommendations, the Government issued an order dated 12-5-1992 by which it fixed the price payable to captive and non-captive distilleries for the Rectified Spirit supplied by them from 1-3-1989 onwards. The relevant portion of the said order fixing the price for the period 1-7-1992 onwards reads as under:

"III The price of Rectified Spirit is fixed uniformly at Rs. 6/- (Six only) per litre. The Bottling Units in the district shall pay Rs. 6/- (Six only) to the Non-captive distilleries towards the cost of spirit. In case of captive distilleries, the Bottling Units shall pay Rs. 5/- (Five only) per litre to the distilleries and the balance of Re. 1/- (One only) per litre to the department, with effect from 1-7-1992, as per the report of the M/s. G.S. Rao and Company, Chartered Accountants and as recommended by the Excise Commissioner".

4. For the excise year 1993-94, the Government by its order dated 24-8-1998 on the representation made by Karnataka Breweries and Distilleries Association, raised the price of Rectified Spirit used in the manufacture of arrack to Rs. 8.50/- per litre uniformly for both captive and non-captive distilleries, It was in the above background, that a demand was raised against the appellant-Malaprabha Co-operative Sugar Factory Limited, for payment of Rs. 13,32,000/- representing the amount calculated at the rate of Re. 1/- per litre received by the said factory from the arrack manufacturers for being remitted to the Government in terms of Government Order dated 32-5-1992. Since the appellant-factory did not make the payment, a demand notice was issued against it which threatened coercive action for the recovery of the amount if the same was not paid. In W.P. No. 15099 of 1994 relevant to Writ Appeal No. 7352 of 1999, the appellant assailed the demand raised against it apart from a certiorari quashing Government Order

dated 12-5-1992 by which prices for the Excise Year 1992-93 had been fixed.

5. In W.P. No. 36275 of 1993 relevant to W.A. No. 8220 of 1999 also, the controversy relates to the payment and recovery of the price of Rectified Spirit at the rate stipulated in the impugned Government Order. The petitioner-Company has in the petition assailed its classification as a captive distillery inter alia on the ground that the Government Order does not provide any rational basis for classification of distilleries into captive and non-captive. A mandamus directing the respondents to treat the appellant as a non-captive unit was prayed for with a further direction to the respondents to release the balance amount of Re. 1/- per litre payable to it in terms of its representation dated 23-6-1992 addressed to the Excise Commissioner.

6. W.P. No. 7751 of 1993 relevant to W.A. No. 7354 of 1999 similarly seeks a mandamus directing the respondents to pay the rates applicable to non-captive distillery units for the quantity supplied by the petitioner to the arrack bottling units and to release the amount claimed by it in that regard, A certiorari quashing communication dated 2-11-1992 issued by the Deputy Commissioner of Excise has also been prayed for. By the said Communication, the petitioner has been asked to refund the amount erroneously paid to it by treating it as a non-captive distillery. The Communication also promised examination of the claim made by the appellant for being treated as a non-captive unit which claim has according to the petitioner not been examined or granted till date.

7. The above petitions came up for hearing before our esteemed brother V.K. Singhal, J., who dismissed the same by a common order dated 29-6-1999. The learned Single Judge was of the opinion that Rule 17 of the Karnataka Excise (Manufacture and Bottling of Arrack) Rules, 1987, could not be said to be beyond the rule making power of the State having regard to the decision of the Supreme Court in Bihar Distillery and Another Vs. Union of India (UOI) and Others, , and Vam Organic Chemicals Limited and Anr. v. State of Uttar Pradesh and Ors., 1997(43) Kar. LJ. 243 (SC), (1997)2 SCC 716, 1997(1) Supreme 550, 1997 Scale 361. The Court also rejected the contention that the classification of units for purposes of fixing the price payable to them was not based on any intelligible differentia. The contention that the State could not either demand or retain the sum of Re. 1/- per litre in terms of the Government Order dated 12-5-1992 too was rejected while dismissing the writ petitions. The present appeals call in question the correctness of the said order as already noticed earlier.

8. Appearing for the appellants, Mr. Jayakumar S. Patil strenuously argued that the decision of the Single Judge of this Court in Gowri Industries Vs. State of Karnataka, ; having declared Rule 17 of the Karnataka Excise (Manufacture and Bottling of Arrack) Rules, 1987, to be unconstitutional, the Government could not invoke the said provision for fixing the price of Rectified Spirit sold to arrack manufacturers. It was further contended that the decision of the Supreme Court in Bihar Distillery's case, was no longer holding good in the light of the judgment of their Lordships in Deccan Sugar and Abkari Company Limited v. Commissioner

of Excise, Andhra Pradesh, (2004)1 SCC 243. The Supreme Court had in the said case reiterated the decision rendered by it in *Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others*, , and held that the State Government could levy excise duty only on potable liquor fit for human consumption. Since Rectified Spirit did not fall in that category, the State Legislature could not impose any excise duty on the same. Alternatively it was submitted that even if the Government had the power to fix the price of Rectified Spirit, the same could not be exercised in an arbitrary or fanciful manner by bringing about an artificial classification like the one in the instant case. It was also argued that petitioner in W.P. No. 7751 of 1993, had made a representation for being classified as a non-captive unit and supported the said claim by furnishing particulars which the authorities had promised to consider but had failed to do so.

9. Mr. Shantha Raju, learned Senior Counsel appearing for the appellant in W.A. No. 8220 of 1999 argued that so long as molasses which was the raw material for the manufacture of Rectified Spirit was controlled under statutory regulations, the so-called captive distilleries could not without an appropriate allotment in its favour make use of the same no matter it was being produced or was available within the sugar factory itself or at a short distance from the distillery. The very basis on which the classification was made was according to the learned Counsel erroneous and unsustainable.

10. Learned Advocate General appearing for the respondents on the other hand argued that the classification of distilleries into captive and non-captive was perfectly justified and was based on an intelligible differentia that distinguished the two. He submitted that the distilleries that did not have to bear any transportation charges on account of carriage of molasses from the sugar factory to the distillery and which did not have to bear any additional burden towards taxes on such raw material could not claim a similarity in treatment with other distilleries which had to bear such additional burden. The difference in the prices payable to the distilleries was therefore clearly related to the cost of production which the Chartered Accountant had determined on the basis of statistics made available to him. It was also argued that the appellants were not entitled to question the authority of the State to fix the prices of Rectified Spirit having sold the quantities produced by them without demur. Any challenge whether the same was to the power of the State Government to classify or fix the prices should have been raised before the distillery made the supply. Having agreed to supply the quantity allotted against its unit, it must be assumed that the distillery had given up the right to protest which it cannot now belatedly offer. On the merits of the contention urged on behalf of the appellants, he submitted that the State's authority to regulate the price of arrack manufactured by its bottling units was undisputed and that the price fixed by the State was relevant as much to the bottling unit as it was to the distillery from where the spirit was to be lifted. The power to regulate and control the sale and manufacture of arrack which included the power to fix its price was admittedly available to the State and so was the power to regulate production and transport of Rectified Spirit to ensure that it did

not get misused or misdirected for use not otherwise unauthorised.

11. Three main questions arise for consideration. These are:

(1) Whether the classification of Distilleries into captive and non-captive units is based on any intelligible differentia?

(2) Whether the Distillery can be allowed to raise the question of price payable to them for the supply of rectified spirit to arrack manufacturers after such supplies have been made without registering a protest?

(3) If the answer to Question No. 2 be in the affirmative, whether the State's power to fix prices extends to rectified spirit produced by the petitioner-Distilleries?

Re: Question No-1.--

12. The need for classifying distillery into captive and non-captive appears to have arisen because of the fact that the cost of production of rectified spirit by the Distillery depends upon whether the Distillery has the raw material in the form of molasses available at its doorstep or has to purchase and transport the same from other sugar mills. The report submitted by the Chartered Accountant engaged by the Government to study the price structure suggested that where a distillery has set up a sugar factory as one of its units and therefore has the advantage of getting molasses without any additional cost being incurred on transportation and payment of taxes, the cost of production of rectified spirit is lesser in comparison to another distilleries which does not have such advantages and therefore depends upon purchase of molasses from other sugar mills either wholly or substantially apart from incurring additional burden on account of taxes payable on such raw materials. The whole object underlying the exercise of fixation of prices was to ensure that the difference in the cost of production of rectified spirit does not undeservedly go to the distillery or for that matter to the arrack contractor. At the same time, the Government was keen to ensure that the arrack contractors received the supplies of rectified spirit at a uniform price so that the sale price of arrack was uniform irrespective of whether the spirit used was supplied from one distillery or the other. Suffice it to say that the price fixed for the spirit produced by the distilleries has a direct nexus with the cost of production incurred by the distilleries. Since the cost of production was not uniform and varied to the extent the captive units were not incurring any expense towards transportation of molasses and payment of taxes on the purchase thereof from other sugar factories, the classification between captive and the non-captive units though loosely described could not be said to be either unrealistic or without any intelligible differentia. So long as there was a rational basis for distinguishing the price payable to one distillery from that payable to the other distillery, the classification for purposes of such payment did not suffer from any illegality. The petitioners have not made any attempt to dispute the basis on which the cost of production was worked out by the Chartered Accountant. This implies that the basis on which the cost was worked out was

sound. If that be so, the conclusion arrived at by the Chartered Accountant that the cost of production was lower in the case of captive units in comparison to non-captive units cannot be faulted. The classification had an evident nexus with the object behind the same namely supplying rectified spirit to the bottling units at a cost that was uniformly applicable to both of them and to ensure that the cost of potable bottled arrack is the same regardless whether it is made out of spirit supplied by a captive or a non-captive distillery. Question No. 1 is therefore answered in the affirmative.

Re: Question No. 2.--

13. It was contended on behalf of the respondents that the petitioner-distillery having supplied rectified spirit manufactured by them without demur on the terms stipulated in the Government Order cannot turn around and question the validity of the same nor can it demand a higher price than the one stipulated in the Order. The petitioners could not approbate or reprobate by accepting the orders placed on them for supply on the one hand and demanding a higher payment for the same on the other.

14. The distilleries had at no stage before making of the supply of the allotted quantity of rectified spirit raised the question of price payable to them for the same. It is not the case of the petitioner that the distilleries were coerced to make supplies against their will by any arm-twisting methods or by use of any other coercive measures. The supplies were without any protest or demur till long after the same a claim for payment of higher amount towards consideration was lodged. There was in the circumstances no real justification for the petitioners to demand more than what the arrack contractor had been asked to pay or had paid. Even in cases where the payment was made at a rate higher than the one admissible to the distillery, the excess of Re. 1/- per litre in the case of captive units was made on the specific understanding that the said excess shall be remitted to the Government. The distilleries were all aware of the price fixed by the Government in terms of the impugned Government Order at all relevant points of time. That being so, it is difficult to appreciate how the seller could after the sale was complete by delivery of the goods sold demand that he had the right to recover a higher sale consideration. Section 9 of the Sale of Goods Act, 1930, which deals with ascertainment of price envisages the fixation of a price in a contract of sale either by the contract or to be fixed in a manner thereby agreed or to be determined by the course of dealing between the parties. In cases where price is not determined in accordance with Sub-section (1) of Section 9, the buyer is in law bound to pay only a reasonable price to the seller. What is reasonable being would depend upon the circumstances of each case. The supplies made by the appellant-distilleries had not left the price to be determined separately or by the course of dealings between the parties. The contracts of sale of rectified spirit between the distilleries and the arrack contractors were conditioned by the fact that the price payable to the seller would be limited to Rs. 5 per litre in the case of captive distilleries and Rs. 6 per

litre in the case of non-captive units. Deposit by the purchaser of any amount in excess of Rs. 5 per litre in the case of captive units was to enure for the benefit of the Government. The arrack contractors who made such deposits were doing so on behalf of the Government as its representatives. The question of leaving the price payable by such purchasers undecided therefore did not arise nor was there any doubt about the price payable by the purchaser. In the circumstances, with the supply of the rectified spirit pursuant to the contracts of sale between the distilleries and the bottling units, a completed sale on the payment of what was stipulated in the Government Order as the price had taken place. The question of changing the terms of any such sale after the same was complete did not therefore arise nor does the law permit the seller to raise a demand for a higher price after the goods had been delivered unconditionally.

15. Even assuming that there was no real settlement of price between the sellers and the bottling units purchasing the stocks nor was there any understanding that price shall be determined by the course of dealings between the parties, all that the distilleries would be entitled towards price would be a reasonable amount within the meaning of Section 9 of Sub-section (2) of the Sale of Goods Act, 1930. The Government had on the basis of data collected by a qualified Chartered Accountant come to the conclusion that in the case of captive distilleries, the reasonable amount payable would be Rs. 5 per litre whereas in the case of non-captive units, the amount would go upto Rs. 6 per litre. Except the petitioners-appellants before us, the remaining units manufacturing rectified spirit had no difficulty in accepting the said amount as the price representing supplies made by them. In the absence of any compelling reason, we see no justification for the appellants claiming a higher amount than what was stipulated by the Government and accepted by the distilleries as the price reasonably payable for the product sold by them.

16. There is apart from the above, yet another angle from which the controversy may be viewed. The appellant-distilleries have relying upon the decision of this Court in *Gowri Industries case*, *supra* argued that the Government had no power to fix the sale price of rectified spirit. If that was so, the appellants were duty-bound to speak up the moment they were required to supply the allotted quantity of rectified spirit on receipt of price as fixed in the Government Order. They could argue that the Government has no power to fix the prices or that the amount fixed was not acceptable to them. They did not admittedly do so. On the contrary, they without demur started making the supplies on deposit of the price as stipulated in the Government Order. Having thus kept quiet and sold their goods, they by their conduct made a representation to the purchasers that they were agreeable to make the supply on the price offered to them. It is fairly well-settled that a representation constituting an estoppel may be made by any of the means available for the expression and communication of thought. Apart from being expressed in language either written or spoken, representation may be made even by silence or inaction. George Spencer Bower and Turner have in their book "The Law Relating to Estoppel by Representation" while dealing with

representation by silence or inaction elucidated the theory in the following words:

"The parties to a transaction are entitled to assume, as against one another, *omnia praesumuntur rite esse acta*; each of them is entitled to suppose that the other has fully discharged all such obligations (if any) of disclosure or action towards himself as may have been created by the circumstances. If, therefore, he receives from that other no intimation, by language or conduct, of the existence of any fact which, if existing, it would have been the latter's duty, having regard to the relation between them, the nature of the transaction, or the circumstances of the case, to reveal, he has legitimate ground for believing that no such fact exists, or that there is nothing so abnormal or peculiar in the nature of the transaction, or in the circumstances of the case, as to give rise to any duty of disclosure, and to shape his course of action on that assumption; in other words, he is entitled to treat the represent or's silence or inaction as an implied representation of the non-existence of anything which would impose, or give rise to, such a duty, and if he alters his position to his detriment on the faith of that representation, the represent or is estopped from afterwards setting up the existence of such suppressed or undisclosed fact".

17. Silence on the part of the distilleries while making the supplies may even tantamount to a declaration to the opposite party viz., the arrack contractors that the distilleries have by their silence decided to adopt a particular course or attitude namely that they have chosen to make the supply on the rates stipulated by the Government. Any such election for one of the two courses available would estop the distilleries from resorting to the alternative course or attitude at a subsequent point of time.

18. Suffice it to say that both from the point of view of the right to demand a price in terms of the Sale of Goods Act as also from the point of view of estoppel by conduct and representation, the distilleries have disentitled themselves to demand a higher price than what was stipulated in the Government Order. Their claim for payment of a higher amount in cases where they have received less or their failure to reimburse to the Government the excess where they have received more is not therefore legally sustainable. Question No. 2 is in that view answered in the negative.

Re: Question No. 3.--

19. In the light of the answers to questions 1 and 2 above, it is unnecessary to examine this question although learned Counsels for the parties had argued at some length the extent and the nature of power exercisable by the State Government vis-a-vis rectified spirit. All that need be said is that the Supreme Court has in *Deccan Sugar and Abkari Company Limited's* case, answered the reference made by a two Judges Bench of the said Court and held that the State can levy excise duty only on potable liquor fit for human consumption and that since rectified spirit does not fall under that category, the State Legislature cannot impose any excise duty on the same. The reference order in *Deccan*

Sugar's case reported in Deccan Sugar and Abkari Co. Ltd. Vs. Commissioner of Excise, A.P., ,, had pointed out a certain amount of conflict between the decisions of the Supreme Court in Synthetics and Chemicals Limited's case and Bihar Distillery's case. The larger Bench has reiterated the view taken by their Lordships in Synthetics and Chemicals case, without advertng to the latter decision rendered by their Lordships in Bihar Distillery's case. The legal position as settled in terms of these decisions may therefore suggest that the State Government does not have any authority to levy any excise duty on rectified spirit as the power of the State is limited to levy of such duty only on potable liquor fit for human consumption. Since rectified spirit does not according to the decision in Deccan Sugar's case answer that description, the State's power to levy any excise duty on such liquor is doubtful and so according to the appellants is the power of the State to fix sale price of rectified spirit. We do not think it necessary to examine in detail the several angles that were argued before us by learned Counsels for the parties in this regard especially the submission made by learned Advocate General that even when the State Government has no power to levy excise duty on rectified spirit, it has the authority to regulate the manufacture, transportation and use of rectified spirit to ensure that the same is not diverted for purposes of consumption by human beings. The correctness of these arguments can in our opinion be more appropriately left to be examined in some other appropriate case especially when the fate of the present appeals stand determined by the answers given by us to earlier two questions formulated above.

20. We may before parting deal with the grievance made by appellant in W.A. No. 7354 of 1999. It was contended by M/s. Patil and Shariff that the appellant had been wrongly classified as a captive unit. It was submitted that a representation had been made by the said appellant to the authorities pointing out that it was purchasing molasses from six units from outside and therefore qualified for being treated as a non-captive unit. The receipt of this representation had been acknowledged by the respondents and an assurance given that the same would be looked into but no action had been taken by them in that direction. A mandamus directing the respondents to examine the representation and the claim for being classified as non-captive was therefore prayed for.

21. Learned Advocate General had no objection to a mandamus as prayed for being issued. He submitted that the competent authority would within the time stipulated by this Court examine the claim made by the appellant for being classified as a non-captive unit and take a decision under intimation to the appellant. That submission in our opinion should sufficiently satisfy the appellant.

22. In the result, the Writ Appeal Nos. 8220 and 7352 of 1999 fail and are hereby dismissed. W.A. No. 7354 of 1999 is however allowed but only to the extent that the competent authority shall examine the claim made by the appellant in that case for being classified as a non-captive unit within a period of

three months from the date a copy of this order is served upon it by the appellant. The parties are left to bear their own costs.