

(1988) 08 PAT CK 0004

In the Patna High Court

Case No : Civil Writ jurisdiction Case no. 1553 of 1987.

Ashok Kumar Chaudhary

APPELLANT

Vs

Hindustan Petroleum Corporation Ltd. and others

RESPONDENT

Date of Decision : 30-08-1988

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (1989) PLJR 1108

Hon'ble Judges : S.B. Sinha, J

Bench : Single Bench

Advocate : Tara Kant Jha, for the Appellant; Navin Kr. Sinha, N.K.P. Sinha (for Resp. 1 and 2) and Ganesh Prasad Sinha (for Resp. 3), for the Respondent

Final Decision : Dismissed

Judgement

S.B. Sinha, J.—This writ petition, inter alia, is directed against an order issued by the respondent No. 1 contained in a letter dated 27th August, 1986 and as contained in Annexure-15 to the writ application, whereby and whereunder, the said respondent terminated the agreement of dealership of the petitioner contained in the memorandum of agreement dated 1.10.1983. Shorn of all unnecessary details the facts of the case are as follows:--

An advertisement was issued on 1.4.1982 for appointment of agent for dealership outlet at Barauni. The said dealership was to be given to the unemployed graduates. The petitioner, pursuant to the said advertisement, applied for the said dealership and ultimately, was found fit therefor. Thereafter letter of intent dated 6.10.1982 was issued in favour of the petitioner.

2. According to the petitioner, he developed the land where the pump was to be installed and also constructed a building.

3. A dealership agreement was thereafter entered into by and between the petitioner and respondent corporation on 1.10.1983. It is admitted by the petitioner that although the outlet was commissioned on 22.2.1983 but the same

was closed for lack of adequate working capital and continued to remain closed throughout the year 1984.

4. The respondent No. 1 corporation gave a final notice to him by a letter dated 27.9.1984 to the effect that if the petitioner did not recommission the outlet by 10th October, 1984, alternate arrangement would be made. The petitioner by a letter dated 10th October, 1984 expressed his inability to recommission the outlet for lack of adequate finance and the respondent No. 1 in its turn informed the petitioner by letter dated 25.10.1984 that it was making alternate arrangement in order to protect its own interest. However, the outlet allegedly ran successfully from April, 1985 to March, 1986.

5. The petitioner in the writ petition has alleged that for starting another industry he entered into a partnership with the Respondent No. 3 and other and in connection with that partnership, he signed some blank papers and left the same with the said respondent. According to the petitioner, a forged partnership deed was created on the blank papers which bore his signatures. The petitioner has further alleged that the said forged partnership agreement was submitted before the respondent No. 2, who upon having come to learn the said fact, issued a show-cause notice dated 15.10.1986 to the petitioner asking for an explanation from him in that regard as allegedly entering into a partnership agreement with others by him was in violation of the terms of the dealership agreement. The petitioner replied to the said show cause notice, inter alia, alleging therein that the said partnership deed was forged. The petitioner has made various averments in this Court for the purpose of showing that the said deed was a forged and fabricated one, The petitioner has contended that the concerned respondent without considering the effect and purport of the petitioner's show cause by the aforementioned order as contained in letter dated 27th August, 1986 terminated the said agreement.

6. The petitioner has further contended that in terms of clause 58 of the agreement in question, he was to be given a chance to remedy the defect, before the agreement could be terminated which having not been done, the same is illegal.

7. Respondents Nos. 1 and 2 in their counter-affidavit, inter alia have contended that the agreement was terminated in accordance with the provisions contained therein and the same was done after giving an opportunity to the petitioner to file his representation. The respondents have further stated that clause 58 has no application in the facts and the circumstances of this case as the breach committed by the petitioner could not have been cured even if an opportunity was given to him as he violated an essential terms of the agreement. In the alternative, it has been submitted that in any event resorting to such clause would have been futile when the petitioner could not have remedied the same within the stipulated period as contained in the agreement. The respondents have further stated that in view of the breach of the terms of the agreement committed by the petitioner with regard to the principle of promissory estoppel/

equitable estoppel has no application in the facts and circumstances of the case.

8. The respondents have further contended that the impugned order being in the nature of termination of the dealership, a writ petition under Article 226 of the Constitution of India is not applicable. It has further been submitted that in any event this writ petition involves serious and complicated disputed questions of fact and on that ground too this Court should not exercise its writ jurisdiction. It has further been contended that the dealership agreement contains an arbitration clause and in that view of the matter, too this writ petition is not maintainable.

9. In view of the rival contentions of the parties, as noticed hereinbefore, the following questions arise for consideration in this case:--

(i) Whether the writ petition is maintainable as it seeks to enforce a contract qua contract ?

(ii) Whether this Court should exercise its jurisdiction under Article 226 of the Constitution of India in view of the serious disputed questions of fact involved therein ?

(iii) Whether this Court should exercise its jurisdiction under Article 226 of the Constitution of India in spite of the fact that there exist an arbitration clause, whereby and whereunder, the parties can settle their disputes.

10. In the instant case there is absolutely no doubt that the agreement in question as contained in Annexure-A to the counter-affidavit by and between the petitioner and the respondent No. 1 was a pure and simple contract and the same is not a statutory one.

11. Mr. Tara Kant Jha, learned counsel, appearing on behalf of the petitioner, however, submitted that the purported order of termination as contained in Annexure-15 to the writ application by respondent No. 1 as contained in his letter dated 27th August, 1986 being arbitrary in nature, the same is hit by Article 14 of the Constitution of India and as such this writ petition is maintainable.

12. The learned counsel in support of this proposition has referred to *Madhu Singh v. State of Bihar and others* (A.I.R. 1973 Pat 253), *Ramana Dayaram Shetty v. International Airport Authority and others* (A.I.R. 1979 SC 1628) and *Ram and Shyam Company Vs. State of Haryana and Others*, .

13. The learned counsel for the respondents on the other hand, placed reliance upon *Divisional Forest Officer v. Bishwanath Tea Co. Ltd.* (1981 supreme Court, 1368), *M.S. Desai and Co. v. Hindustan Petroleum Corporation Ltd.* (A.I.R. 1987 Gujrat, 19) and *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, .

14. In the instant case there is absolutely no doubt that the action on the part of the petitioner and respondent No. 1 to enter/into the agreement of dealership was a voluntary one. It is not the case of the petitioner that the terms,

conditions and covenants of the said agreement were governed by or under the provisions of any statute nor has it been suggested that the said agreement was statutory in nature.

15. By reason of the impugned order, the respondent Nos. 1 and 2 merely terminated the said agreement. The order of termination may be good or may be bad; the reason assigned may be valid or invalid; the facts found and the reasons assigned by respondent No. 2 for exercising the respondent No. 1 may be correct or incorrect but such questions in my opinion, cannot be a subject matter of a writ application.

16. The decisions relied upon by the learned counsel, appearing on behalf of the petitioner, have absolutely no application in the facts and the circumstances of this case. *Madhu Singh v. State of Bihar and others* (A.I.R. 1973, Patna 253) was a case of statutory contract. Similarly *Airport Authority's case* (supra) and *Rain & Shyam Company's case* (supra) were decided absolutely on different premises. In those cases the question involved was not in relation to a termination of a contract pure and simple as is in the present case.

17. In *Radha Krishna Agrawal's case* (supra) the Supreme Court has clearly held that the remedy provided under Article 226 of the Constitution of India is a discretionary remedy. In the said decision it has further been held that the question of termination of contract qua-contract cannot be decided in a writ application.

18. In the instant case, as has been seen hereinbefore, the respondent Nos. 1 and 2 have categorically stated that the petitioner, inter alia, had entered into a partnership with the respondent No. 3 in violation of the terms, conditions and covenants contained in the dealership agreement. The petitioner does not deny that prior to termination, he was given a chance to offer an explanation in the matter and he did avail the said opportunity. The respondent No. 2 has issued the impugned letter dated 27.8.1986 as contained in Annexure-15 to the writ application on being satisfied that the petitioner has violated the terms of the agreement. The contention of the petitioner appears to be that such termination was in violation of clause 58 of the agreement in question as he was not given a chance to remedy the defect Assuming that the petitioner's contention is correct, although it is the contention of respondent Nos. 1 and 2, that in that facts and the circumstances of this case the said clause has no application, the same cause at best be said to have been done in violation of the contractual obligation on the part of the concerned respondents but thereby the same cannot be said to be an arbitrary act on the part of the said respondents. In the facts and the circumstances of this case, the respondent can legitimately contend that the petitioner having entered into a partnership agreement with other persons in the matter of operating his business activities with respondent No. 1 committed a breach of an essential term of the agreement in question and as such the same cannot be remedied within a period of four days and in that view of the matter the said clause is not applicable.

19. Apart from the facts aforesaid the breaches as alleged against the respondents have arisen from the terms, conditions and covenants in the agreement itself in my opinion, small breaches Or technical breaches of the terms, conditions and covenants of such agreement cannot be termed as an arbitrary action on the part of respondent Nos. 1 and 2 in the context of Article 14 of the Constitution of India. In my opinion, if recourse is taken to the provision to a contract relating to its termination by one or the other party thereof and in a case of technical violation thereof the same cannot be termed to be an arbitrary action. The word "Arbitrary" has to be given a restricted meaning.

20. In the instant case the respondent Nos. 1 and 2 have not been charged with violating any provision of any statute nor has it been contended that the impugned order terminating the petitioner's dealership agreement was done in violation of any policy decision evolved by the Central Government which is binding upon them. It is also not the case of the petitioner that concerned respondents while ostensibly discharging its contractual function had in fact exercised an executive power of the State.

21. It is a common ground that the dealership agreement can be terminated on account of its breaches or misconduct on the part of the dealer. There cannot be any doubt that such termination of dealership being in the realm of contract, the respondents Nos. 1 and 2 were entitled to exercise their contractual power under the said agreement.

22. Reference in this connection may also be made to a recent decision of the Supreme Court in *L.I.C. of India v. Escort Ltd.* (reported in AIR 1986 Supreme Court, 1370 wherein the Supreme Court observed as follows:--

The Court will not debate academic matters or concern itself with the intricacies of trade and commerce. If the action of the State is related to contractual obligation or obligations arising out of the Court, the Court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the Court will ex-amine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private field. The difficulty will be in demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances. When the State or an instrumentality of the State ventures into the corporate world and purchases the shares of a company, it assumes to itself the ordinary role of a share-holder, and dons and robes of a shareholder, with all the rights available to such a shareholder. There is no reason why the state as a shareholder should be expected to state its reason when it seeks to change the management, by a resolution of the company, like any other shareholder.

23. Apart from Radha Krishna Agrawal's case (supra) reference may also be made to Divisional Forest Officer v. Bishwanath Tea Company (reported in AIR 1981 Supreme Court, 1368) where the Supreme Court held that "Where a company tried to enforce through writ petition the right to remove timber without the liability to pay royalty, it was held that the company was not enforcing its right not under the Rule 37 of the Assam Land and Revenue and Local Rates Regulations but was seeking to enforce a contractual right under the specific terms of contract of lease agreed to between the company and the Government. Such contractual right, therefore, could not be enforced in writ petition.

24. Further, the main plank of the petitioner's case appears to be that respondent No. 2 had issued the impugned order on wrong pre-raises inasmuch as the purported partnership agreement allegedly entered into by and between the petitioner and respondent No. 3 was a forged and fabricated one. The question as to whether the said deed was forged and fabricated one is a disputed question of fact. There is absolutely no doubt that in a given case even oral evidence can be taken by a writ Court. However, it is also the settled law that normally a writ Court would refuse to do so.

25. In the instant case if such disputed question as involved in this case has to be gone into, in such an event it will have to decide the same upon taking evidence on the adverse contentions of the petitioner and respondent No. 3 who is a private individual which, in my opinion, is not permissible.

26. Further, the question as to whether the respondent No. 3 obtained signature of the petitioner on some blank papers and thereafter converted the same into a partnership agreement would lead to entering into a thicket of such disputed questions of fact which may not only require oral evidences to be recorded but also may necessitate the opinion of experts. There is absolutely no reason as to why such an extraordinary and exceptional course should be adopted in this case.

27. If the contention of the petitioner is to be accepted then a proceeding u/s 226 of the Constitution of India would be converted into a proceeding of a civil suit for the purpose of examining the legality and validity of a particular clause in a contract.

28. Reference in this connection may again be made to Escorts Ltd's case where the Supreme Court after noting the rival contention held

Everyone of these circumstances is capable of some explanation, adequate or not. We do not have the necessary material to say on the record now before us. The question will involve a probe into individual purchases and the adduction of evidence. That would be beyond the scope of the writ petition in the High Court.

29. At this juncture, it may further be noted that it is an admitted fact that the agreement contained an arbitration clause. It is now well settled that where there exists an arbitration clause the writ Court refuses to exercise its jurisdiction

under Article 226 of the Constitution of India. Reference in this connection may be made to *Indian Aluminium Co. Versus Kerala Electricity Board* (Reported in 1975 Supreme Court, 1967).

30. Mr. Jha, the learned counsel appearing on behalf of the petitioner, however, submitted that in the instant case the arbitration clause will be of no avail as the arbitrator is one of the officers of respondent no. 1. In this connection, the learned counsel has referred to a recent decision of the Supreme Court in *State of Karnataka vs. Rameshwara Rice Mills* (Reported in AIR 1987 Supreme Court, 1359). The facts of the case upon which the said decision was rendered were entirely on a different premises. In that case it was held that the State did not hold the power to assess the damages when the same required determination of the question of breach of condition which was itself disputed and in such situation it was held that even if an issue is made as to whether there has been a breach of condition or not, the government cannot take recourse to its power to assess the damages.

31. In the instant case such position is not available and, therefore, the decision of the Supreme Court referred to hereinbefore and relied upon by the learned counsel for the petitioner is of no assistance as the background of the facts of the said case was absolutely different.

32. Reference in this connection may be made to a decision in *Ambica Quarry Works etc. vs. State of Gujrat and others* (reported in AIR 1987 Supreme Court, 1073) wherein in para 18 of the judgment it was observed as follows :--

The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically following from it. (See Lord Halsbury in *Quinn vs. Leathern*, 1901 AC 495).

33. There cannot be any doubt that an arbitration agreement which was entered into by the petitioner with his eyes wide open wherein the named arbitrator is to adjudicate upon the disputes arising out of the agreement. Reference of such a dispute to a named arbitrator by the parties, be he an officer of respondent No. 1 or otherwise is a valid agreement unless bias on the part of the arbitrator is alleged and established.

In any event the Arbitration Act, 1940 itself provides that in case the arbitrator is biased or circumstances exist for revocation of the arbitration agreement or for removal of arbitrator in certain conditions. This Court while exercising its jurisdiction under Article 226 of the Constitution cannot usurp the function of the Civil Court in such matter, particularly when in the writ petition no foundational facts showing bias on the part of the named arbitrator has been pleaded. If such a prayer is to be entertained, the same would amount to determination of a question as to whether the arbitration agreement should be revoked. Evidently such a prayer cannot to be granted and hence, this writ petition cannot be entertained.

34. Assuming that there is some substance in the contention of the petitioner, the same cannot be examined under Article 226 of the Constitution of India as this proceeding cannot be converted into a proceeding of a civil suit or an application under the Arbitration Act. Extraordinary jurisdiction of the High Court under Article 226 of the Constitution cannot be exercised for determining question arising out of the contractual rights or obligations of the respective parties under a contract. Considering this case from all angles, I am of the opinion that this writ petition is not maintainable and is, therefore, liable to be dismissed.

In the result, this writ petition is dismissed but in the facts and the circumstances of the case, there shall be no order as to costs.