

Registrar of Restrictive Trade Vs. United Breweries Ltd. and anr.

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Court : Monopolies and Restrictive Trade Practices Commission MRTPC

Decided On : Jun-04-1986

Reported in : (1989)65CompCas656NULL

Judge : D Aggarwal, M Satyapal

Appellant : Registrar of Restrictive Trade

Respondent : United Breweries Ltd. and anr.

Judgement :

1. This is an application under Section 10(a)(iii) read with Section 37 of the Monopolies and Restrictive Trade Practices Act, 1969, for enquiry into restrictive trade practices which fall under Sub-clauses (a) and (g) of Sub-section (1) of Section 33 and Section 2(o) of the Monopolies and Restrictive Trade Practices Act. M/s. United Breweries Ltd., (UB), respondent No. 1, and M/s. Indo Lowenbrau Breweries Ltd., (ILB), respondent No. 2, are both engaged in the business of production, distribution and marketing of beer. On April 27, 1978, they entered into an agreement (copy at exhibit A-1) which shows that ILB arranged with UB for marketing the entire beer produced by it.

Consequently, UB agreed to disclose to ILB the know-how process for manufacture of beer and make available to it the expertise and advice in marketing and distribution. According to the Registrar of Restrictive Trade Agreements (now designated as the Director-General (Investigation and Registration), hereinafter referred to as the applicant) Clauses 2, 5 and 12 of the agreement, exhibit A-1,

relate to restrictive trade practices. These Clauses read : 2. With the object of ensuring effective marketing and distribution of the beer, ILB shall sell to UB and UB shall purchase from ILB the said beer at prices to be mutually agreed upon. The parties shall disclose to each other all necessary information, data, working costs and other expenses and costings necessary to enable them to arrive at such agreement.

5. In consideration of the obligation undertaken by UB under this agreement, ILB shall carry out its manufacturing processes in such manner as is approved by UB and shall permit UB to have the technical direction of its manufacturing and processing of beer and, in particular, shall appoint such personnel as may, from time to time, be nominated by UB and shall bear the cost of such personnel including their salaries and other expenses incurred by them while engaged in the business of ILB. 12. ILB shall not, without the consent of UB, during the currency of this agreement, engage or be concerned or interested, whether directly or indirectly, in the manufacture of beer other than such as will be manufactured by ILB in pursuance of this agreement.

2. The notice of enquiry dated August 14, 1984, was, therefore, issued in terms of regulation 58 of the Monopolies and Restrictive Trade Practices Commission Regulations, 1974. The said notice of enquiry adumbrates the following restraints which allegedly take the guise of restrictive trade practices, namely : (a) the terms and conditions of the agreement between respondents Nos. 1 and 2 prohibit the sale of beer by respondent No. 2 to any party other than respondent No. 1 ; (b) respondent No. 2 shall not, without the consent of respondent No. 1, during the currency of the said agreement, engage or be concerned or interested, whether directly or indirectly, in the manufacture of beer other than such as will be manufactured by respondent No. 2 in pursuance of the said agreement; (c) the terms and conditions further impose on respondent No, 2 a restriction that respondent No. 2 shall carry out such technical directions in manufacturing and processing of beer including directions to appoint personnel as may be given by respondent No. 1.

3. Both the respondents filed a common reply to the notice of enquiry in justification of the restrictions pleading, in the alternative, that the said restrictions cannot be regarded as detrimental to public interest by virtue of Clauses (b) and (h) of sub-section (1) of Section 38 read with the balancing Clause thereunder.

4. ILB, i.e., respondent No. 2, was incorporated in the year 1970 and started producing and marketing beer in the year 1975 under the brand "Brigadier and Bullet". By the year 1978, ILB was declared to be a sick unit due to lack of knowledge and expertise in the beer industry.

Moreover, ILB's market did not extend beyond the northern region where the demand is more or less seasonal resulting in lower utilisation of capacity and recurring losses. To save the company from total ruination, it is stated, the management entered into the impugned agreement with UB, i.e., respondent No. 1 because the latter not only possessed expert technical know-how to manufacture high grade beer but also has, at its disposal, an extensive and effective marketing organisation. ILB had incurred a loss of over Rs. 81 lakhs as against a paid-up capital of Rs. 72 lakhs when it entered into the agreement with UB. As a result thereof, as on June 30, 1984, the losses came down to Rs. 10.25 lakhs only and at present the loss had been completely wiped off, rather, ILB can even boast of a profit.

5. According to the respondents, the agreement redounds to the mutual benefit of both the parties inasmuch as the entire beer produced by ILB with the expertise provided by UB is marketed under the brand names of UB and this tends to optimise the production and supply of beer. Thus, the beer industry has been benefited by this arrangement rather than suffering any loss or detriment. As regards the restrictions, it is stated that there has been no strict prohibition to selling the beer to parties other than respondent No. 1. The second restriction against manufacturing beer for any party other than respondent No. 1 is said to be necessary as a safeguard to ensure that there is no tampering with the quality of the beer directly or indirectly so that the brands which UB has been marketing do not suffer any sort of infamy. In para 14 of the reply, it is stated as a matter of fact that respondent No. 2 has been selling beer under its own brand name "Bullet

extra strong ".

6. As for the third restriction that only the personnel named or approved by respondent No. 1 shall be appointed, it is contended that it is only to serve the object that the beer produced at the plant of respondent No. 2 is not inferior in quality in any way. Anyhow, since the market share of respondent No. 2 is only 4% of the total beer market, the alleged restrictions will not tend to diminish competition to a material degree. Hence, they submitted that the notice of enquiry be discharged.

(1) Whether the respondents have been indulging in the trade practices as mentioned in the notice of enquiry dated August 14, 1984 (2) If the answer to issue No. 1 is in the affirmative, then whether the said trade practices are restrictive trade practices within the meaning of Section 2(o) of the Monopolies and Restrictive Trade Practices Act, 1969 (3) If the answer to issue No. 2 is in the affirmative, then whether the respondents are entitled to avail of the gateways provided under Sections 38(1)(b) and (h) read with the balancing Clause 8. In order to adjudge whether the agreement between the parties in the matter of production, distribution and marketing of beer leads to restrictive trade practices, one or two Clauses thereof should not be read in isolation but the total effect thereof bearing in mind the background which necessitated the arrangement may have to be taken into account. UB has been in the business for the last 70 years and maintains a countrywide network for marketing its products. So far as ILB is concerned, it started manufacturing beer only in the year 1975.

It is the case of ILB that it was marketing beer under the brand names "Brigadier and Bullet" but due to lack of marketing network, it suffered losses aggregating to Rs. 81 lakhs as against the paid-up capital of Rs. 72 lakhs. The beer under the brand name "Brigadier and Bullet" could not make an appreciable dent in other parts of the country except northern India.

9. So, with a view to offset the losses, they were obliged to enter into this agreement with UB.10. Under Clause I, UB agreed to disclose to ILB, the manufacturing know-how and marketing and distributing expertise. Clause 2 relates to determining the prices by mutual discussion and with that object in view

both the parties agreed to disclose to each other working costs and other expenses as well as requisite data and information. Clauses 5, 6, and 10 may be noticed along with Clause 2. Under Clause 5, ILB promised to carry out the manufacturing process in the manner approved by UB and permit the latter to give technical directions in this respect. With that object in view, ILB has to appoint the personnel as may be nominated by UB, and the salaries and subsidiary expenses to be borne by ILB. By virtue of Clause 6, UB will place orders with ILB and the latter would supply beer in terms of the orders and within the time as stipulated. With that object, they agreed to co-operate with each other in planning the production schedule with a rider that ILB would be responsible to procure the raw material and packing material; of course, the labels are to be supplied by UB. Clause 10 gives UB a right to inspect the plant of ILB to verify as to whether the beer is being manufactured according to the standards laid down by UB. If UB may happen to allow supply of beer carrying the brands belonging to some third party, then the inspection is to be directed to see that those products answer to the standards as laid down by that third party to whom particular brand or trade mark belongs. For this purpose, UB will conduct such quality control checks as it may consider necessary.

11. Under Clause 11, ILB is obliged to keep the formula and the technical know-how secret and ensure that the employees also enter into a covenant that they would not disclose or divulge the formula, the technical know-how and the advice as may have been given to anybody. On the termination of the agreement, ILB would not use the trade marks which belong to UB and the said technical know-how formula and the advice. As per Clause 13, the duration of the agreement is 5 years but liable to be automatically renewed until terminated by either party by a six-month notice to the other. However, under Clause 14, the agreement can be terminated even earlier if ILB may go into liquidation or if any distress execution may take place. Under Clause 15, the waiver by either party of any default on the part of the other will not imply that a similar default subsequently would be waived nor would it in any way affect the provisions of the agreement. Under Clause 16, each party is debarred from assigning or parting with in whole or in part the rights, benefits and obligations under the agreement.

12. Under Clause 8, the relationship between the parties is on principal to principal basis. Clause 9 directs that the beer as will be manufactured by ILB shall be marketed by UB under the brand names/trade marks approved by UB. If the proprietorship of any trade mark is in the name of a third party, then ILB will be responsible to obtain regularisation of the use of that trade mark by ILB and/or UB as may be considered necessary. On the termination of the agreement, ILB would discontinue using those trade names/trade marks. Also, for the purpose of carrying out the obligations under this clause, ILB will enter into such registered users' agreements upon such terms and conditions as shall be required by UB. "ILB shall not, without the consent of UB, during the currency of this agreement, engage or be concerned or interested, whether directly or indirectly, in the manufacture of beer other than such as will be manufactured by ILB in pursuance of this agreement.

15. The applicant has assailed Clauses 2, 5 and 12 as giving rise to restrictive trade practices. As already stated, Clause 2 merely ensures that for effective marketing and distribution of the beer, ILB shall sell and UB shall purchase the beer at prices to be mutually agreed upon and for that purpose the working costs and other information and data would be disclosed by the one to the other. There is no specific prohibition to selling the beer thus produced to parties other than UB. The respondents examined in evidence, R.W-1, K. C. Gupta, secretary of ILB, RW-2, Sivaramakrishnan of UB and RW-3-A, Akhilandam, secretary and chief accountant of UB. They deposed that ILB is manufacturing UB's brands, namely, Kingfisher, Sunlager and UB Export lager. UB purchases the beer from ILB at Rs. 53.10 per dozen, freight, octroi, allied expenses and excise duty being extra. It is stated that excise duty is also paid by UB or its dealers. The retail price of the beer is Rs. 10 per bottle. It is stated that ILB can sell beer under the brand names whose proprietorship belongs to UB directly but on all those sales, UB is entitled to royalty. In annexure A appended to the reply to the notice of enquiry, the respondent ILB says that from July 1982 to June 1983, in all, 8, 66, 115 bottles of beer were sold out of which the sales made to UB were of 7,80,050 bottles. So, 86,065 bottles of beer were sold to other parties which numbered 28. Annexure B to the reply to the notice of enquiry relates to the sale from July, 1983, to June, 1984. In that year, 6,87,400 cases containing one dozen bottles each were sold to

UB. The total sales were, however, 9,05,325 cases. Thus, 2,17,925 cases containing one dozen bottles each were sold to other parties named therein which number 35. Mr. K.C. Gupta, RW-1 who is the secretary of respondent No. 2, says that prior to the agreement, the utilisation of the installed capacity was only 36%, but after the agreement, at present, the capacity utilisation has gone up to 141%.

Anyhow, it seems that Clause 2 of the agreement does not explicitly or implicitly prohibit the selling of beer to parties other than UB but the only condition is that royalty has to be paid to UB on those sales.

This being so, Clause 2 cannot be said to attract the provisions of sub-clause (a) of sub-section (1) of Section 23. The obligation to pay royalty to UB on all direct sales cannot be deemed to be a restriction as such on sale to parties other than UB; the benefit which UB received in the form of royalty is said to redound to the advantage of both but there is nothing to show that it tantamounts to manipulating the conditions of delivery and prices so as to impose unjustified cost on the consumer.

16. So far as Clause 5 of the agreement is concerned, the only objection is that the liberty of ILB has been curtailed in the matter of appointing its own persons. Needless to say, every agreement (vide observations in *Mahindra and Mahindra Ltd. v. Union of India* [1979] 49 Comp Cas 419; AIR 1979 SC 798), would ipso facto involve some restriction but every trade practice which is in restraint of trade is not necessarily a restrictive trade practice. The obligation to appoint such personnel as may be nominated by UB is incidental or natural in the background which necessitated the arrangement and having regard to other terms and conditions of the agreement and cannot be assailed on a consideration of the object to be achieved. Clause 5 as such hardly falls in any of the Clauses of sub-section (1) of Section 33.

17. As regards Clause 12 of the agreement, it is emphasised by Shri O.P. Dua, advocate, learned counsel for the applicant, that it is duly covered by Clause (g) of sub-section (1) of Section 33, and, therefore, it relates to a restrictive trade practice. Clause (g) reads as follows: (g) any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the

disposal of the goods; 18. In this respect, the reply of the respondent is two-fold. Firstly, this restriction is intended to ensure that beer of inferior quality is not mixed up with the beer which UB is marketing under particular brand names. This is to ensure that the quality which for those brands has been established in the estimation of consumer does not suffer or fall.

Secondly, this restriction is justifiable under Clause (b) of sub-section (1) of Section 38.

19. It may be mentioned that the restriction on ILB from manufacturing beer other than such as will be manufactured by ILB in pursuance of this agreement would tantamount to limiting, restricting or withholding the output, or supply thereof. Needless to say, the restriction is frowned upon by law because it is presumed to restrict competition between one manufacturer/dealer and the other besides having the potential of affecting the flow of supplies in the market in a manner as to impose on the consumer unjustified cost or restriction. The argument in support of the condition that it is in the nature of a safety Clause to ensure quality is self-defeasible vis-a-vis the plea that the condition is not being strictly adhered to inasmuch as ILB has also been selling beer under its own brand "Bullet Extra Strong". RW-2.

R. Sivaramakrishnan says that there is no express Clause in the agreement so as to prevent ILB from manufacturing beer under the brand names other than the brands owned by UB. If it is so, and if ILB finds that the capacity utilisation does not permit to do any job work for others, they would certainly be content with confining their manufacturing activity to the orders placed by UB and there should be no need to bind them so as to refrain from looking elsewhere. It is noteworthy that Clauses 2, 5 and 6 adequately safeguard the interests of UB in that the personnel nominated by the latter are to keep a watch on the production and also that the supplies as ordered by it are made with due regard to the time stipulated in the orders. It would be too presumptuous to say that no other brand of beer can match in quality the brands belonging to UB or that there is no scope for further improving the quality of other brands. Certainly, this restriction would be inhibitive of competition in this respect besides being detractive of maintaining abundant

supply of the goods and at reasonable prices, from the standpoint of the consumer. Needless to say, Clause 12 of the agreement otherwise too is to be regarded as relating to a restrictive trade practice under the deeming provisions of sub-section (1) of Section 33 without even reference to the provisions of Section 2(o) of the Monopolies and Restrictive Trade Practices Act. So, issues No. 1 and 2 are decided against the respondents with respect to Clause 12 of the agreement exhibit A-1.

20. Issue No. 3 relates to the question whether the restrictive trade practice as it emerges from Clause 12 of the agreement is not prejudicial to public interest. According to the respondents, Clause (b) of sub-section (1) of Section 38 read with the balancing provision justifies imposing of such a restriction on ILB. Clause (b) reads as follows : that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom.

21. Under the balancing provision, the respondents are expected to further satisfy the Commission that the restriction is not unreasonable having regard to the balance between the circumstances as described in Clause (b) and any detriment to the public or to the purchasers, consumers, etc. or persons engaged in the trade or business of selling such goods resulting or likely to result from the operation of the restriction.

22. It is submitted by learned counsel that the market share of ILB is around 4% in the beer industry and, therefore, it may not affect competition to any material degree. So far as this aspect of the matter is concerned, it may not be out of place to say that if ILB whose supply is confined to northern India enjoys 4% of the total business in beer, the quantum of business in combination with UB must confer on them a dominating position in the country inasmuch as it is admitted that UB has a countrywide distribution network. According to RW-1 K. C.Gupta, M/s Phipson and Co., M/s McDowell and Co. M/s Herbertson Ltd. are part of the UB group of companies. As at present, according to RW-3, Shri A. Akhilandam, orders to the

extent of 60 to 70% of the beer produced at the plant of ILB are placed by UB. So, even in that context, there is no justification to impose restriction on ILB with regard to manufacturing of beer pursuant to orders of third parties or pursuant to any initiative by ILB to produce its own beer. Of course, the marketing of that beer would be under the brand names not belonging to UB. The very implication of the agreement under Clause 12 is to lessen competition unfairly or to create a monopoly.

23. The only justification for Clause 12 of the agreement is that it would ensure purity and quality of the beer marketed under the brand names which belong to UB and also protect the technical know-how disclosed to ILB from being divulged to others. It may be mentioned that there is no allegation nor any evidence to the effect that the beer manufactured by ILB earlier was of inferior quality and that on that account it failed in the consumer market. Rather, a prefatory appendage to the agreement is that ILB has acquired an expertise inter alia in the manufacture and effective distribution and marketing of beer. The primary motive of ILB in approaching UB seems to be that it had no market except in Northern India where the demand is seasonal.

Under Clause (b) of Section 38(1), such a restriction would be justifiable only if the consumers or purchasers would be denied of any other specific and substantial benefits or advantages by the removal of the restriction. Obviously, the benefits and advantages contemplated by law are not just conceptual, fanciful or illusory but real and substantial. It may be added that the agreement is not for an indefinite period but only for five years in the first instance and thereafter terminable by either party with six months prior notice in writing. Clause 11 of the agreement provides for the termination of the agreement and the only restriction is that on the termination of the agreement, ILB shall not use the trade marks whose proprietorship is enjoyed by UB nor the formula and the technical know-how disclosed to it during the currency of the agreement. This being so, it is only one's good sense and adherence to a standard of morality or at best fear of damages for breach of the terms and conditions that can ensure steadfastness to one's commitments.

24. In *Trivoli Manchester Ltd. v. Collery* [1904] 32 WR 632 ; 20 ILR 437 Walton J. said "There may be cases in which even though the restraint is not unreasonable in the interest of the parties concerned, it may of itself be of such a character as to be injurious to the public and in such cases again, the restraint is void," (Extracted from Commentary at page 114 by D. J. Ganatra on MRTP Act, 1971 edition) 25. Manifestly, this clause, suffering as it does from the taint of being a restrictive trade practice, finds no justification under Section 38 particularly as it denies the services or utilisation of the industry of ILB to other tradesmen.

26. Before parting with this discussion, it may be just as well to notice some case law cited by Shri S.S. Kumar, advocate on behalf of the respondents. He makes reference to *Lubi Electrical P. Ltd.* (RTPE No. 126 of 1984--February 23, 1985) *Gulshan Rai Jain and Sons v. Rohtas Industries Ltd.* (RTPE No. 86 of 1984--August 23, 1984), *Ballarpur Industries Ltd.* (RTPE No. 119 of 1984--October 22, 1984), *Kota Nagar Pan Vikrela Sangh of Kota v. Godfrey Philips India Ltd.* (RTPE No. 14 of 1980--November 18, 1983), *RRTA v. Shriram Pistons and Rings Ltd.* (RTPE No. 41 of 1976--November 24, 1978). *RRTA v. Cooper Engineering Ltd.* (RTPE No. 37 of 1976--May 18, 1978), *RRTA v. Motor Industries Co. Ltd.* (RTPE No. 3 of 1976--December 7, 1978), *Sandvik Asia Lid.* (RTPE No. 27 of 1984--March 6, 1985). Learned counsel also read out some paras from Wilberforce's *Restrictive Trade Practices and Monopolies...2nd edition*, *Permanent Magnet Association's Agreement of U.K.*, *In re* [1962] LR 3 RP 27. It maybe mentioned that none of the decided cases helps the respondents in the context of the nature of the product, the circumstances leading to entering into the agreement and the restriction under Clause 12 of the agreement. RTPE No. 126 of 1984 and RTPE No. 86 oi 1984 were closed without issuing notice of enquiry inasmuch as the only grievance was that a particular trader was not getting supply direct from the manufacturers but only through the sole distributor. As to how many distributors or wholesalers should be appointed for a particular product, necessarily, would be within the discretion the manufacturer. In RTPE 119 of 1984, it was noticed that the distributor, M/s. South India Paper Distributing Company of Madras, had written to the aggrieved party, M/s. Modern Stationery Mart, that there would be no difficulty in supplying paper within four to six weeks from the receipt of the orders and so the Commission observed that the grievance of there being only one

distributor in a particular place does not fall within the definition of restrictive trade practice. In RTPE No. 14 of 1980 also the grievance was similar and the appointment of wholesale dealers who would deal with the retail dealers and not with the consumers direct was upheld. In RTPE No. 41 of 1976, an exclusivity Clause in the agreement for marketing automotive pistons was permitted. It was noticed that the distributor merely acted as an agent for procuring bulk orders from purchasers and in the eye of law, an agent could not compete with his principal. There was no exclusive dealing at the level of dealers/retailers.

28. In RTPE No. 37 of 1976, the exclusive dealership-arrangement pertains to marketing of diesel engines, pumping sets and spare parts.

In RTPE No. 3 of 1976 also, MICO was permitted to incorporate an exclusivity Clause in the distributorship agreement for marketing fuel injection equipment. The exclusivity Clause in these two cases was permitted having regard to the requirement of after-sale specialised services for the maintenance of these products in good repair and necessity for the supply of genuine parts. In the MICO case, the decision was also influenced by the essentially wholesale nature of the distributors business and customers' option to avail of neutral source of supply." In the former enquiry, it was also found that the service personnel were trained at the factory of the manufacturing company. In RTPE No. 27 of 1984, it was a case of a sole selling agency having been given to M/s. Atlas Copco India Ltd. and the agreement had been approved by the Government of India under Section 294AA of the Companies Act. The draft of the sole selling agency agreement had been duly scrutinised by the Department of Company Affairs, Ministry of Law and Justice.

29. This discussion will show that there is no identity or similarity between the circumstances which justified the exclusivity Clause in the aforesaid agreements and the circumstances and the facts having a bearing on the agreement in the instant case.

30. In Permanent Magnet Association's Agreement of UK, In re, [1962] LR 3 RP 119, referred to by learned counsel, Clause (b) of Section 21 of the UK Restrictive Trade Practices Act was under consideration.

Needless to say Clause (b) of sub-section (1) of Section 38 of our Act corresponds to Clause (b) of Section 21 of the UK Act. The controversy relates to the fixing of minimum prices for the magnets sold by the member-manufacturers of the Association. For the determination of the minimum prices, it seems that the Association established a technical committee and a Central Research Laboratory. Although we do not have the benefit of the original report, an extract thereof read out to us says: " The benefits made available to the public of the association's technical co-operation, which were likely to recur in the future, were definable, of a special character, and of real value and, therefore, qualified as 'specific and of substantial benefit' within paragraph (b). On the other hand, the abrogation of the price agreement would induce members to abandon the technical agreement from which these benefits were derived. " 31. It was also observed that the future benefits to the public to be derived from the continuation of the technical co-operation more than outweighed the possibility in some cases of higher prices under the agreement and, therefore, the general price restrictions were not unreasonable within the balancing provision.

32. It may be stated that no such substantial and definable benefits are shown to proceed from the exclusivity Clause of the agreement except that it would ensure purity and quality of the brands marketed by UB. This is nothing but conjectural particularly when it is admitted that this restriction is not being strictly adhered to. This being so, the respondents have failed to show that the restrictive trade practice as it emanates from the exclusivity Clause 12 of the agreement is not prejudicial to public interest. Issue No. 3 is decided against the respondents.

33. Reliefs.--In the result, Clause 12 of the agreement is declared to be void and shall be deleted. Respondent No. 1 is further directed to discontinue the restrictive trade practice of not allowing ILB, respondent No. 2, to manufacture beer to be marketed under its own brand names or to be manufactured on orders of any third parties to be marketed under the brand names other than those belonging to UB, respondent No. 1, and the same shall not be repeated in future. It is further directed that UB and ILB shall enter into a new agreement within one month's time without incorporating Clause 12 of the present agreement therein.