

K.T. VENATAGIRI AND ORS.
v.
STATE OF KARNATAKA AND ORS.

FEBRUARY 13, 2003

[V.N. KHARE, S.B. SINHA AND DR. AR. LAKSHMANAN, JJ.]

Karnataka Excise (Sale of Indian and Foreign Liquors) Rules, 1968.

rr.4A and 11(b)—Distribution of Liquor in the State—MSIL appointed as sole distributor by Notifications dated 13.9.1989—Amount to be charged in respect of operation by MSIL as distributors—Writ petitions by manufacturers, who before the Notification were selling their product either to Distributor or direct to wholesale dealer, filed before High Court challenging the common Notifications dismissed—Appeals before Supreme Court—Interim stay granted on 20.11.1989 with a direction that in the event of dismissal of the appeals, compensation to be paid to MSIL—Except appellant 'K', other appellants withdrew their appeals, but took the advantage of the stay orders that remained operative in 'K's appeal—K's appeal dismissed with the directions that the appellants would pay to MSIL the requisite commission amount—Appellants other than 'K' contending that the Notification dated 13.9.1989 having come into force w.e.f. 1.7.1990 and the appellants having withdrawn their appeals on 9.4.1990, they did not commit any violation of interim order dated 20.11.1989 nor were they liable to pay to MSIL—Held, ordinarily in a disposed of appeal the Court would not have entertained contentious questions—But in these appeals questions to be determined relate to adjustment of equities—Appellants not only took advantage of the interim order passed in 'K's appeal, but also denied and disputed claim of MSIL relying on the Court's order permitting them to withdraw their appeals— Though the Court permitted the appellants to withdraw their appeals, they took advantage of the interim order passed in K's appeal—State also issued permits to wholesale dealers having regard to stay order passed in K's appeal—Appellants either expressly charged commission payable to MSIL or otherwise recovered the said amount from other distributors—In some cases appellants realised the amount of commission payable to MSIL, without actually showing it in the bills—They cannot having regard to doctrine of 'unjust enrichment' retain the undue advantage derived by them—They are liable to pay back the amount received either directly or indirectly on account of MSIL—Doctrine of restitution must be applied in*

A *these appeals—With a view to do complete justice between the parties directions given to determine the amount payable to MSIL—Equity—Constitution of India—Article 142—Doctrine of ‘unjust enrichment’—Doctrine of restitution.*

**Khoday Distilleries Ltd. and Ors. v. State of Karnataka and Ors., [1996] 10 SCC 304, referred to.*

B *Bimal Chandra Banerjee etc. v. State of Madhya Pradesh etc., [1970] 2 SCC 467 and State of Kerala v. Madras Rubber Factory Ltd., [1998] 1 SCC 616, cited.*

C *Constitution of India*

Articles 132 and 142—Appeals challenging common Notifications—Interim stay granted with a direction to compensate the respondent in the event of dismissal of appeals—Except appellant ‘K’ all other appellants withdrawing their appeals, but taking advantage of stay order in K’s appeal—

D *K’s appeal ultimately dismissed—All the appellants directed to compensate the respondent as a consequence of the stay orders—Appellants who had withdrawn their appeals contending that since they had withdrawn their appeals, they were not liable under the stay order granted in K’s appeal—Held, the appellants having taken advantage of the interim order are liable to pay back the amount realised by them and payable to respondent—Interim order—Effect of*

E *Doctrines:*

(i) *Doctrine of ‘unjust enrichment’—Applicability of.*

F (ii) *Doctrine of restitution—Applicability of.*

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4728-4732 of 1989.

G From the Judgment and Order dated 13.11.1989 of the Karnataka High Court in W.P. Nos. 16876, 17418, 17530, 17531 and 17632 of 1989.

WITH

H C.P. (C) Nos. 443-448/98 in C.A. Nos. 4702-4707/89 and C.P. (C) Nos. 449-453/98 in C.A. Nos. 4728-4732 of 1989.

A.K. Ganguli, Rakesh Dwivedi, K.K. Venugopal, P.P. Rao, Jaideep Gupta, Padmanabha Mahale, Nagendra Naidu, S.S. Sukumaran, D.N.N. Reddy, Shivaji Srinivas. K. Rajeev, Udaye Hola, Mohammed Risha, A.S. Bhasme, S.R. Bhat, Naveen R. Nath, Ms. Lalit Mohini Bhat, Ms. Hetu Arora, Sanjay Sehrawat, Sanjay R. Hegde, Satya Mitra, Anil Mishra, M. Veerappa (NP), Rajesh Mahale, Rahul Ray, Umesh Kumar Khaitan and Ms. Indu Malhotra, (NP) for the appearing parties. A
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The following Order of the Court was delivered :

The appellants in these appeals have questioned a judgment and order dated 13.11.1989 passed by the High Court of Karnataka in a batch of writ petitions challenging the validity of two notifications issued on 13.9.1989, the effect whereof was to create a monopoly in favour of Mysore Sales International Ltd. (MSIL), a public sector undertaking, in terms whereof the wholesale distribution of liquor and brewery was to be dealt with exclusively by it. C

According to the appellants in terms of licences granted in their favour under Karnataka Excise Act, 1965, in Form No. 2, they were free to sell their product either to the Distributors possessing CL II licences or directly to wholesalers possessing CL 1 licences who in turn would sell to the retailers namely, CL 2 licences. D

On 13.9.1989 the Excise Rules framed under the Karnataka Excise Act were amended, in terms whereof the State was to appoint an Agency as its sole Distributor as a result whereof manufacturers of liquor etc. were required to sell their products to it only, enabling the latter to sell the same to the wholesalers who in turn could sell the same to the retailers. E
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It is not in dispute that the said amended rules were to come into force with effect from 1.7.1990 i.e. from the next excise year.

The said writ petitions were dismissed by the High Court by reason of a judgment and order dated 13.11.1989, *inter alia*, holding : G

“(v) Licences granted under the amended Rules, create a privilege under the Act: that privilege in no way gets the protection of Article 19(1)(g) of the Constitution. Since the existing licences are saved during the current year (i.e. during their current period) no further question of hardship and irrationality in enforcing the Rules, arises.” H

A On the said date, the State appointed MSIL as the Sole Distributor in terms of Rule 11(b) of the Karnataka Excise (Sale of Indian and Foreign Liquors) Rules, 1968. On that date itself, a licence was granted in favour of MSIL by the State of Karnataka in the prescribed form. One of the conditions of the said licence was that the terms and conditions mentioned in the letter dated 13.11.1989 shall form part of the licence which was an inter departmental one. Paragraph 4 of the said letter is as under :-

B “4. MSIL shall be entitled to charge reasonable margins not exceeding 0.5% on exports and 5% on all Sales within the State in respect of its operations as distributors.”

C In the Special Leave Petitions filed by the appellants herein, this Court while granting leave passed the following conditional interim order on 20.11.1989:-

D “In case ultimately the petitioners lose in the final hearing provision should be made for the payment of compensation in favour of third respondent, namely, M/s. Mysore Sales International Limited.”

However, on 9.4.1990, upon oral mentioning of the matter to withdraw the appeals, a Bench of this Court took the same on Board and passed the following order:

E “These matters are taken on Board. The appeals are permitted to be withdrawn, as prayed for. No costs. In view of the fact that these appeals are being withdrawn, there will be no compensation payable to the third respondent”.

F The appellants would contend that MSIL had all along been aware of and acted upon the said order.

G One of the appellants, namely, Khoday Distilleries Ltd., however, did not withdraw the appeals. By a judgment and order dated 15.12.95, the appeals filed by Khoday Distilleries Ltd. were dismissed [See *Khoday Distilleries Ltd. and Ors. v. State of Karnataka and Ors.*, [1996] 10 SCC 304. Therein this Court held :

H “it was also submitted before us that the Rules must be considered manifestly arbitrary because the avowed purpose of formulating the amended Rules is to stop evasion of excise. In the counter-statement filed by the Government of Karnataka before the High Court of

Karnataka it has set out the object of the amendment. The affidavit states : "The impugned Rules have been made with the sole object of preventing leakage of excise revenue and, therefore, they are reasonable restriction within the meaning of Article 19(6)." It is submitted before us that such evasion could have been checked by other means which would have been more beneficial to or less hard on the appellants. How such evasion is to be checked, however, is a matter of policy. So long as the policy as formulated in the amended Rules is not manifestly arbitrary or wholly unreasonable, it cannot be considered as violative of Article 14. There is, in the present case, no self evident disproportionality between the object to be achieved and the Rules which have been framed.

It was lastly submitted that MSIL ought not have been nominated for a distributor licence because it is not competent to discharge its obligations and does not have the necessary infrastructre. This plea was raised before the Karnataka High Court at a time when MSIL had not started functioning. It is now a fully functional authority. MSIL has stated that it has a large number of depots in various districts of the State and is already handling very substantial business. This plea, therefore, merits no further consideration. In any event, some problems with the discharge of its duties by MSIL will not render the amended Rules providing for a distributor licence arbitrary or violative of Article 14.

In the premises, these appeals have no merit and they are dismissed with costs. Under the interim orders, the appellants are liable to pay compensation to MSIL if they lose in the appeals. This is in view of the commission which is prescribed under the Rules which is to be paid to MSIL. The appellants were also directed to keep separate accounts of their dealings and supply a copy of the same, *inter alia*, to MSIL. Some of the appellants have accordingly supplied statements of accounts to MSIL. Those who have not supplied such statements are directed to supply the same to MSIL within eight weeks from today. The appellants are directed to pay to MSIL the requisite commission amount on the basis of the dealings conducted by them within twelve weeks from today."

It is not in dispute that the Government of Karnataka changed its policy as the impugned Rules were not found to be workable and withdrew the same by Notification dated 13.2.1997.

A It is also not in dispute that a contempt proceeding was initiated as against Khoday Distilleries and in the said proceeding directions were issued to make payment of the commission at the rate of 0.5% to MSIL in a contempt proceeding under the Contempt of Courts Act.

This Court directed:

B “Having heard learned counsel for the parties, we are satisfied that the submission of the learned Attorney General should be accepted. The interim order dated November, 20, 1989 is clear about the liability of M/s. Khoday Distilleries Ltd. in the event of their failing in the appeals in this Court. There is no direction in the final judgment of this Court relieving M/s. Khoday Distilleries Ltd. of that liability to any extent. In calculating the interest, the account given by MSIL shows that the same is not calculated from the date on which the commission became due but from the later date of first of April of every year beginning with April 1, 1990 which is also a date subsequent to the date of the interim order.

D We are satisfied that there is no reason to award interest at a rate lesser than 18% per annum and that the calculation made by MSIL requiring payment of Rs. 533.30 lacs interest at this rate also does not call for interference on any basis.”

E On 31.3.1999 MSIL filed a review application for modifying this Court’s order dated 9.4.1990, *inter alia*, on the ground that this Court while permitting the appellants to withdraw the appeals could not have directed that no compensation would be payable to it.

F A 3-Judge Bench of this Court upon considering the rival contentions raised in the said review proceedings in terms of its order dated 28.4.2000 directed deletion of the sentence “there will be no compensation payable to the third respondent” contained in this Court’s order dated 9.4.1990 and with a view to arrive at a rate at which such compensation should be determined in fairness to the appellants directed the matter to be heard.

G Mr. A.K. Ganguly and Mr. K.K. Venugopal, learned Senior Counsel appearing on behalf of the appellants addressed us at great length. It was submitted that having regard to the fact that the amended Rule was to come into force with effect from 1.7.1990 and the appeals have been withdrawn on 9.4.1990, the question of MSIL’s suffering any loss or consequently any

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direction to pay any compensation to it, would not arise. Having regard to the fact that the appellants did not incur any liability during court regime, in any event, as the interim order has lost its force upon withdrawal of the appeals; in terms of the order dated 9.4.1990, the appellants cannot be said to have committed any violation of this Court's interim order dated 20.11.1989. A

The learned counsel would submit that the claim of MSIL, if any, must be held to have arisen with effect from 1.7.1990 and for enforcement of their right, if any they must take recourse to the provisions of the Karnataka Excise Act and the Rules framed thereunder by making a demand and by showing that they had rendered service by acting as Sole Distributor. It was contended that having regard to the conditions of licence, the appellants were bound to supply liquor to all wholesalers who had been granted permits by the State Government. According to the appellants, MSIL have been paid their commission on the transactions they had with the manufacturers. It was pointed out that MSIL did not raise any demand even after the decision of this Court in *Khoday Distilleries* (supra) and only after expiry of nine years despite knowledge of the interim order, the review application was filed by way of camouflage and on misstatement of facts. It was submitted that in *Khoday Distilleries*'s case (supra) the directions had been issued by this Court to pay the amount in question on a misconception whereof the appellants are bound to pay any amount to the MSIL. According to the learned counsel, the letter dated 13.11.1989 which was issued by the State of Karnataka in favour of MSIL being an inter departmental letter, no liability could be created against the holders of the licence thereunder as they are bound to pay fee, excise duty and other charges only in terms of the provisions of the Act, the Rules and conditions of the licence. It was contended that margin money which was in the nature of commission was to be paid in consideration of the service, which MSIL was to render, wherefore, it had been given sufficient time by the State of Karnataka and as it failed and neglected to provide any services, the question of its being compensated does not arise. The learned counsel would contend that when this Court passed an interim order dated 20.11.1989 validity or otherwise and in fact even the existence of the said letter dated 13.11.1989 was not brought to its notice. B
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In support of the aforementioned contention, reliance was placed on *Bimal Chandra Banerjee etc. v. State of Madhya Pradesh etc.*, [1970] 2 SCC 467 and *State of Kerala v. Madras Rubber Factory Ltd.*, [1998] 1 SCC 616.

Mr. S.R. Bhat, learned counsel, would submit that wine has been H

A exempted from the purview of the said Rule. He drew our attention to the fact that Rule 6A was inserted in the Rules in terms whereof a person holding a retail licence under the Rules was permitted to sell wine. The learned counsel would contend that his client has produced accounts from time to time before MSIL and had all along been giving notice so as to take supplies of its product but it had failed to do so. It was contended that in the year 1997

B it had entered into two lease agreements with Pampose Distilleries and Balaji Enterprises and in terms thereof the amount of duty was to be paid by the lessee.

C Mr. Jaideep Gupta, learned counsel appearing on behalf of Pampose Distilleries would submit that his client only has taken over a winery division. The learned counsel would submit that this Court having been disposed of the appeal by Khoday Distilleries in the year 1995 and his client having been taken over the management of the winery division in 1997 no liability pursuant to this Court's order would arise.

D Mr. P.P. Rao learned senior counsel appearing on behalf of MSIL, would accept that the commission was payable from 1.7.1990. It was also accepted that the impugned notification, in view of Rule 6A of the Rules shall not apply to wine. The learned counsel would contend that despite the fact that the appellants had withdrawn their appeals, they not only took full benefit of the interim order passed by this Court in *Khoday's* case, in various

E correspondences that took umbrage under the order of this Court dated 9.4.1990 to the effect that in terms thereof they were not liable to pay any compensation whatsoever. According to the learned counsel having regard to the conditional order passed by this Court on 20.11.1989, the appellants were bound to pay the requisite amount of compensation to his client. The learned counsel would

F submit that till *Khoday's* writ petition was pending wherein the operation of the notification was stayed the legal position was not clear and taking advantage thereof, the appellants were transacting businesses with the other wholesalers in gross violation of the existing rules. Drawing our attention to several documents, the learned counsel would point out that while supplying liquor to the wholesalers the appellants had not only charged commission at

G the rate of 5% on their account but they had also taken recourse to commission of fraud in so far as although they had passed on the amount of commission to the customers, they did not show the same in their bills. Drawing our attention to some of the bills, it was submitted that it would be evident from the bills that in relation to the self same commodity for supply made one rate

H has been charged from MSIL but another rate which would be 5% above the

same had been charged from another wholeseller with a view to cover the liability of the appellants. The learned counsel would contend that the liability of the appellants to pay commission in terms of the Rule must be held to be an admitted fact and only a quantum thereof is required to be determined.

We have also heard Mr. Sanjay R. Hegde, learned counsel appearing on behalf of the State of Karnataka who on instructions, submitted that the State of Karnataka have refused to amend the Rules as asked for by the Licensees in their representations.

The questions which are required to be determined in these appeals relate to adjustment of equity. Ordinarily in a disposed of appeal this Court would not have entertained contentious questions which have been raised in these appeals we did so as there is no doubt whatsoever that the appellants herein have not only taken advantage of the interim order passed in *Khoday's* case but also denied and disputed the claim of MSIL relying on the basis of this Court's order dated 7.4.1990. It has not been disputed that in terms of the Rules, as amended by the State of Karnataka, on and from 1.7.1990, all supplies were required to be made by owners of the distilleries and breweries only through MSIL who was appointed as the sole distributor therefore.

In the special leave petitions, the appellants herein had prayed for stay of the operation of the Notification No. HD 25 PES 89 dated 13.9.1989 and the Notification No. HD 26 PES 89 of the same date. In terms of Notification No. HD 25, Rule 4A in the Rules was inserted providing that no licensee shall sell liquor to any person other than one holding a distributor licence or export liquor outside the State. By reason of Notification HD 26, Rule 3A was inserted in the Karnataka Excise (Brewery) Rules 1967 to the same effect in respect of beer.

This Court although permitted the appellants to withdraw the appeals, we have no doubt in our mind that the admitted fact clearly go to show that the appellants took advantage of the interim order passed in favour of *Khoday Distilleries*. In terms of the amended Rules, the appellants were bound to sell only through MSIL and no-one. There cannot further be any doubt that the State of Karnataka rightly or wrongly issued permits to the wholesale dealers presumably having regard to the orders of stay passed by this Court in *Khoday Distilleries*.

The appellants herein did not question the legality or otherwise of the rule under which commission became payable to MSIL. They did not question

A the right of MSIL to charge commission at the rate of 5% of the transaction. They in any other proceedings had not raised the contentions raised before us in these appeals. They indisputably either expressly charged commission payable to MSIL at the said rate or otherwise recovered the said amount from the other distributors.

B The materials placed before us further clearly demonstrate that the appellants in some cases although sold their product directly to the wholesale dealers, they had charged commission payable to MSIL at the rate of 5%, despite the fact that in terms of the letter of the State of Karnataka dated 13.11.1989 MSIL could claim the amount of commission to the extent of 5%.

C Admittedly, the State of Karnataka had not fixed the rate at which such commission could be charged in respect of inter-State sale or export.

Prima facie we are also satisfied that in some cases the appellants realized the amount of commission payable to MSIL by adopting a back door method, namely, charging the said amount without actually showing in the

D bills.

In view of the order proposed to be passed by us and as at present advised, we are not disposed to go into the legal questions raised by the learned counsel for the parties.

E The appellants admittedly took benefit of the interim order passed by this Court in *Khoday's* case. They cannot, having regard to the doctrine of 'unjust enrichment' retain the undue advantages derived by it. They must be asked to pay back the amount received either directly or indirectly on account of MSIL. The doctrine of restitution must, thus, be applied in these appeals.

F We are, therefore, of the opinion that with a view to do complete justice between the parties and having regard to the order passed by this Court in *Khoday Distilleries's* case, the following directions should be issued:

G (1) The appellants would have no liability to pay any commission to MSIL prior to the appointed date, namely, 1.7.1990 and after 13.2.1997;

(2) The appellants shall produce or cause to be produced all books of accounts for the period 1.7.1990 to 13.2.1997 within eight weeks from date before the authorised agent of MSIL so as to enable it to determine the amount due and payable to MSIL;

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- (3) Determination of such amount shall be confined only to those transactions wherein the appellants had charged commission on account of MSIL or indirectly realized the same although not shown in the bills issued therefor: A
- (4) In the event of an unlikely dispute as regards the quantum of the amount of commission, the State of Karnataka if called upon by any of the parties will appoint an authorised officer not below the rank of Principal Secretary to the Government of Karnataka who shall then determine the same upon giving opportunities to the parties of being heard and whose decision shall be final and binding between the parties and shall not be open to judicial review; B C
- (5) However, in the event, MSIL does not want to take recourse to mode in clause (4) above, it may take recourse to such proceedings for recovery of its dues in accordance with law;
- (6) MSIL shall be entitled to enforce its claims; if any, against the appellants in accordance with law; D
- (7) On the amount found to be due and owing to MSIL by any of the appellants the same shall be paid with interest at the rate of 18% per annum leviable from the date of realisation till 12.2.1997 and thereafter at the rate 9% per annum, within twelve weeks from the date of final determination. E

These appeals are disposed of in the above terms. Parties shall bear their own costs of these proceedings.

In view of the aforesaid, no further orders are required to be passed in Contempt Petitions. Notice issued to the respondents in Contempt Petitions is hereby discharged. The Contempt Petitions shall stand disposed of. F

R.P.

Appeals/Petitions disposed of.