

(2009) 05 PAT CK 0050

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 2031 of 2009

United Breweries Limited

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 08-05-2009

Acts Referred:

Citation : (2009) 05 PAT CK 0050

Final Decision : Allowed

Judgement

J.B. Koshy, C.J.—The challenge in this writ application is against the order of the Managing Director of the Bihar State Beverages Corporation Ltd ("the Corporation", in short) directing recovery of amounts from the running business of the petitioner for payment of the same to the fifth respondent. According to the petitioner, the order is unfair, arbitrary, unreasonable, intended to enrich the fifth respondent without any authority of law, without jurisdiction and against the provisions of the Liquor Sourcing Policy ("the Liquor Policy", for brevity).

2. The Corporation was established by the State Government as a fully owned Government company entrusted with the monopolistic privilege of wholesale supply of liquor in the State of Bihar. The Corporation had framed its own policy and incorporated terms and conditions in the agreement executed between the manufacturers and suppliers of liquor. Annexure - 1 is the liquor policy of 2006 which was executed by the petitioner and the fifth respondent. As per the agreement, the terms and conditions incorporated in the agreement are binding on the parties. The petitioner and the fifth respondent are engaged in the manufacture and supply of reputed brands of beer in the State of Bihar. Since the Corporation was entrusted with the exclusive privilege of wholesale supply of all kinds of liquor in the State of Bihar and is licensed under Form I of the Bihar Excise Act, the petitioner and the fifth respondent, as per the agreements entered into between them, are bound to supply branded beer only to the Corporation. On 26.9.2006, the petitioner, to meet its ever-growing demand of its beer brands like Kingfisher, entered into an agreement with the fifth

respondent to manufacture/bottle UBL brand, in accordance with the terms and conditions therein. The said agreement was amended incorporating certain relevant conditions on 28.12.2006, as is evident from Annexure - 2. On the basis of the agreement, the fifth respondent was authorised to manufacture beer by using the trade marks of the petitioner. The amended Clauses (1) and (2) of the agreement are as follows:

1. VARIABLE COST:

In addition to the retention for fixed cost (including power and fuel cost) by the Brewer, UBL shall reimburse the BREWER actual Variable Cost incurred on account of Raw Materials, Packing Materials, Bottles, Chemicals, Consumables and Water Charges.

It is agreed that Wastages shall not exceed the norms prescribed and agreed upon as mentioned in Annexure 1. Any Wastage in excess of that prescribed shall be compensated by the Brewer and deducted from the retention of the Brewer mentioned in Clause 8.

UBL shall arrange to procure Raw Materials, Packaging Materials, Bottles, Chemicals and Consumables, cost of which shall be borne by UBL. UBL shall, through the BREWER's common Bank Account to be operated exclusively by UBL, pay to all such Creditors directly for supplies received for production of UBL's Beer by the BREWER. UBL shall be responsible for all the above payments to the Creditors.

2. COLLECTIONS/COLLECTION ACCOUNT:

Wherever possible, the BREWER shall endorse all invoices in favour of UBL to facilitate receipts of payments in the name of UBL directly from the parties to whom supplies have been made under the advice of UBL.

The BREWER shall open a new account in a nationalized/scheduled bank call a "Collection Account" which shall be operated exclusively by two of UBL's nominees.

The BREWER undertakes to pass necessary Board Resolutions and keep the Bank informed of the Authorised Signatories or any change in the names of the Authorised Signatories. UBL shall provide the BREWER names of the Signatories whom they want to include in operating the said Account.

The BREWER shall not under any circumstances alter or change such signatories without the written approval of UBL.

In case it is not possible to endorse all invoices in favour of UBL, all collections from the sale of UBL's brands of Beer shall be deposited in the said account and all payments towards ex-Brewery price to the BREWER and statutory levies to the Governmental Authorities shall be made out of this. The balance amounts in this account shall be reimbursed to UBL in terms of Clause 7 of the Original Agreement.

The above clauses show that the fifth respondent had agreed to endorse all invoices in favour of the petitioner and all collections from the supply of the petitioner's brand was to be made directly to the petitioner or to be deposited in an account of the first respondent, "collection account", to be operated by the two nominees of the petitioner, who are authorised by the fifth respondent to deal with the Corporation on its behalf. The fifth respondent will be entitled to a fixed service charge of Rs. 40/- per case out of the total sale proceeds (see Clause 8). The petitioner shall bear the cost of raw materials and other articles.

Clause 18 deals with "arbitration". In the event of any dispute arising under the said agreement, it was provided that the same shall be referred to a sole arbitrator to be appointed by UBL. Both the petitioner and the fifth respondent had agreed to abide by the terms of the Liquor Policy, as could be seen from the agreement. As per the Liquor Policy - Annexure - 1, the payment of sales recorded weekly shall be computed and paid on the following Wednesdays. The Liquor Policy also provided for monthly reconciliation and that the Corporation shall not entertain any claim after two months of the close of the financial year. Clauses 12.3 and 12.7 of the Liquor Policy read as follows:

12. Payment for stocks sold

12.3 The amount payable to a manufacturer/supplier for the sales provisionally recorded within the week ending every Saturday shall be computed and paid on the following Wednesday. Any amounts to be recovered from the manufacturer/supplier due to demurrage charges, interest, etc. shall be recovered out of the amounts payable. The Corporation would provide a statement of provisional sales recorded to facilitate reconciliation. Any missing data due to delays/failures in electronic transfer of data shall be reckoned in the succeeding week and adjusted.

12.4 ...

12.5 ...

12.6 ...

12.7 The Corporation would provide an extract of all transactions of manufacturer/supplier before the 10th of the succeeding month. Manufacturers/suppliers may verify the statement and point out instances of differences, if any, within the next two months. The Corporation would, after confirmation, initiate corrective action. However, the Corporation shall entertain no such difference after two months of the close of the financial year.

On 22.6.2007, the fifth respondent sent a letter to the Corporation, which reads thus:

June 22, 2007

The Managing Director, Bihar State Beverages Corporation Ltd, Patna-800001.

Sub: Payments in relation to beer supplied to BSBCL from SDBPL.

Dear sir,

In relation to the aforesaid subject matter, it is stated that I am authorised on behalf of Spencer Distilleries & Breweries (P) Ltd and in exercise of the aforesaid authorisations, it is requested that in relation to all brands of beer owned by United Breweries Ltd and manufactured and supplied through Spencer Distilleries & Breweries (P) Ltd. to Bihar State Beverages Corporation Ltd., the payments be made directly to United Breweries Ltd and cheques should be issued in favour of "United Breweries Ltd" and for all other brands supplied by Spencer Distilleries & Breweries (P) Ltd. and not owned by UB, the payments be made in the name of Spencer Distilleries & Breweries (P) Ltd. Details of brands owned by United Breweries Ltd. against whom payment be made to United Breweries Ltd are listed below:

- (a) Kingfisher Premium Lager Beer
- (b) Kingfisher Strong Premium Beer
- (c) Kalyani Black Label Premium Lager Beer
- (d) Kalyani Black Label Strong Premium Beer
- (e) Zingaro Strong Beer
- (f) Sandpiper premium Lager Beer

This is for your information and necessary action.

Thanking you,

For Spencer Distilleries & Breweries (P) Ltd. Sd/- Authorised Signatory

3. The fifth respondent entered into an agreement with the Corporation for supply of branded beer of the petitioner from its own brewery, as prescribed under the Liquor Policy and copies of the agreement entered into between the petitioner and the fifth respondent authorizing the petitioner to manufacture its branded beer were also given to the Corporation. As per the Liquor Policy, the manufacturer has to provide the names of authorised representatives to deal with the Corporation in matters connected with and in relation to liquor supplies. Accordingly, the fifth respondent had executed a declaration in favour of M/s. Hemant Mehta and Usmani, who are the employees of the petitioner declaring that they shall be liable for all omissions of the aforesaid authorised representatives in execution of the terms and conditions with the Corporation. On the basis of the agreement, the amount due to the fifth respondent was credited in the "collection account" which is to be operated by the two nominees, who are the authorised representatives of the fifth respondent in dealing with the Corporation. Since the Corporation was facing technical difficulties in making payment in the name of the fifth respondent, as the petitioner's brand was supplied to the Corporation from various other sources, it requested the authorised representatives of the fifth respondent to give consent so that

payments in relation to the petitioner's brand could be directly made to the petitioner. Accordingly, payments were made every week upto December 2007 to the petitioner by the Corporation, for which the fifth respondent did not make any objection. Even after two months of the close of the financial year, no such objection was made and as per the Liquor Policy, no claim could be made after two months of the close of the financial year with regard to the supply made during the said financial year. Its contention is that on the basis of the agreement, the petitioner paid all statutory dues as well as the cost of raw materials, packing materials, etc. including fixed retention/service charges to which the fifth respondent was entitled. The fifth respondent, being well aware regarding payment schedule every week, had clear knowledge of its dues made to the petitioner and the manufacture and supply of the brands to the Corporation through the fifth respondent was stopped after 17.12.2007. For the first time on 24.10.2008, the fifth respondent made a claim before the Corporation that it had not received payments for the supply made from May to December 2007. When the claim was made to the Corporation, it directed recovery of the amount from the running account of the petitioner with the Corporation for being paid to the fifth respondent. It is the case of the petitioner that the direction given by the Managing Director of the Corporation is contrary to its own Liquor Policy and if there was any dispute regarding payment between the petitioner and the fifth respondent, the same should have been settled by arbitration, as provided in the agreement executed between them.

4. It is submitted by counsel for the fifth respondent that the writ petition is not maintainable, as it is based on a contractual matter. In the counter affidavit filed by the Corporation, it is stated that there is no contract between the petitioner and the Corporation and, therefore, the petitioner cannot challenge the same. Before going into the merits, we shall consider the above aspect first. It is not disputed that the impugned order was issued by the Corporation, a company registered under the Companies Act, on account of the monopolistic privilege granted to it under the provisions of the Bihar Excise Act. The State's power to deal with distribution and supply of liquor was relegated to the Corporation. Since the Corporation has got monopoly and exclusive privilege in the supply and distribution of liquor in the State and has framed its own Liquor Policy, it has to be accepted by all manufacturers and retail dealers who were dealing with them. The Corporation was established by the State Government and it comes within the meaning of "State" as defined under Article 12 of the Constitution of India. The Corporation, in the counter affidavit, has stated as follows:

5. That the following three facts are humbly being brought to the notice of this Hon'ble Court in the very beginning,

(a) The petitioner was NOT a supplier to the Respondent Corporation during the period in question.

(b) The petitioner Company had absolutely no contractual or any formal relationship or arrangement with the Respondent Corporation during the period

in question.

(c) No supplies were made by the petitioner to the Corporation during the period in question and no money whatsoever was due to the petitioner from the Respondent Corporation.

This is repelled in reply to the counter affidavit thus:

5. That the statement made in paragraph 5 of the counter affidavit that the petitioner was not a supplier to the respondent corporation during the period in question and that the petitioner had absolutely no contractual or any formal relationship with the respondent corporation during the period in question and that no supplies were made by the petitioner to the corporation during the period in question is wholly incorrect and denied. In fact the petitioner had entered into an agreement with the respondent corporation for supply of its brands owned by it and an agreement to that extent was entered by the petitioner company with BSBCL for the period 2007 - 08. It may be stated that the brands of beer supplied by the petitioner to BSBCL during the said period are the same brands of beer which was supplied through the respondent No. 5 and in fact the petitioner has received payments from BSBCL directly in its name i.e. "United Breweries Limited" in relation to the beer brands supplied by the petitioner through (i) Millenium Beer Industries limited, (ii) Spencer Distillery and Breweries Limited and (iii) United Breweries Limited and it had accordingly received a total amount of Rs. 44,50,80,100.00 from BSBCL in relation to the aforesaid supplies. Hence, the statement made by respondent No. 4 that the petitioner had no formal agreement with the respondent No. 4 during the period in question is apparently false.

Copy of the agreement given to the petitioner is also produced as Annexure - 13 in the rejoinder to the counter affidavit. In fact, the petitioner is the owner of the trade mark of the beer supplied by the fifth respondent. As per the Liquor Policy of the Corporation itself, when the manufacturer supplies the trade marked liquor of some other companies, it is bound to forward the agreement entered into between the owner of the trade marked liquor and the manufacturer and the Corporation cannot enter into agreement with the fifth respondent for the supply of branded products by the fifth respondent unless that agreement is produced. Further, if there is no contractual obligation, how the Corporation could make payments to the petitioner company has to be explained by the Corporation itself or how the Corporation can recover the amount from the running account of the petitioner. It is true that the amount now sought to be recovered is not on the basis of any agreement entered into between the petitioner and the Corporation. There is no legal basis or jurisdiction for the Corporation to recover the amount from the petitioner for making payment to the fifth respondent. There is no such clause in the agreement entered into between the petitioner and the fifth respondent or between the petitioner and the Corporation. The Corporation has no obligation to get the amount recovered from the petitioner to give it to the fifth respondent or to interrupt the agreement between the petitioner and the

fifth respondent. If the fifth respondent has got any dispute or a contention that despite payment received, for the liquor supplied by it, the petitioner is not paid the amount due to it, it is for the fifth respondent to approach arbitrator as mentioned in their agreement. The existence of the arbitration clause in their contract is not disputed.

5. In this connection, we shall refer to some of the decisions cited at the Bar. It is settled law that the State has freedom of contract. But fair play in the joins is a necessary concomitant for an administrative body functioning in an administrative or quasi-administrative sphere, as held by the Supreme Court in *Tata Cellular Vs. Union of India*, . The decision must not only be tested by the application of Wednesbury principle of reasonableness, but must be free from arbitrariness not affected by bias or actuated by mala fides. It is true that the contract between the parties is in the realm of private law. The dispute relating to interpretation of the terms and conditions of a contract could not have been agitated in a petition under Article 226 of the Constitution of India. But, in this case, the contracts were between the Corporation and the fifth respondent, between the Corporation and the petitioner and between the petitioner and the fifth respondent, in accordance with the provisions under the Bihar Excise Act and the Rules made thereunder. That apart, the Corporation has framed its own Policy. Hence the Corporation, which comes within the meaning of "State" has communicated its decision to recover amount from the current account of the petitioner for payment being made to the fifth respondent. There is no such provision under the Bihar Excise Laws, contract with the petitioner and the Corporation or with the Corporation and the fifth respondent. It is an arbitrary exercise of power without any authority of law and wholly without jurisdiction. The Corporation cannot act arbitrarily to help the fifth respondent in a most unfair manner, merely because the privilege of distribution and supply is vested with the Corporation and not even a complaint was made by the fifth respondent after two months of the closure of the financial year and the claim itself was made by the fifth respondent only much after two months of the closure of the financial year. The High Court will be free to interfere even in contractual matters, if the decision made is irrational or arbitrary. The apex Court considered the matter in detail in *ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others*, and held as follows:

8. As could be seen from the arguments addressed in this appeal and as also from the divergent views of the two courts below, one of the questions that falls for our consideration is whether a writ petition under Article 226 of the Constitution of India is maintainable to enforce a contractual obligation of the State or its instrumentality, by an aggrieved party.

After reference to the decision of the apex Court in *K.N. Guruswamy Vs. The State of Mysore and Others*, , it held thus:

10. It is clear from the above observations of this Court in the said case, though a writ was not issued on the facts of that case, this Court has held that on a

given set of facts if a State acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the court by way of writ under Article 226 of the Constitution and the court depending on facts of the said case is empowered to grant the relief. This judgment in K.N. Guruswamy Vs. The State of Mysore and Others, was followed subsequently by this Court in the case of D.R.O v. Ram Sanahi Singh (1973) 3 SCC 864 wherein this Court held: (SCC p. 865, para 4)

By that order he has deprived the respondent of a valuable right. We are unable to hold that merely because the source of the right which the respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not to a petition by way of a writ. In view of the judgment of this Court in K.N. Guruswamy case AIR 1954 SC 592 there can be no doubt that the petition was maintainable, even if the right to relief arose out of an alleged breach of contract, where the action challenged was of a public authority invested with statutory power.

In Life Insurance Corporation of India Vs. Escorts Ltd. and Others, , it was held by the apex Court that the State or such authorities of the State will be free to contract with anybody, but the State cannot discriminate or take arbitrary action violating Article 14 of the Constitution of India. In Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd., , following the judgment in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , the Supreme Court held that the instrumentality of the State, which would be "State" under Article 12 of the Constitution of India cannot commit breach of a solemn undertaking to the prejudice of the other party which acted on that undertaking or promise and put itself in a disadvantageous position. The appellant Corporation, created under the State Financial Corporations Act, falls within the expression of "other authority" in Article 12 and if it backs out from such a promise, it cannot be said that the only remedy for the aggrieved party would be suing for damages for breach and that it could not compel the Corporation for specific performance of the contract under Article 226 of the Constitution of India. In the case on hand, there is no dispute regarding the facts and the law. In Food Corporation of India and Another Vs. SEIL Ltd. and Others, also the apex Court held thus:

16. It is now no longer res integra that contractual disputes involving public law element are amenable to writ jurisdiction. In these cases, the Central Government not only scrutinized the bills but also verified the claims of the respondents. A direction was issued to make payment. The appellant, which is "State" within the meaning of Article 12 of the Constitution of India, withheld payment without any legal justification.

In this connection, we also refer to the decisions of the Supreme Court in Ansal Properties and Industries Ltd. Vs. State of Haryana and Another, and Karnataka State Forest Industries Corporation Vs. Indian Rocks, .

6. Now we will consider the facts of this case. It is not disputed that the petitioner is the owner of the trade mark of beer like "Kingfisher", etc. During the relevant year 2006-07, the petitioner had made supply of branded beer to the State on the basis of the agreement. The petitioner had also supplied branded beer through the franchisee manufacturers like the fifth respondent, on the basis of the agreement entered into between the petitioner and the fifth respondent. As per the contracts, the petitioner has to supply raw materials, etc to the manufacturer and pay the Government dues. The amount that is payable to the fifth respondent was also mentioned in the agreement. On the basis of the power of attorney issued by the fifth respondent, two authorised representatives of the petitioner were appointed and on the basis of the letter dated 22.6.2007, which is produced as Annexure - A to the counter affidavit, the Corporation was directed to make payments directly to the petitioner. On that basis, payment was made as per the agreement and collection of the amount was being made by the authorised representatives of the petitioner, as authorised by the fifth respondent. The fact is that as per the agreement between the Corporation and the fifth respondent, payment has to be made weekly ie. on every Wednesdays. Such payments were made by the Corporation on the basis of the direction given by the fifth respondent as well as the agreement executed between the Corporation and the fifth respondent. The letter issued by the fifth respondent to the petitioner was in consonance with the arrangement made between the petitioner and the fifth respondent as per the agreement. The petitioner did not make any complaint to the Corporation that they had not received payments for the supplies made to the Corporation till the end of the financial year. Much after the closure of the accounting year 2006-07, for the first time the petitioner by letter dated 24.10.2008 informed the Corporation that what is due to them for the supply made during that financial year for the period May 2007 - December 2007 was not received by it and on the basis of that complaint, the Managing Director of the Corporation decided to recover the amount already paid to the petitioner on the basis of the direction of the fifth respondent and the agreements as afore-mentioned and pay the same to the fifth respondent as if the Corporation is acting as a collection agent on its behalf. As per the agreement between the fifth respondent and the Corporation, claim, if any, has to be made within two months after the closure of the financial year. No claim was made during the financial year in question or within the period of two months and, therefore, the petitioner cannot make a claim and the Corporation ought to have rejected the claim. The fifth respondent had authorised two authorised representatives, who are the employees of the petitioner to deal with the Corporation and payment for the supply made by the fifth respondent was made as authorised. It is the case of the petitioner that they paid the share to the fifth respondent and informed that they made excess payments. So long as the payment for the supply is made, the Corporation's liability as against the fifth respondent is over. Within two months period after the accounting year, no claims were made by the fifth respondent to the Corporation. The real dispute is between the petitioner and the fifth respondent and the Corporation has no role

in the matter. The Managing Director of the Corporation was not appointed as the arbitrator. If there was any dispute between the petitioner and the fifth respondent, the remedy of arbitration is provided in the contract and the fifth respondent has to resort to such remedy and regarding the dispute between the fifth respondent and the petitioner, we do not understand how the Managing Director of the Corporation had got jurisdiction to recover the amount to be paid to the fifth respondent. If the authorised representatives of the petitioner had done anything then it is for the fifth respondent to take appropriate action against them. The Corporation cannot act as a recovery agent on behalf of the fifth respondent. We are of the view that the direction issued by the Managing Director of the Corporation is without jurisdiction, arbitrary, unfair and unreasonable and the same is liable to be set aside. We do so. It is for the fifth respondent to move for arbitration if it has got any claim against the Corporation. It is also open to the fifth respondent to move for arbitration or any legal action against the authorised representatives, if they are so advised, if they exceeded their authority or committed fraud. If any action is taken or arbitration proceedings are taken, it shall be decided according to law, untrammelled by any of the observations made in this judgment.

The writ application is allowed. The impugned order dated 2.2.2009/5.2.2009 produced as Annexure 11 and 11(1) passed by the Managing Director of the Corporation is set aside.

Ravi Ranjan, J.

7. I agree