

(2004) 03 PAT CK 0007
In the Patna High Court
Case No : C.W.J.C. No. 12866 of 2003

Dwivedi and Sons

APPELLANT

Vs

Bharat Petroleum Corporation Ltd. and Others

RESPONDENT

Date of Decision : 23-03-2004

Acts Referred:

Citation : (2004) 03 PAT CK 0007

Final Decision : Allowed

Judgement

Radha Mohan Prasad, J.—In this writ petition, the prayer is for setting aside the order dated 12.11.2003, contained in Annexure 1, issued by the Territory Manager (Retail). Patna (Respondent No. 2) imposing penalty of Rs. 20,000/- pursuant to test report that "The RO retention sample is failing with respect to the observed density (0.7583) as compared with the recorded density at the RO (0.7544) after the last receipt and the variation (0.0039) is beyond permissible limit of 0.0030."

2. The Petitioner is a dealer of Bharat Petroleum Corporation Limited and it has High Speed Diesel (HSD) and Motor Spirit (MS) outlet in the town of Siwan. On 7.5.2003 the Company's representatives took samples from the Petrol Pump and put be M.S. sample in six sealed glass jars, two of which were, left with the Petitioner. As prima facie on preliminary investigation made on the spot, variation in density was found in the petrol sample, the sale from the Petitioner's outlet was suspended with immediate effect. Thereafter, the Petitioner was served with a show cause notice as to why appropriate action be not taken against them under the provisions of the Marketing Discipline Guidelines, 2001.

3. According to the Petitioner, shortly thereafter on 15.5.2003 a mobile Laboratory of Indian Oil Corporation (a Company other than the one of which the Petitioner is dealer) came to the petrol pump and tested the petrol. The report indicated that the petrol at the Petitioner's outlet was of the prescribed standard. In response to the show cause notice it appears that the Petitioner denied the charge and solely relied upon the test report dated 15.5.2003 in his defence. In

the meanwhile, the samples taken from the petrol pump were sent to the Laboratory of Bharat Petroleum Corporation at Budge Budge and on a chemical analysis the laboratory gave its report-dated 16.5.2003, from which it appeared that the Motor Spirit sample failed to meet the prescribed standard/specification. On the basis of the test report the Petitioner was given a notice dated 2.6.2003 (Annexure 6) along with which the copy of the Laboratory test report was also enclosed. The Petitioner submitted his reply on 20.12.2003 on consideration of which an order dated 27.6.2003 was passed finding that the sample of Motor Spirit taken from the petrol pump was adulterated and that the Petitioner's explanation in that regard was not satisfactory. Accordingly, the Petitioner was awarded with the punishment of suspension of the retail outlet for 30 days with effect from that date and a penalty of Rs. 20,000/-.

4. The Petitioner, being aggrieved by the said order, came to this Court in C.W.J.C. No. 6230 of 2003 assailing its validity. This Court vide order dated 5.9.2003 (Annexure 9), held that, the test report of Indian Oil Corporation dated 15.5.2003 would be of no avail to the Petitioner. Further in view of the provisions contained in Clause (c) under the heading "General Points, to be observed in all cases" of the Marketing Discipline Guidelines, 2001 that "in the event of request for retesting by the dealer/transporter, the same to be considered on merits by the Regional G.M. The sample of Retail Outlet retained by the dealer should be sent for testing" the Court directed that it is open to the Petitioner to make a request under this clause and in case the Petitioner makes a request before the Regional G.M. within one week from today, there is no reason why the sealed sample left with the dealer sent for testing to the Budge Budge Laboratory or any other suitable Laboratory as may be decided by the Regional G.M. and a test report may not be received within a period of one month from the date of submission of such request. The writ petition was disposed of with an observation that the payment of fine by the Petitioner shall abide by the test report. Thereafter, the Petitioner approached and the Respondent took two samples. Which were kept at the Petitioner's place in order to get it tested again, whereupon the Petitioner has been communicated with the impugned order that the samples are not as per the specification.

5. It is contended that in the earlier report dated 8.5.2003 contained in Annexure 10, the test result showed 708.5 and 758.4 (recorded after last receipt in the laboratory) against the requirement of 710-770, on account of which the penalty was imposed but on re-examination of samples of the same lot of petroleum product in the same laboratory report, contained in Annexure 1 at page 18, shows the density as 758.3 and 754.4 (recorded after last receipt in the laboratory) which is well within the requirement of 710-770. Further, it is contended that the petrol supplied by the Corporation on 10.4.2003, vide invoice contained in Annexure 11, shows the density as 0.7583 and the petrol supplied later on 27.4.2003, vide invoice contained in Annexure 12, shows the density as 0.7546. Thus, according to the Petitioner, there is variation in density even in the supply itself.

6. A counter affidavit has been filed on behalf of the Respondents, in which the aforementioned facts have not been disputed. It is, however, stated that the finding of failure of the retention sample by a statutory notified Lab is binding upon the parties more so when a second test was carried out at the request of the Petitioner and on the direction of the High Court. It is further stated that the Lab report was analysed by the senior officials at Kolkata in the Regional Office and they are of the firm opinion that the retention sample has failed as the density of the sample at the retail outlet in the tank and the sample are beyond permissible level of 0.0030. In the opinion of the Chief Manager, contained in Annexure B to the counter affidavit, the RO retention sample is not the same as that of the RO sample sent earlier and that the sample has undergone a change.

7. Learned Counsel for the Petitioner submitted that the allegation that the sample has undergone a change is unfounded and malafide. He further submitted that perusal of the aforementioned Annexure 1, 10, 11 and 12 would show that every time there is variation in density in the supply of petrol by the Corporation itself and it has never been consistent. Thus, learned Counsel for the Petitioner submitted that even if there is variation of 0.0009 beyond permissible limit, as alleged, the Petitioner cannot be held responsible for such negligible variation.

8. Mr. Tripathi, learned Counsel appearing for the Respondent-Corporation contended that this matter purely related to contract and the High Court under Article 226 of the Constitution has always refrained from going into such matter.

9. I am unable to accept the said submission of Mr. Tripathi. The Supreme Court in the case of Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, held that the decision of the State/public authority under Article 298 of the Constitution is an administrative decision and can be impeached on the ground that the decision is arbitrary or violative of Article 14 of the Constitution of India on any of the grounds available in public law field. In the present case, no argument has been advanced on the basis of any disputed question of fact, on the account of which the jurisdiction under Article 226 may not be invoked by the High Court. From the facts aforementioned it would appear that there has been variation in the test report with respect to same product on the test conducted by the laboratory at two different stages.

10. Mr. Tripathi contended that in any view of the matter, the test has been done strictly as per the requirement of the Motor Spirit and High Speed Diesel (Regulation of Supply and Distribution and Prevention of Malpractices) Order, 1998 and it has been found that the variation is beyond permissible limit of 0.0030, which as per the definition contained in Clause 2(a), (e) and (f) read with Schedule I is adulterated, for which the Corporation as per its revised Marketing Discipline Guidelines, 2001 is competent to impose penalty. Thus according to him, there is no illegality in the impugned order, more so when the Chief Manager in Annexure B has found that the sample has undergone a change for which obviously the Petitioner is only responsible.

11. This Court finds no substance in the plea taken by the Chief Manager that the RO retention sample is not the same as that of RO sample sent earlier and that the sample has undergone a change. As per the Revised Marketing Discipline Guidelines, it is the responsibility of the visiting officers/Mobile Laboratory to ensure proper collection of samples and send the samples to the laboratory and deliver the samples to the dealer and retaining it at Division/Territory. No such objection was ever taken at the time when they took two, samples, which were kept with the dealer, namely the Petitioner for retesting. It is not even their case that at the time of taking delivery of the samples from the dealer, they found any tampering which can even give any scope for arriving at the opinion that the sample has undergone a change.

12. Under such circumstances this Court does not find any force in the submission of the learned Counsel for the Respondent-Corporation. In view of the aforementioned variations demonstrated with reference to Annexures 1, 10, 11, and 12, in my opinion, the penalty imposed pursuant to the impugned order of the plea of alleged variation of 0.0009 beyond permissible limit of 0.0030 cannot be said to be just and proper, more so, when the sample in question is well within the requirement as is evident from Annexure 1 itself.

13. In the result, the writ petition is followed. The impugned order is quashed and the Respondents are directed to restore the supply, if not already restored as per the direction given in the earlier writ case. However, in the facts and circumstances, there shall be no order as to costs.