
(2013) 08 PAT CK 0001
In the Patna High Court
Case No : CWJC No. 1747 of 2013

United Breweries Limited

APPELLANT

Vs

The Bihar State Beverage Corporation Limited and Others

RESPONDENT

Date of Decision : 19-08-2013

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 226

Citation : (2014) 2 ARBLR 271 : (2013) 4 PLJR 741

Hon'ble Judges : Rekha Manharlal Doshit, C.J; Ashwani Kumar Singh, J

Bench : Division Bench

Advocate : Jitendra Singh and Satyabir Bharti, for the Appellant; Lalit Kishore and Girijesh Kumar, for the Respondent

Judgement

Rekha Manharlal Doshit, C.J.—This petition under Article 226 of the Constitution is filed by United Breweries Limited (hereinafter referred to as "the Company"), a Company registered under the Companies Act, 1956, engaged in manufacture of beer under different brand names. The petitioner has approached this Court against the alleged highhanded action of the respondent-Bihar State Beverage Corporation Limited (hereinafter referred to as "the Corporation") in charging extension fee, cancellation fee, demurrage etc. in respect of the offer for supply of a quantity of beer not accepted by the Company. It appears that the procurement and supply of liquor in the State of Bihar is controlled by the State of Bihar. In 2006, the State of Bihar established the respondent-Bihar State Beverage Corporation Limited, a company registered under the Companies Act, 1956 to regulate the procurement and supply of liquor in the State of Bihar; to control the supply and sale of illicit liquor; to control the exploitation of the consumers and to generate revenue for the State. It is not in dispute that the Corporation is wholly owned by the State of Bihar and is a "State" within the meaning of Article 12 of the Constitution. For procurement of liquor on large scale, the Corporation has framed "Liquor Sourcing Policy 2008-09" (hereinafter referred to as "the LSP 2008-09"). The policy is still in operation. It is not in dispute that the Corporation acts as a wholesaler in the State of Bihar and enjoys

monopolistic privileges. Any manufacturer wishing to sell its product's in the State of Bihar has to sell it to the Corporation and the Corporation sells it to the retail sellers licenced to make retail sale of the liquor to the consumers. Thus, the procurement, storage, retail supply and pricing of the liquor is wholly controlled by the Corporation.

2. Under the said LSP 2008-09, the Corporation has determined the terms and conditions, procedure etc. for sale of liquor to the Corporation.

3. Having regard to the LSP 2008-09, we can say in a nutshell that it is the Corporation which assesses the demand for various brands of liquor in the State of Bihar; the Corporation receives offer for sale from manufacturers/suppliers; the Corporation determines the price and the location for bulk supply and places order for supply to the manufacturers/suppliers. For default in supply within the time specified, the supplier is charged with certain fees. If the supply is not consumed within the specified period, the supplier is charged with certain demurrage. The terms and conditions for bulk purchase and supply forms part of the LSP 2008-09. The said agreement also includes arbitration clause.

4. The Company has no dispute in respect of the above referred terms and conditions under the LSP 2008-09. The dispute relates to the demand of the Corporation for bulk supply of liquor which the Company had not offered to sell/supply and the amount of extension fee, cancellation fee and the demurrage charged by the Corporation for non-supply of unsolicited orders.

5. Learned counsel Mr. Jitendra Singh has appeared for the Company. He has taken us through the terms and conditions under the LSP 2008-09. He has submitted that the Company and its subsidiaries manufacture beer at the breweries situated in various parts of the country and sell their products under various brand names. Certain brands of the beer manufactured by the Company are very popular and have a great demand all over the country. In the State of Bihar also, the brands of the Company have a great demand. The Company, depending upon its capacity to supply and demand in the State of Bihar, offers to sell specified quantity of its beer to the Corporation. Pursuant to the said offer, the Corporation issues Order For Supply (hereinafter referred to as the OFS"). He has submitted that in the financial year 2011-12, pursuant to the offer for sale made by the Company, the Company received certain OFS issued by the Corporation. The Company did honour the said orders for supply. However, over and above, the Corporation issued unsolicited OFS for a large quantity of beer which the Company could not honour. Nonetheless, the Company did make an effort to honour part of such unsolicited OFS but not the entire quantity. Although the OFS were issued without there being an offer for sale by the Company; although the Company did not accept such OFS, the Corporation of its own action extended the validity period of the said unsolicited OFS and charged the huge amount as extension fee and the cancellation fee. In case of unsolicited OFS honoured by the Company, the Corporation charged a huge amount as demurrage.

6. In the submission of Mr. Jitendra Singh, the terms and conditions under the LSP 2008-09 would apply in case of OFS solicited by the Company and not in case of unsolicited OFS issued by the Corporation.

7. In support of his submissions Mr. Jitendra Singh has relied upon the judgments of the Hon''ble Supreme Court in the matters of Puran Singh Sahni Vs. Sundari Bhagwandas Kripalani (Smt) and Others, of ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, of Kerala Samsthana Chethu Thozhilali Union Vs. State of Kerala and Others, of Karnataka State Forest Industries Corporation Vs. Indian Rocks, ; and of this Court in the matter of United Breweries Limited v. The State of Bihar & Ors., (2009 (3) BBCJ 668).

8. In the matter of Puran Singh Sahni (supra), the Hon''ble Court held, "the intention of the parties to an agreement has to be gathered from the terms of the agreement construed in the context of surrounding, antecedent and consequent circumstances. The crucial test would be what the parties intended."

9. In the matter of ABL International Ltd. (supra), the Hon''ble Supreme Court emphasized upon the principle of fair play by the State Government even in the contractual matters. Although the dispute arose from a contractual relation between the parties, one of the parties being State, the Hon''ble Court held, "Merely because the first respondent wants to dispute this fact, in our opinion, it does not become a disputed fact. If such objection as to disputed questions or Interpretations is raised in a writ petition, in our opinion the courts can very well go into the same and decide that objection if facts permit the same as in this case". The Court citing the judgment of the Hon''ble Supreme Court in the matter of Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, , held, "it is clear that when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution..... In such factual situation, we are of the opinion, the facts of this case do not and should not inhibit the High Court or this Court from granting the relief sought for by the petitioner."

10. The same principle is reiterated in the matter of Karnataka State Forest Industries Corporation (supra). The Court held, "Although ordinarily a superior court in exercise of its writ jurisdiction would not enforce the terms of a contract qua contract, it is trite that when an action of the State is arbitrary or discriminatory and, thus, violative of Article 14 of the Constitution of India, a writ petition would be maintainable."

11. In the matter of Kerala Samsthana Chethu Thozhilali Union (supra), a similar view was expressed by the Hon''ble Supreme Court. The matter was in relation to the control of the Kerala Government over the sale of liquor in the State of Kerala exercised through Kerala Abkari Shops Disposal Rules, 2002 framed under the Abkari Act, 1902, The Court held, "The State while parting with its exclusive

privilege cannot take recourse to the said doctrine having regard to the equity clause enshrined under Article 14 of the Constitution. The State in its dealings must act fairly and reasonably. The bargaining power of the State does not entitle it to impose any condition it desires."

12. In the matter of United Breweries Limited (*supra*), a similar issue of maintainability of the writ petition was raised by the respondent-Corporation. This Court held, "the impugned decision of the Corporation was without any provision of the Act, Rules or the contract between the parties, was an arbitrary exercise of power. The High Court was free to interfere in exercise of power under Article 226 of the Constitution even in contractual matters."

13. The petition is contested by the Corporation. Learned Principal Additional Advocate General Mr. Lalit Kishore has appeared for the Corporation. He has submitted that the agreement for sale/purchase of liquor forms part of the LSP 2008-09. All the terms and conditions contained in the said LSP 2008-09 would govern the supply or purchase of liquor to/by the Corporation. He has submitted that at the relevant time, the Company had demanded enhancement in the price of the beer sold by it to the Corporation. With a view to pressurising the Corporation in enhancing the price of the beer, the Company stopped supply to the Corporation. The action of the Company was not only mala fide or oppressive; it also threw the retail market in disarray. He has submitted that the action of the Corporation in issuing the OFS, in charging the extension fee/cancellation fee/demurrage, is all within the terms and conditions of the agreement and cannot be challenged in the present petition filed under Article 226 of the Constitution. He has submitted that the parties having agreed to an arbitral agreement, the dispute, if any, has to be referred for arbitration. Mr. Lalit Kishore has also submitted that the petition suffers from the vice of mis-joinder of causes of action. The Company has not only raised the dispute in connection with the fees and charges debited to its account, but has also brought in the matters relating to the other companies and suppliers. May be, such companies are the subsidiaries/the sister concerns of the Company, but for supply contract such suppliers are independent legal entities. Mr. Lalit Kishore has vehemently argued that the Corporation has, under the LSP 2008-09, an unfettered right to issue OFS for any quantity of liquor and the Company is bound to honour the same.

14. To buttress his submissions that the charging of extension fee, cancellation fee and demurrage are all within the terms and conditions of the agreement, Mr. Lalit Kishore has heavily relied upon paragraphs 6.5 and 6.8 of the LSP 2008-09. In support of his submissions, Mr. Lalit Kishore has relied upon the judgment of the Hon'ble Supreme Court in the matter of Radhakrishna Agarwal and Others Vs. State of Bihar and Others,

15. The above matter arose from the claim for damages made by the appellant against the State of Bihar for breach of contract for processing of sal seeds and extraction of oil therefrom. The Hon'ble Supreme Court upheld the decision of

the Patna High Court. The Court observed, "In the cases before us the contracts do not contain any statutory terms or obligations and no statutory power or obligation which could attract the application of Article 14 of the Constitution is involved here. Even in cases where the question is of choice or consideration of competing claims before an entry into the field of contract facts have to be investigated and found before the question of a violation of Art. 14 could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Art. 226 of the Constitution. Such proceedings are summary proceedings reserved for extraordinary cases where the exceptional and what are described as, perhaps not quite accurately, "prerogative" powers of the Court are invoked. We are certain that the cases before us are not such in which powers under Art. 226 of the Constitution could be invoked."

16. Mr. Jitendra Singh has admitted that under the agreement any dispute is referable to the arbitration by a sole arbitrator who will either be the Managing Director of the Corporation or any officer of the Corporation nominated by the Managing Director. He has submitted that the matter at dispute is outside the purview of the LSP 2008-09. The petition under Article 226 of the Constitution is maintainable.

17. We are alive to the arbitral agreement existing between the parties. The parties are bound by such arbitral agreement. Any dispute in respect of the liquor/beer supplied by the Company will have to be resolved by reference to the arbitrator. But in our opinion, a larger issue is raised in the present petition. We are called upon to consider whether the Company was under obligation to supply the liquor more than the quantity offered for sale, on demand by the Corporation; whether non-supply against such additional/unsolicited demand would create a liability under the LSP 2008-09. In other words, we are called upon to examine the action of the Corporation, a State within the meaning of Article 12 of the Constitution, in charging various kinds of fees in respect of unsolicited OFS. Whether the action of the Corporation is fair, just and reasonable, taken in accordance with the terms of the contract. Whether the Corporation has traveled beyond its authority under the contract and has acted unfairly, arbitrarily or against the public interest. The matter calls for intervention by the High Court without entering into the niceties of the accounting between the parties.

18. We have closely examined the LSP 2008-09. The paragraphs relevant for our purpose are:

6.1. Manufacturers/Suppliers to the Corporation shall be based on the OFS issued by it. The Corporation shall issue OFS based on the stock requirement of depots after duly considering the quantity held, the sales trend and requests of the manufacturer/supplier, if any. To facilitate the process, the manufacturer/supplier

may indicate the requirement of its brands and pack sizes in various depots. However, the Corporation reserves its right to decide the quantity for which OFS can be issued. Special requests or difficulties faced by manufacturers/suppliers regarding issue of OFS may be addressed to the M.D., BSBCL.

6.2. This Corporation will be under no obligation to procure any specified minimum quantities of any brand of FMFL/IMFL/BEER/WINE during the period of currency of the contract. The quantity to be procured from time to time shall depend upon the demand for the product. Further, the Corporation shall not be under any legal compulsion to procure all or any brands produced by a particular manufacturer/supplier, simply because they have signed this Agreement and have made an offer.

6.3. The Corporation will ordinarily indent based on the actual sales of the previous month. In respect of brands with low volume of sales the Corporation will consider the eligibility depot-wise/size-wise to meet requirements. The supplier/manufacturer should, as requested by the Corporation, shift the stocks from one depot to another at its own cost and risk. The closing stocks of any brand at any depot shall not normally exceed the quantity anticipated to be sold in 15 days.

6.4. Two copies of the OFS will be issued for the exact quantity that the supplier/manufacturer proposes to transport. It is, therefore, imperative that manufacturers/suppliers indicate their dispatch plan for issue of OFS. The OFS shall be signed by either of the authorized signatories of the Corporation, whose specimen signatures may be seen in Annexure-8 (page-33).

6.5. The OFS would indicate the validity date within which the manufacturer/supplier should complete the delivery. If a manufacturer/supplier does not honour the quantity indicated in the OFS within the validity period, then the order for the remaining quantity shall lapse automatically. The Corporation may, at its discretion, extend the validity of the OFS and manufacturer/supplier shall honor the OFS within the extended validity period without fail. However Corporation shall charge a fee for extending validity of each OFS as under:--

(1) For first 3 days or part thereof-- Rs. 500/- per OFS.

(2) For every next 3 days and part thereof Rs. 1,000/- per OFS.

However, these rates may be revised by the MD from time to time.

6.8. In case the supplies are not effected against any OFS and the same is submitted to Corporation for cancellation, the same shall be cancelled on payment of a fee of Rs. 1,000/- per OFS. And if the cancellation request is submitted after the validity date, the fee mentioned in the clause 6.5 shall be charged from the supplier in addition to the cancellation charges.

However, these rates may be revised by the MD, BSBCL from time to time.

10.4. Inactive stocks shall be charged a demurrage of Rs. 2 per carton box per

day. The demurrage charge shall be computed on the basis of carton box days (i.e. one carton box of an inactive item stored for one day is termed as a carton box day and would attract a demurrage of Rs. 2/-) and adjusted against the payments due to the manufacturer.

19. On examining the scheme and the terms and conditions under the LSP 2008-09, it is apparent that it is the manufacturer who will approach the Corporation to offer its products for sale. On receipt of such offer the Corporation will, depending upon the demand in the retail market, place an order for supply. The manufacturer then is supposed to supply the liquor, according to the specification of quantity, time, location etc. mentioned in the OFS. Thus, the contract for sale is complete on the Corporation issuing OFS.

20. The matter before us is reverse. The OFS were issued by the Corporation for the quantities beyond the offer for sale made by the Company. In other words, offer to purchase was initiated by the Corporation; unless such offer for purchase were accepted by the Company a completed contract did not take place. That is exactly the situation before us. Admittedly, the Corporation issued OFS for the supply of liquor more than what was offered by the Company for sale. Thus, the offer was generated by the Corporation. Part of the said offer was accepted by the Company by honouring some of the OFS and by supplying the quantity of liquor which was not originally offered for sale.

21. In our opinion, the Company having accepted the offer for supply; having supplied the quantity mentioned in the OFS, the contract was complete and such contract would be governed by the terms and conditions of the LSP 2008-09. Any dispute relating to the price payable or the fees or demurrage charged by the Corporation would be required to be resolved by reference to the arbitration agreed upon by the parties.

22. The unsolicited OFS not honoured by the Company, in our opinion, did not result into a completed contract. In absence of a completed contract between the parties neither of the parties would be bound by the terms and conditions of the LSP 2008-09. Neither the Company would be liable, nor any rights or liabilities were created under the LSP 2008-09.

23. Under the Law of Contracts, no rights or liabilities would be created between the parties unless the contract is complete between the parties. Nothing in the LSP 2008-09, particularly the terms and conditions mentioned above, provides for the Corporation issuing unsolicited OFS which would be binding to the Company or for that matter any manufacturer or supplier. True, the character of the Corporation is monopolistic but it does not have an enforceable right to demand supply which the manufacturer has not offered for sale or the manufacturer is not ready or willing to sell.

24. If the Corporation were permitted to charge fees in respect of unsolicited OFS, as has been done in the present case, the Corporation would be tempted to generate revenue by acting as Shylock and claiming its pound of flesh.

Corporation will unnecessarily issue OFS, if not honoured will generate revenue in the form of extension fee/cancellation fee; if honoured will generate revenue in the form of demurrage. To avoid such an eventuality, the High Court has to step in, in exercise of its extraordinary power under Article 226 of the Constitution.

25. In our opinion, in absence of a completed contract, the action of the Corporation in issuing unsolicited OFS; in extending the validity period of such OFS and cancelling such OFS are of no consequence. Neither the Company was under any obligation to honour such OFS; nor to supply the specified quantity of liquor; nor it is under any obligation to pay extension fee or cancellation fee for such unsolicited OFS. The petition is allowed to the aforesaid extent. Legal consequences shall follow.

Ashwani Kumar Singh, J.

I agree.