

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.7.2009

CORAM

THE HON'BLE MR.JUSTICE S.J.MUKHOPADHAYA
AND
THE HON'BLE MR.JUSTICE RAJA ELANGO

Writ Appeal No.2258 of 2000

The State of Tamil Nadu
rep. by the Secretary
Home, Prohibition & Excise Department
Fort St. George, Madras-9.

.. Appellant/Respondent

Vs.

1. Penguin Leasing Ltd.
1/2, Shiva Krupa
IV Main III Cross
Ganganhalli Extension
Bangalore 32,
rep. by its Director.

2. The Tamil Nadu State Marketing
Corporation Ltd.
LLA Buildings, III Floor
735, Anna Salai, Madras
rep. by its Managing Director.

3. Balaji Distillery Limited
No.9, Bazulla Road
T.Nagar, Madras 17.

4. Shiva Distilleries Ltd.
No.2, Venus Colony, II Street
Madras-2.

5. Mohan Breweries & Distilleries Ltd.
781, Anna Salai, Chennai 2.

6. Southern Agrifurance Industries Ltd.
92, G.N.Chetty Street, T.Nagar
Madras-17.

7. Empee Distiller Limited
695, Anna Salai, Chennai 6.

.. Respondents/Petitioners

Appeal against the order of the learned single Judge dated 13.11.2000 made in W.P.No.5620 of 1993 on the file of this Court.

For Appellant : Mr.D.Sreenivasan, Addl.G.P.

For Respondent-1 : Mr.Sundar Narayanan
For Mr.R.Sunil Kumar

For Respondent-2 : Mr.J.Ravindran

J U D G M E N T
(Delivered by S.J.MUKHOPADHAYA, J.)

The writ petition was preferred by Penguin Leasing Ltd. (hereinafter referred to as the "petitioner-Company") in the year 1993 to issue a writ of Mandamus directing the Tamil Nadu State Marketing Corporation Ltd. (for brevity "Corporation") to forbear from purchasing Indian Made Foreign Spirits (in short "IMFS") from any source or person except on the basis of the contract awarded by it, by the method of inviting tenders or by the method of public auction. The learned single Judge, by the impugned order dated 13.11.2000, having allowed the writ petition, the appeal has been preferred by the State of Tamil Nadu.

2. During the pendency of the writ appeal, in view of certain developments, it is not necessary to discuss the claim and counter claim of the parties, though it is relevant to notice the development.

3. Prior to 2003, the State Government used to grant exclusive or other privilege for manufacturing or selling by retail IMFS. Under Section 17C of the Tamil Nadu Prohibition Act, 1937, (hereinafter referred to as "Prohibition Act") though the power to grant privileges of manufacture and retail sale was vested with the State, under clause (b) to sub-Section (1-A) of Section 17C, it was mandated to grant such license for exclusive privilege in favour of the Corporation for manufacture and marketing of IMFS.

4. For the purpose of retail sale, Corporation used to purchase IMFS from five local manufacturers. It is, at this stage, the writ petition was preferred by the petitioner/ Company in the year 1993. During the pendency of the appeal, the State Government notified Tamil Nadu Liquor Retail Vending (in Shops and Bars) Rules, 2003 by G.O.Ms.No.202 dated 3.11.2003 from Prohibition and Excise Department of the State. The Tamil Nadu Prohibition Act, 1937 was also amended by Tamil Nadu Prohibition (Amendment) Ordinance, 2003. Under Rule 3, it was prescribed that after promulgation of the Tamil Nadu Prohibition (Amendment) Ordinance, 2003, the Corporation shall make an application to the Commissioner of Prohibition and Excise for the grant of licence for the retail vending of liquor in shops and bars.

for the whole of the State of Tamil Nadu. Under Rule 4, it was further prescribed that only on application, the Commissioner of Prohibition and Excise shall grant licence to retail vending of liquor in shops and bars in the whole State in favour of the Corporation. Under Clause (3) of Rule 4, the Corporation was authorised to issue Form-II in respect of each shop where the business of retail vending of IMFS is to be carried on either directly by the Corporation or through the Co-operative Societies as agents of the Corporation and since the promulgation of the said wholesale or retail vending of IMFS is now with the Corporation, it makes it through different shops.

5. So far as the distilleries and breweries in the State is concerned, the learned counsel for the Corporation produced the minutes of the 110th Board Meeting held on 27.6.2003, wherein the following decision was taken.

"Agenda No.6 - Installation and utilised capacities of the Distilleries and Breweries in the State - Details called for by the Board of TASMAC - Report received from the Commissioner of Prohibition and Excise - Placed before the Board with other relevant details - Reg.

Resolution:-

The Board perused the report submitted by the Commissioner of Prohibition & Excise and discussed it in detail. It has noted that as per the details furnished by the Commissioner of Prohibition & Excise the total licenced capacity of all the IMFS distilleries in the State is 295.92 lakh cases whereas the average production during the last two years was 142.60 lakh cases. The licenced capacity of all the Breweries in the State is 230.70 lakh cases whereas the average production was 60.08 lakh cases per annum. The licenced capacity utilization works out to 48.19% for IMFS and 26.04% for Beer. The local installed capacity is 380.80 lakh cases of IMFS and 240.06 lakh cases of Beer. The installed capacity utilization works out to 37.45% for IMFS and 25.03% for Beer. Thus it is clear as per the report that there is enough surplus capacity in the State to produce the required quantity of IMFS/Beer.

The Board was informed that molasses is in surplus in the State to the tune of four lakh metric tons per annum.

The sales of IMFS in 2002-03 was 142.23 lakh cases and Beer was 97.16 lakh cases. As per the Budget estimates approved by the Board, the projected sales for the year 2003-04 is 171.34 lakh cases of IMFS and 111.66 lakh cases of Beer.

The Board noted that the average growth rate in sale of IMFS and Beer during the last ten years had been about 5% annually.

From the above analysis of average annual sales and growth rate, the Board concluded that the local production capacity of IMFS and Beer is surplus compared to the projected sales, factoring in the average growth rate in the sale of IMFS and Beer.

The Board also noted that currently TASMAC is importing six brands of IMFS and three brands of Beer. The import suppliers have also applied for collaboration and local production in respect of all the six existing IMFS brands.

The Board also noted that with regard to Beer, tie-up arrangements for all the import Beer brands already exist with local breweries and that the local breweries have more than enough capacities to produce the required quantities locally.

The Board noted that tie-up arrangements do not exist for one IMFS and two Beer brands whose market share is, however very negligible. It was reported to the Board that the supply of these brands by the manufacturers have also been irregular.

The Board noted that during the last few years, a number of new Beer and IMFS brands have been permitted to be introduced by the local manufacturers in tie-up with outside manufacturers in all the three segments viz., ordinary, medium and premium. The request of the local manufacturers for permission to produce some more new IMFS and Beer brands in tie-up with the outside manufacturers are also under consideration of the Government and TASMAC.

The Board therefore felt that fresh tie-up arrangements on a case by case basis can be encouraged so that local surplus capacities and raw materials can be fully utilized.

The Additional Director General of Police (Prohibition Enforcement Wing) who was present as a special invitee stated that there is a substantial inflow from neighbouring States of non-duty paid stocks as there is a Maximum Retail Price differential between Tamil Nadu and other States in spite of various measures taken by the Prohibition Enforcement Wing in the border areas and in spite of the best efforts of the Prohibition Enforcement Wing police. There is also an apprehension that import permits issued for the import of IMFS could be misused for bringing non-duty paid liquor. Due to the proposed heavy reduction in the Excise Duty rates in Karnataka, the possibilities of smuggling duty paid liquor items into Tamil Nadu is also

more.

The Board noted that there are no tie-up for local production/bottling arrangement for Scotch Whisky and Wine brands.

After considering the Commissioner's report that surplus capacity is available for production within the State of Tamil Nadu of required quantities of IMFS and Beer in the distilleries and breweries of the State and in view of the fact that all the major IMFS and Beer brands currently being imported have a tie-up arrangement or have applied for tie-up for production within the State, the Board decided that further import orders for the IMFS and Beer brands currently being imported with the manufacturers of IMFS and Beer items from outside the State, need NOT be placed from 01.07.2003 onwards.

In view of the fact that there is no Winery in Tamil Nadu and Scotch Whisky is not bottled in Tamil Nadu, the Board decided to continue the import of Scotch and Wine brands by TASMAC.

In this connection, the following resolution was passed.

Resolved to direct TASMAC not to place orders for IMFS and Beer brands currently being imported, with the manufacturers of IMFS and Beer items from outside the State from 01.07.2003 onwards.

Further resolved to authorize the Managing Director to continue the import of Scotch and Wine brands.

Also resolved to authorize the Managing Director to inform the above decision of the Board of TASMAC to the Government and to the Commissioner of Prohibition and Excise."

6. The learned counsel appearing on behalf of the Corporation submits that the Corporation is purchasing IMFS from all the distilleries situated within the State of Tamil Nadu and no discrimination is made. In the resolution, it has been noticed that there is enough surplus capacity in the State to produce the required quantity of IMFS and Beer. Even the molasses is in surplus in the State to the tune of four lakh metric tons per annum, as was noticed by the Corporation. The Board decided that further import orders for IMFS and Beer brands, currently imported with the manufacturers of IMFS and Beer items from outside the State, need not be placed from 1.7.2003 onwards. This was done taking into consideration the capacity of distilleries to produce IMFS and Beer within the State and also the fact that if import permits issued for the import of IMFS, it could be misused for bringing non-duty paid liquor. Due to the proposed heavy reduction in the excise duty rates in Karnataka, the possibilities of smuggling duty paid liquor items into Tamil Nadu is also more and this fact was also noticed by the Corporation. It

is also submitted that if any purchase is made from outside the State, the Corporation is bound to follow the Rules, including the Tamil Nadu Transparency in Tenders Act, 1998. We have noticed that under Section 3 of the Act, the prohibition of procurement has been made except by tender.

7. We have heard the learned counsel for the parties and noticed the development.

8. So far as the State of Tamil Nadu is concerned, it is well within its jurisdiction to regulate the matter of manufacture and sale of potable liquor so far as the whole sale or retail sale of IMFS or Beer is concerned. Now, such power being vested with the Corporation by the State under the Tamil Nadu Prohibition Act, 1937, it is not open to the petitioner/Company to challenge the same. In the absence of challenge of the provisions of law, the petitioner/Company cannot claim the right to sell IMFS or Beer either as a wholesaler or retailer.

9. Insofar as the supply of IMFS or Beer is concerned, we have noticed that the Corporation has given equal opportunity to all the manufacturers within the State. Thus, Article 14 of the Constitution of India is being followed. The opportunity having given to all the manufacturers of the State, question of following the technical procedure of tender does not arise. For the interested persons (manufacturers) within the State of Tamil Nadu, it is very clear that now the Corporation procures potable liquor. So far as potable liquor import of IMFS or Beer from outside the State is concerned, in view of misuse of bringing non-paid duty liquor and possibilities of smuggling duty paid liquor items into Tamil Nadu, for the present, the Corporation has decided not to go for the same and such decision taken on 27.6.2003 cannot be held to be arbitrary. However, if they import such IMFS or Beer from outside the State, they have to follow the Tamil Nadu Transparency in Tenders Act, 1998 and other Rules and Guidelines, if any framed by the State Government, such as Tamil Nadu Indian Made Foreign Spirit (Supply by Wholesale) Rules, 1983 and etc.

10. The order passed by the learned single Judge dated 13.11.2000 made in W.P.No.5620 of 1993 stands modified to the extent above.

The writ appeal stands disposed of with the aforesaid observation. There shall be no order as to costs. CMP No.19568 of 2000 is closed.

Sd/-
Asst. Registrar

/ True Copy /

Sub.Asst Registrar

kpl

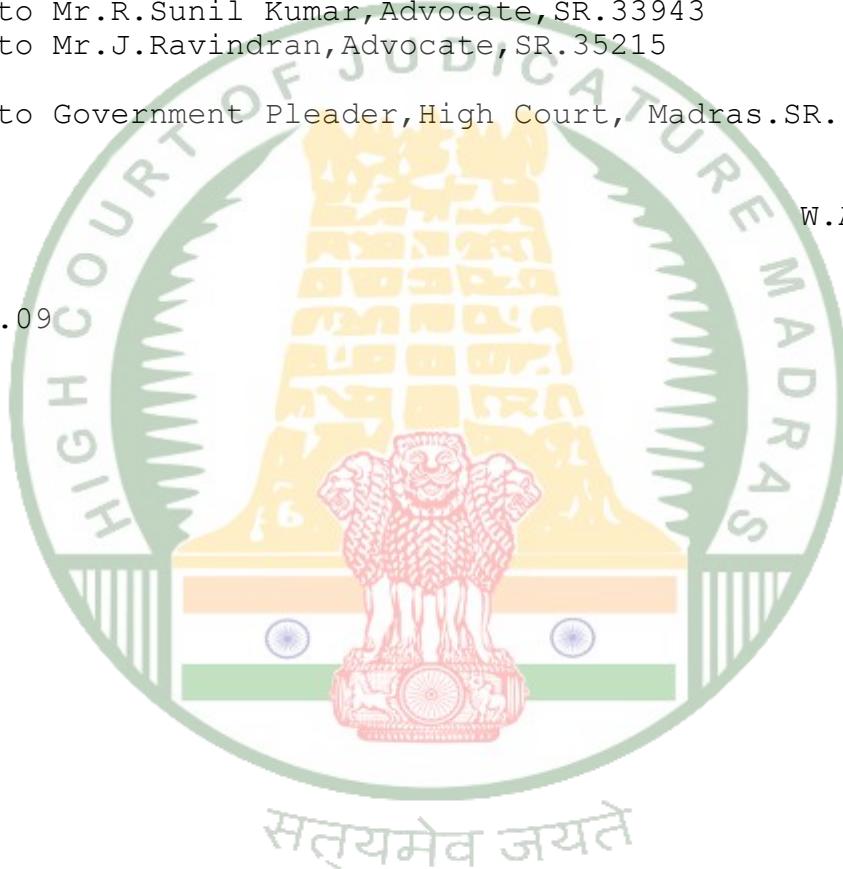
To

The Managing Director
Tamil Nadu State Marketing
Corporation Ltd.
LLA Buildings, III Floor
735, Anna Salai, Madras.

+ 2 cc to Mr.A.Sasidharan,Advocate,SR.33906
+ 1 cc to Mr.R.Sunil Kumar,Advocate,SR.33943
+ 1 cc to Mr.J.Ravindran,Advocate,SR.35215
+ 1 cc to Government Pleader,High Court, Madras.SR.33972

W.A.No.2258 of 2000.

MBS (CO)
EM/12.8.09



WEB COPY