

(1999) 09 MAD CK 0066
In the Madras High Court
Case No : W.P.No.11476 of 1999

B. Jenarathanan, Balaji Service Station, Coimbatore	APPELLANT
Vs	
The Senior Regional Manager, Hindustan Petroleum Corporation, Coimbatore Regional Office, Coimbatore	RESPONDENT

Date of Decision : 09-09-1999

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 226
Criminal Procedure Code, 1973 (CrPC) — Section 100
Essential Commodities Act, 1955 — Section 3

Citation : (1999) 09 MAD CK 0066

Hon'ble Judges : P.D. Dinakaran, J

Bench : Single Bench

Advocate : T.R. Rajagopalan, S.C. for Mr. C. Prakasam, for the Appellant; K. Kumar, A.C.G.S.C., for the Respondent

Final Decision : Dismissed

Judgement

P.D. Dinakaran, J.—Petitioner, who is the Managing partner of Balaji Service Station, who is appointed as retail outlet dealer by the respondent Corporation under the Dealership Agreement dated 29.12.1985. The dealership of the petitioner is admittedly governed by the provisions of the Motor Spirit and High Speed Diesel (Prevention of Malpractices in Supply and Distribution) Order, 1990, an order framed by the Central Government in exercise of the powers conferred by Sec. 3 of the Essential Commodities Act, 1955. Following clauses of the agreement dated 29.12.1985 are relevant to be mentioned.

24. The quantities of petroleum and other allied products stated to be delivered by the Corporation as measured by the Corporations measuring devices or means shall be final and binding upon the parties hereto. The property in the product shall pass from the Corporation to the Dealer at the time of delivery of the product to the dealer or his representative and the Corporation not in any way be responsible for loss or shortage thereafter. A receipt signed by or on

behalf of the dealer at the time of delivery of petroleum products by the Corporation will be conclusive evidence that the petroleum products mentioned therein were in fact delivered to the dealer, that such products were in accordance with the specifications there for mentioned hereunder and that the quantities of such products mentioned in the receipts are correct, and the dealer shall thereafter be precluded from making any claim against the Corporation for compensation or otherwise on the ground of short delivery or contamination of such products.

25. The dealer shall be responsible for all loss, contamination, damage or shortage of or to the products to the whether partial or entire, and no claim will be entertained by the Corporation therefor under any circumstances except in cases where the Corporation is satisfied that loss arose from leakage from underground tanks or pipes which the dealer could not reasonably have discovered and of which the dealer gave immediate notice in writing to the Corporation on discovery. The Corporation will consider compensation only from the date of receipt of notice till leakage is rectified.

26. All the products supplied by the Corporation to the dealer hereunder shall be in accordance with the specification laid down by the Corporation from time to time. The dealer shall take every possible precaution against contamination of the Corporation's product by water, dirt or other things injurious to the quality and shall not in any way directly or indirectly alter the specifications of the said product as delivered. The Corporation shall have the right to exercise at its discretion at any time and from time to time quality control measures for products marketed by the Corporation and lying with the dealer the opinion of the Regional Manager for the time being at the Corporation Regional Office at Ernakulum as to whether any product of the Corporation has been contaminated shall be final and binding upon the dealer. In the event of the said Regional Managing Director finding that the contamination has been due to any act or default of the dealer or of its servants or agents, the Corporation shall have the right without being bound to do so, to remove the contaminated product and to destroy or otherwise deal with the same without making any payment therefor to the dealer and without prejudice to the Corporation right to terminate this agreement forthwith.

42. The dealer undertakes faithfully and promptly to carry out, observe and perform all directions or rules given or made from time to time by the Corporation for the proper carrying on of the dealership of the Corporation. The dealer shall scrupulously observe and comply with all laws, rules and regulations and requisitions of the all Central/State Governments and of all "all authorities" appointed by them or either of them including in particular the Chief Controller of explosives, Government of India and/or any other municipal and/or any other local authority with regard to the storage and sale of such petroleum products.

55. Notwithstanding anything to the contrary herein contained, the Corporation shall be at liberty to terminate this agreement forthwith upon any time after the

happening of any of the following namely:

(1) If the dealer shall contaminate or tamper with, the quality of any of the products supplied by the Corporation.

The Corporation's right to terminate this agreement under the terms of this clause shall be without prejudice to any of its other rights and remedies against the dealer, in the event of the Corporation terminating this Agreement under the provisions of this clause, it shall be liable to pay for any loss of compensation in respect of such termination provided that the supply of any petroleum products by the Corporation to the dealer pending expiry of any notice of termination or after any act contravention or omission by the dealer entitling the Corporation to terminate this agreement shall have become known to the Corporation, shall not in any way prejudice or affect the right of the Corporation to revoke and/or enforce the termination of this agreement and the licence granted hereunder.

66. Any dispute or difference of any nature whatsoever or regarding any right, liability, act, commission or account of any of the parties hereto arising out of or in relation to this Agreement shall be referred to the sole arbitration of the Managing Director of the Corporation or of some officer of the Corporation who may be nominated by the Managing Director. It is also a term of this contract that no person other than the Managing Director or a person nominated by such Managing Director of the Corporation as aforesaid shall act as Arbitrator hereunder. The award of the Arbitrator so appointed shall be final, conclusive and binding on all parties to the agreement, subject to the provisions of the Arbitration Act, 1940 or any statutory modification of/or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the Arbitration proceedings under this clause.

The following clauses of the Control Order are relevant to be mentioned:

2(a) "Adulteration" means the introduction of any foreign substance into motor spirit/high speed diesel illegally or unauthorisedly with the result that the product does not conform to the requirements and specifications of the product indicated in Schedule I;

2(c) "Dealer" means a person appointed by an Oil Company to purchase, receive, store and sell motor spirit and high speed diesel oil whether or not in conjunction with any other business, and shall include his representatives, employees or agents;

2(d) "High speed diesel" means any hydrocarbon oil (excluding mineral colza oil and turpentine substitute) which meets the requirements of Bureau of Indian Standards specification No.IS-1460 and is suitable for use as fuel in Compression Ignition Engines;

2(e) "Malpractices" shall include the following acts of omission and commission in respect of motor spirit and high speed diesel;

2(g) "Oil Company" means any person, firm or company authorised by the Central Government who is engaged in the sale of Motor Spirit of High Speed Diesel to consumers or dealers;

2(r) "Sale of off specification product" means, sale of Motor Spirit of High Speed Diesel by dealer of quality not conforming to Bureau of Indian Standards specifications, No.IS2796 and ISI1460 for Motor Spirit & High Speed Diesel or also not in conformity with Schedule I.

2. Product supply and Transportation:

(i) The product from the supply point shall be transported by the transporter in a container of tank truck certified fit by the concerned authorities (Explosives and Transport authorities and oil company) to carry the product with accurate calibration as certified by the Weights and Measures authority and supported by delivery documents and deliver the same to the storage or dispensing point in the same condition as delivered to him by the originating supply point both in respect of quality and quantity.

(ii) The transporter shall ensure that the product is transported only in containers or tank trucks which are properly sealed.

(iii) The dealer/consumer shall inspect such containers or tank trucks in which he receives the product to ensure.

(a) That the container or tank truck, including the seals are not in any manner tampered with;

(b) That the quantity and quality of the products are as per delivery documents issued by the Oil Companies and the quality of the product conforms to the requirements indicated in Schedule I. For this purpose, the dealer/consumer shall maintain a record of densities as indicated in Schedule 1 and keep samples of product or take such other measures, as prescribed by Oil Company.

.....

(iv) No dealer, transporter, consumer or any other person shall indulge in any manner in any of the malpractices listed in Clause 2(e) above.

3. Clause 4 of the Control Order empowers the officers authorised under the Control Order to enter and search and place or premises used by the dealer or transporter and to take samples of the product and/or seize any of the stocks of the product, for the reasons to be recorded in writing for taking such samples or seizure, by following the provisions of Sec. 100 of CrI.P.C. Clause 5 of the Control Order deals with the procedure to be followed in collecting the samples of the product for laboratory analysis. Schedule I to the Control Order deals with the method of tests to be adopted for verifying the quality of the product supplied such as colour, density, requirements relating to distillation with reference to initial boiling point, final boiling point, etc. As per the said Schedule I, the maximum final boiling point of the petroleum product supplied by the

Corporation should be 215 C.

4. It appears that the authorised officer made an entry into the retail outlet of the petitioner, conducted an inspection and search on 10.5.1999, collected sample of the petroleum product stored in the petitioner's retail outlet and sent the same for lab analysis. On receipt of the lab analysis report, the respondent served a show-cause notice dated 28.5.1999 to the petitioner as to why the dealership licence of the petitioner should not be suspended for the difference of the requirements with reference to the boiling point of the petroleum product. The petitioner, by his letter dated 7.6.1999, requested a copy of the lab report and the same was furnished to him on 8.6.1999. As the petitioner did not submit any further explanation to the show-cause notice issued, the respondent sent a reminder on 15.6.1999 seeking explanation from the petitioner to the show-cause dated 28.5.1999, to which, the petitioner submitted his explanation on 17.6.1999 stating that there is no variation in the requirements with reference to the boiling point of the petroleum product. Not satisfied with the explanation offered by the petitioner, the respondent, by order dated 29.6.1999, which is impugned in the above Writ Petition, suspended the dealership licence of the petitioner for a period of 45 days. Hence the above Writ Petition praying for a Writ of Certiorari, calling for the entire records relating to the impugned proceedings in CBRO/TRD/RET, dated 29.6.1999 and quash the same in so far as it relates to the suspension of the sales and supplies for a period of 45 days with effect from 1.7.1999.

5. While admitting the Writ Petitions on 5.7.1999, this Court directed the respondent to forward the sample collected on 10.5.1999 from the petitioner's retail outlet and also the sample entrusted to the petitioner on the same day to the laboratory of the Indian Institute of Technology, Madras, for lab analysis with regard to the adulteration of the petroleum product. Accordingly the respondent had sent the sample for chemical analysis and obtained the following test report from the Indian Institute of Technology, Madras:

HCL Sample

Dealer Sample

I. Appearance

Clear

Clear

2. Colour (visual)

Orange

Orange

3. Density at

Temp. 24 C

0.729 g. per ml

0.740 g. per ml

4. Distillation:

Initial amount taken 200 ml

5. Initial boiling point (degree C)

38

38

Recovery at 70 C

52 ml(26%)

40 ml (20%)

Recovery at 125 C

101 ml

103 ml

(50.5%)

(51.5%)

Recovery at maximum

35 ml

44 ml

Temperature 148 C

(17.5%)

(22%)

Undistilled residue

(upto 200 C)

8 ml

11 ml

(4%)

(5.5%)

This report given to M/s. Hindustan Petroleum Corporation Ltd. is purely related to technical aspects of the sample given by them and has no legal binding on the Institute.

In view of the observation of the Department of Chemistry, Indian Institute of Technology, Madras, that the report submitted by them shall not have legal binding force, the same do not serve any purpose.

6. Mr. T.R. Rajagopalan, learned senior counsel for the petitioner contends that there is no variation in the density of the sample and hence the finding of the respondent that the petitioner had adulterated the petroleum product entrusted to him. Mr. T.R. Rajagopalan, learned senior counsel further contends that the petroleum product is contaminated merely on the basis of the final boiling point is erroneous and in any event, the unilateral finding of the respondent that the petroleum product had been adulterated and contaminated by the petitioner is not justified, and therefore, the order of suspension of the petitioner's dealership licence for a period of 45 days, by the impugned proceedings, is arbitrary and unreasonable and violative of Art. 14 of the Constitution of India.

7. Per contra, Mr. K. Kumar, learned Additional Central Government Standing Counsel, appearing for the respondent-Corporation contends that the dealership agreement dated 29.12.1985, entered into between the petitioner and the respondent-Corporation is admittedly a non-statutory contract and therefore the petitioner is not entitled to challenge the impugned order of suspension by way of judicial review invoking Art. 226 of the Constitution of India. In this regard, learned Additional Central Government Standing Counsel relies upon the decisions in Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others, and State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., .

8. Mr. K. Kumar, Learned Counsel for the respondent-Corporation further contends that in any event the petitioner is governed by Clause 66 of the dealership agreement dated 29.12.1985, which provides for resolving of disputes, if any, arising under the dealership licence, through arbitration and therefore the petitioner is entitled to seek the remedy only through the arbitration proceedings but not by way of a judicial review under Art. 226 of the Constitution of India. In this regard, Learned Counsel for the respondent relies upon the decision in Hindusthan Petroleum Corpn. Ltd. and Others Vs. Shyam Sundar Ganeriwala, .

9. Finally, Mr. Kumar, placing reliance on the decision in Krishna Kumar v. Senior Superintendent of Police, Bulandshahr, reported in 1998 A I H C 4581, contends that the criteria of density alone cannot be taken into consideration for determining the adulteration or contamination or malpractice because it is possible to reduce the density to adulterate the petroleum product and then raise the density rate to the level of the diesel by adding substance. It is, therefore, contended that if the product does not conform to the standard and requirements mentioned in Schedule I to the Control Order, it has to be held as adulterated or contaminated and therefore the same would amount to malpractice. Mr. K. Kumar, further contends that the procedure prescribed under the Control Order is self-sufficient to decide whether the product is adulterated or contaminated and to find whether the dealer has indulged in any malpractice;

and that testing the impugned proceedings in the light of Clauses 3, 4 and 5 of the Control Order read with Clauses 24, 25, 26, 42 and 55 of the Dealership Agreement dated 29.12.1985, there is no arbitrary or unreasonable exercise of powers in passing the impugned order, as once the dealer accepts the consignment, there is no scope for its variation in its density beyond the permissible limits, unless some foreign substance is mixed with it. Mr. K. Kumar pointed out that the lab analysis report of the sample collected on 10.5.1999 shows that the final boiling point is 227 C which should be only 215 C as per Schedule I to the Control Order. Mr. K. Kumar also contends that the supply of petroleum products is made only through the Government owned companies and therefore it has to be presumed that the Government Corporations are not expected and will not supply sub-standard and adulterated petroleum products and it can safely be presumed that the petroleum products supplied by them would be pure and would conform to the standards laid down by the Indian Standard Institute. Petrol or diesel is not manufactured or produced by dealers nor it is supplied by private manufacturers. The dealer is only required to maintain the product in the same condition in which they receive it. There is no compulsion on any one to get a dealership of petrol or diesel. Learned Counsel for the respondent-Corporation further contends that the petitioner, having been appointed as dealer of the respondent-Corporation, submitting themselves to the provisions of Control Orders, cannot be heard to complain that the Control Order by which he is governed does not give him a second opportunity to get the sample analysed again and therefore the petitioner cannot complain of violation of Art. 14 and Art. 21 of the Constitution merely on the ground that a second opportunity to get the sample analysed is not provided to him. Mr. K. Kumar, learned A.C.G.S.C. further contends that there is no arbitrary or unreasonable or illegal exercise of powers in passing the impugned order nor is there any violation of Art. 14 and Art. 21 of the Constitution of India.

10. I have given careful consideration to the rival submissions.

11. The issues that arises for my consideration in the light of the rival contentions are:

(i) Whether the Writ Petition is maintainable in law on the grounds:

(a) Since the impugned order of suspension dated 29.6.1999 arises under a non-statutory contract; and

(b) The dealership agreement dated 29.12.1985 provides of resolving of disputes between the Corporation and the Dealers through arbitration.

(ii) Whether the impugned order of suspension dated 29.6.1999 is liable to be granted granted (sic.) (quashed)?

12. As rightly pointed out by Mr. Kumar, learned A.C.G.S.C. for the respondent Corporation, placing reliance on the decisions in Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others, and State of U.P. v. Bride & Roof.

Ltd., reported in AIR 196 SC 3515, it is well settled in law that the right of parties inter se of a non-statutory contract cannot be challenged in a Writ Petition under Art. 226 of the Constitution of India.

13. In Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others, Apex Court held as follows:

When the contract entered into by the State is non-statutory and purely contractual and relations are no longer governed by the constitutional provisions but by the legally valid contract which determines the rights and obligations of the parties inter se. In this sphere, the parties can only claim rights conferred upon them by the contract in the absence of any statutory obligations on the part of the authority in the said contractual field. It is also settled that no writ or order can be issued under Art. 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple.

14. Similarly, a Division Bench of the Calcutta High Court in Hindusthan Petroleum Corpn. Ltd. and Others Vs. Shyam Sundar Ganeriwala, a case identical to the present case, held as follows:

Even assuming that the appellant corporation was an instrumentality of the State, the case of Writ Petitioner is that the Corporation acted beyond its powers under the agreement in directing suspension of supply of its products for sale through him. It is not a case where such an instrumentality of the State issued that direction in exercise of any statutory power or in exercise of any sovereign power of the State delegated to it. It is an act qua licensor and, as such, in purported exercise of its powers reserved unto itself as a party to the agreement. It is wholly irrelevant as to whether the impugned act is an arbitrary one or an act in exercise of the powers under the agreement so long as it remains in act in the realm of the contract between the parties. Since the relief claimed emanates from the realm of contract, a proceeding under Article 226 of the Constitution is hardly an appropriate remedy.

A right derived from an agreement or a contract may be infringed by breach thereof. In all such cases the remedy available is the usual remedy under the laws, namely specific performance or damages. Irrespective of whether the party committing the breach is a private individual or the State and/or its instrumentalities, in all such cases the parties to the agreement or contract having entered into a contractual relationship they would be governed exclusively by the laws relating to the contract. But at the same time a right derived from an agreement with the State may as well be infringed by the State by way of breach thereof and by some administrative action taken in the exercise of any statutory power or in exercise of its administrative power. In such cases where the right or a citizen is infringed a writ proceeding would be available if it can be established that such infringement is in breach of the law notwithstanding the fact that the right emanates from the agreement as the right to relief arises not for any breach of the agreement pure and simple but for breach of law.

The wider power of termination incorporates by necessary implication the lesser power of temporary termination by way of suspension.

Since the dispute raised is fully covered by the arbitration clause incorporated in the agreement itself, the parties including the Writ Petitioner are bound to avail of the forum mutually settled for redress of the grievance and such a form must have precedence over others. A proceeding before the High Court under Article 226 of the Constitution of India cannot derogate from this position.

In view of the above settled principles, I am obliged to hold that the petitioner is not entitled to maintain the above Writ Petition.

15. Issue No.(ii): Whether the impugned order of suspension dated 29.6.1999 is liable to be granted (sic.) (quashed)?

16. It is not in dispute that Sec. 2(a) of the Control Order clearly defines the term "adulteration" if the product does not conform with the requirements and specifications of the product indicated in Schedule I to the Control Order. No doubt, adulteration is one of the malpractices defined under Clause 2(e) of the Control order. Again as per clause 2(r), the sale of "of the specification product" means, the sale of petroleum product by dealer of quality not conforming to Bureau of Indian Standards Specifications or also not in conformity with Schedule I. Schedule I to the Control Order clearly indicates that the maximum final boiling point is 215 C. Once the dealer accepts the delivery of petroleum product and acknowledges the same with necessary documents and certificates, it is presumed that the laboratory analysis report of the mother sample is conform to the requirements mentioned in Schedule I to the Control Order. If the quality of the sample collected from the petitioner on 10.5.1999 do not conform with the requirements of the specification relating to the maximum boiling joint as mentioned in Schedule I to the Control Order, it has to be construed that the product is adulterated attracting Clause 2(a) and Clause 2(e) of the Control Order in which event, the contention of the learned senior counsel for the petitioner that the finding to the effect that the petroleum product is adulterated by the petitioner and the consequential order of suspension of dealership licence of the petitioner is arbitrary, unreasonable and illegal, violating Arts. 14 and 21 of the Constitution of India is not tenable in as much as the lab analysis report of the sample of the product shows that the maximum final boiling point was 217 C as against 215 C as specified in Schedule I to the Control Order.

17. In this regard, I am obliged to refer to the ratio laid down in Krishna Kumar's case, reported in 1998 AIHC 4581, which reads as follows:

..... There are only four oil companies which are all government corporations which supply the product to the dealers. The Government Corporations are not expected and will not supply substandard or adulterated material and it can be presumed that the product supplied by them would be pure and would conform to the standards laid down by Indian Standards Institution. The dealer is only required to maintain the product in the same condition in which he had received

it. There is no compulsion on any one to get a dealership of petrol or diesel. Any one who wants to be appointed as a dealer of an oil company does so by his own choice and after becoming a dealer he cannot be heard to complain that the Control Order by which he is governed does not give him a second opportunity to get the sample analysed again. We think that in view of the nature of the commodity involved, its source of supply being oil companies as defined in Clause 2(g) and the requirement being confined to the variation of density within permissible limits as required by Schedule I, a dealer cannot complain violation of Art. 21 of the Constitution merely on the ground that a second opportunity to get the sample analysed is not provided to him.

As a result of discussion made above our conclusions are as follows:

(1) It is not possible to give the precise quantity or extent of adulteration in any petroleum produce. The report of the laboratory to the effect that the product is adulterated is sufficient to hold that the dealer has indulged in malpractice as defined in Clause 2(e).

.....

18. That apart, the density of the petroleum product alone cannot be a criterion to determine whether the petroleum product is adulterated or "contaminated or any malpractice has been committed by the dealers as held in Krishna Kumar" case, reported in 1998 AIHC 4581 which reads as follows:

It is not possible to give the precise quantity or extent of adulteration in any petroleum produce. The report of the laboratory to the effect that the product is adulterated is sufficient to hold that the dealer has indulged in malpractice as defined in C1.2(e). The report of analysis submitted by any of the laboratory enumerated in Sch.III of the Control Order is conclusive and is admissible without any formal proof.

The density of diesel is higher than that of Kerosene and density of kerosene is higher than that of petrol and therefore, if kerosene is mixed with diesel the density of such adulterated product would be less than the density of pure diesel. However, by mixing some other article it is possible to gain raise the density of this adulterated product to the level of diesel. Therefore, by mixing more than one item to diesel its density can be brought back to the prescribed standard. Similarly, density of petrol will become higher by mixing kerosene but it can be brought back to the prescribed standard by mixing another item having lower density. It can never be the intention of the legislature that even though two or more foreign substance have been mixed with diesel but if the product so made conforms to the density standard it should not be treated as a malpractice or that it does not amount to violation of the provisions of Control Order. If the criteria of density alone is taken into consideration it will lead to an absurd result that where only one item is mixed it will amount to a malpractice but if more than one item is mixed in such a manner which brings the density to the prescribed standard, it will not amount to a malpractice.

19. In view of the above well settled principles, I do not find any good and sufficient reason to interfere with the impugned order of suspension dated 29.6.1999.

20. However, taking into consideration the grievance of the petitioner that there are possibilities to adulterate or contaminate or to commit malpractice by the transporter while the petroleum products are in transit and the mere non-identification of such tampered seals on the containers of the petroleum products cannot by itself be foolproof to conclude that any such adulteration or contamination or any malpractice could not have been committed by the transporter while the petroleum products are in transit, this Court expects that the Government shall take into consideration the above grievance of the retail outlet dealers and introduce appropriate safeguards to protect the interests of the dealers as also the general public by making necessary provisions in the Control Order to collect and sample of the petroleum products at the time of delivery to the dealers, leave one such sample with the dealers and keep one sample with the oil company, which can be compared as and when the question of adulteration or contamination or any malpractice is complained of against the dealers, which would in fact avoid any evasion of any of the provisions of the Control Order. The Writ Petition is dismissed with the above observation. No costs. Connected W.M.P.Nos.16190, 17604 and 17620 of 1999 are rejected.