
(2012) 04 AHC CK 0220

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 23764 of 2009

Diesel Engineering Co. Pvt. Ltd. and Another

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 06-04-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2012) 6 ADJ 331

Hon'ble Judges : Sunil Ambwani, J; Pankaj Naqvi, J

Bench : Division Bench

Advocate : H.R. Misra and Abhishek Misra, for the Appellant; A.K. Nigam, P. Padia and C.S.C., for the Respondent

Final Decision : Dismissed

Judgement

Hon'ble Pankaj Naqvi, J.—The petitioner-a retail outlet dealer of the products of Bharat Petroleum Chemicals Limited (short as B.P.C.L.) has challenged an order dated 24.4.2009 passed by respondent No. 4 whereby the dealership of the petitioner's company has been terminated. The petitioner-company entered into a dealership agreement with B.P.C.L. for retail sale of petroleum products, supplied at Civil Lines, Bilaspur, District Rampur. The said outlet was inspected by one Mr. A.K. Batra of the mobile lab of Indian Oil Corporation on 3.5.2008. A "Marker Test" was carried out. As the said H.S.D./Diesel sample of tank No. 2 failed in the marker test, the supply of the retail outlet was suspended on the same day. On the basis of inspection dated 3.5.2008, respondent No. 4 issued a show-cause dated 4.8.2008 calling for an explanation from the petitioner. The petitioner submitted his reply on 17.9.2008 denying the allegations. The respondent No. 4 terminated the dealership agreement on 24.4.2009, giving rise to the present petition.

2. Sri H.R. Mishra, learned Senior Counsel for the petitioner has canvassed the following propositions in support of his contention:

- (i) Marker test is not a foolproof test and therefore, no reliance can be placed solely on the said test to adjudicate the issue of adulteration;
- (ii) As no retesting was done in terms of sub clause D of Clause 2.5 of the Marketing Discipline Guidelines, 2005, hence the agreement could not be cancelled only on the ground of failure in marker test;
- (iii) Clause 2.5 K of the MDG guidelines were violated inasmuch as, where a sample was found to be off spec, subsequent sample should have been drawn from the same retail outlet within three months from the date of test report of the earlier sample;
- (iv) As the report was not furnished within a specified period in terms of clause (e) of 2.4 of M.D.G. guidelines, hence no reliance could have been placed on the same for cancelling the agreement;
- (v) A copy of the clinical test report was not furnished to the petitioner, hence the impugned order stood vitiated.

3. The case of respondents/B.P.C.L. is that in the inspection so conducted at the retail outlet on 3.5.2008 by I.O.C.L. mobile lab, in the presence of the representative of the petitioner, the H.S.D., sample on testing, failed in the "marker test". The R.O. (Retail outlet), H.S.D., sample and T/L (Tank and Lorry) samples of last two supplies viz. 23.4.2008 and 28.4.2008 were tested at Mathura lab on 16.5.2008 in the presence of the petitioner's representative and transporter of the tank lorries and again the H.S.D., R.O., sample failed in marker test, whereas the tank lorry sample of the last two loads passed the "marker test". On the basis of the aforesaid report, a show-cause dated 4.8.2008 was issued to the petitioner and in response thereto, the petitioner submitted his reply and thereafter an order dated 24.4.2009 terminating the dealership agreement of the petitioner has been passed. It is further submitted that the marker test has been incorporated by MOP and NG in the Motor Spirit, H.S.D. Control order 2005 vide MS/HSD amendment order 2007 dated 12.1.2007 and to rule out a possibility of any errors and omissions, a 3 tier sample process has been adopted, wherein the R.O., sample of the corresponding T.L. retention sample of last two receipts and corresponding S.L., samples are tested to find out the stage at which marker doped kerosene has entered into the product so that necessary action may be taken against the erring dealer as per the current guidelines. It is further submitted that the marker test has now been discontinued with effect from 1.1.2009.

4. Learned counsel appearing for the Central Government has taken the same stand as by the Oil company as regards the introduction of the marker system to curb adulteration. It is submitted that with the presence of marker, adulteration of even from low levels of kerosene can be detected and accordingly the provisions of the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of malpractices) order, 2005, Kerosene (Restriction and Use and Fixation of Selling Price) order, 1993 and Marketing Discipline

Guidelines (MDG), 2005 were amended for introducing "marker system" in kerosene to check adulteration of motor spirit/high speed diesel. Accordingly MS/HSD control order was amended on 12.1.2007 vide G.S.R. 18(E) notification to give legal sanctity to the marker test. Similarly Kerosene Control Order was also amended on 12.1.2007 vide GSR 19(E) notification giving legal sanctity to doping of kerosene with marker. MDG (Marketing Discipline Guidelines) 2005 was also amended with the approval of the ministry of petroleum and natural gas vide order dated 15.1.2007. It was submitted that marker test has proved as a superior detection method of checking adulteration. As the selection of new marker could not be completed by the manufacturing company by 31.12.2008, hence in view of Government notification, the marker test was discontinued with effect from 1.1.2009.

5. We have heard learned counsel for the parties and examined the record.

6. Sri H.R. Mishra, learned Senior Counsel for the petitioner submits that the "marker test" is not a foolproof test to check adulteration and therefore, the same was withdrawn with effect from 1.1.2009. He further submits that if by sheer chance or accident, a marker is dropped in the underground tank in a very small quantity, it would discolour, even the purest H.S.D., irrespective of whether adulteration was there or not, and therefore the "marker test" is not a conclusive indica for adulteration.

7. Sri H.R. Mishra, learned Senior Counsel for the petitioner further submits that in terms of Cl. 2.5 (D) of the M.D.G. of 2005, in case of sample failure a request for testing is to be considered on merits by the State Office/Regional/Zonal General Manager of the concerned Oil Company and as the said procedure was not resorted to, hence a substantial miscarriage of justice has resulted qua the petitioner.

8. The next submission of learned Senior Counsel of the petitioner is that the Provision of Clause 2.5 (K) of the M.D.G. of 2005 were violated as no subsequent sample was drawn from the same retail outlet, within 3 months from the date of the test report of the earlier sample.

9. Shri H.R. Mishra submits that as the report was not furnished within 30 days of the receipt of the sample in terms of clause 2.4(e) of the M.D.G., hence no reliance could have been placed on the same for cancelling the agreement. He has relied upon Hindustan Petroleum Corporation Limited and others v. Super Highway Services and another, (2010) 3 SCC 321, in support of his submission.

10. Finally learned Senior Counsel for the petitioner submitted that as copy of the clinical test report was not furnished to the petitioner, hence the impugned order is vitiated.

11. The "Marker test" was introduced all over the country from 12.1.2007. It comprised of introducing a "marker" in the subsidized kerosene oil. The petroleum products such as M.S. and H.S.D. were tested at retail outlet using

marker detection kit by the officials of company and/ or its authorized agents. In case, "marker" was doped in M.S. and H.S.D., "PINK" colour appeared, which is indicative that the subsidized kerosene has been mixed with M.S. and H.S.D. products.

12. In the instant case the H.S.D. sample drawn from the retail outlet on 3.5.2008 by Sri A.K. Batra of I.O.C.L., mobile lab failed in the marker test. The confirmatory test carried out at the Quality Control lab at Mathura in the presence of petitioner on 16.5.2008 also failed in the marker test, whereas the tank lorry samples of the last two loads passed the marker test which proved that the products supplied by the company through tank lorry was not adulterated; rather adulteration took place at the retail outlet. Further as per marker testing procedure, once a sample fails in Marker test, no other test is to be conducted, and action is taken against the dealer for adulteration, if the T/L sample passes in the Marker test.

13. In *M/s. Kishore Auto Sales and others v. B.P.C.L. and others*, 2010 (6) ADJ 711, the validity of the marker test was upheld by this Court, repelling the contention that the same is not a foolproof test. It was held that on the basis of various scientific reports/investigations, there is nothing intrinsically wrong in the marker test which was effective from 12.1.2007 to 31.12.2008. The marker test was discontinued from 1.1.2009 due to the expiry of contract with the company that was supplying markers and not because it lacked viability and reliability. A Special Leave to Appeal (Civil) No. 21238 of 2010, against the Judgment was dismissed by the Apex Court on 9.8.2010.

14. Clause 2.5 (D) of the M.D.G. of 2005 is extracted herein below:

D. In case of sample failure, in the event of request for testing by the dealer, the same to be considered on merits by the State Office/Regional/Zonal General Manager of the concerned Oil Company. If approved by GM, the sample of retail outlet retained by the dealer alongwith the counter sample retained with the Field Officer/Oil Company are to be tested as per the guidelines, preferably in presence of the Field Officer, RO dealer/representative and representative of QC Dept. of the Oil Co. after due verification of the samples. All the 3 samples should be tested only in the same lab, and if possible by the same person to ensure repeatability and reproducibility. The expenditure incurred for such testing should be recovered from the dealer. The decision of the GM, which would be based on the test results of all the 3 samples would be decisive and binding on all.

A perusal of the aforesaid clause would indicate that a request for testing by a dealer, is sine-qua-non for applicability of the aforesaid clause. In case of sample failure, a fresh testing can be considered on merits, only in the event of a request for testing by a dealer. There is nothing on record to indicate that upon intimation of sample failure report the petitioner made any request for testing of the sample from the retail outlet. In this view of the matter, action of the

respondents cannot be faulted on non compliance of the testing as contemplated under Clause 2.5 (D) of M.D.G. of 2005.

15. Clause 2.5 (K) of the M.D.G. of 2005 is reproduced herein below:

K. In all cases where the samples are found to be off-spec, a subsequent sample should be drawn from the same R.O. within 3 months from the date of test report of the earlier sample.

16. The record of the case reveals that the supply and sales were suspended with effect from 3.5.2008 itself i.e. the date on which the sample failed in the marker test and as the retail outlet itself was not operational after 3.5.2008, a subsequent sample from the same retail outlet within a specified period could not have been subjected to a fresh test.

17. Clause 2.4 (e) of the guidelines reads as under :

(e) The laboratory shall carry out the tests (product/brand specific) and make available the test reports within a maximum period of 30 days of receipt of samples." In the present case the sample was collected on 3.5.2008 by the mobile lab and the same was handed over to the Assistant Manager (Sales) Bareilly on 5.5.2008 for testing of the H.S.D. sample in the Quality Control (QC) lab at Mathura. The petitioner was informed vide letter dated 12.5.2008 to be present in the QC lab at Mathura on 16.5.2008 to witness to the marker test to be conducted on H.S.D., R.O. Sample, H.S.D. TL sample (supplied on 28.4.2008 by TL No. UP 22/4652 and on 23.4.2008 supplied by TL No. UP 75A 2205) and H.S.D. SL sample (drawn on 28.4.2008 and 23.4.2008 from tank No. 8 of Aonla Installation on respective dates). The entire process of testing was carried out in presence of Sri Ashok Kumar the representative of the petitioner on 16.5.2008 and on 19.6.2008. It is admitted to the petitioner in his reply that the marker report (confirmatory test) dated 16.5.2008 was received by him. The test report was thus made available to the petitioner, within the period stipulated. The ratio of the judgment of Apex Court in Hindustan Petroleum Corporation's case, that a proper notice must be given before the test is carried out, is thus not applicable on the facts of the present case.

18. From the records it is evident that no clinical test was conducted on H.S.D. sample either at the retail outlet on 3.5.2008 or at the QC lab at Mathura on 16.5.2008, as the sample had failed the marker test. As per the M.D.G. of 2005, if a sample fails in the marker test, no other test is required to be conducted.

19. The impugned order also reflects that the sales and services were also suspended on account of illegalities committed by the petitioner at the retail outlet on 8.6.2005. The supplies were resumed only on 25.6.2005. A penalty of Rs. 50,000/- was imposed on him earlier for not retaining the T/L sample in respect of inspection conducted on 10.9.2007. We do not find any error in the impugned order, warranting interference in exercise of jurisdiction, under Article 226 of the Constitution of India. The writ petition fails, and is hereby dismissed.

No order as to costs.