

(2011) 09 CHH CK 0058

In the Chhattisgarh High Court

Case No : Writ Petition C. No 5997 of 2007 and Writ Petition C. No 3396 of 2009

Gagan Fuels

APPELLANT

Vs

Bharat Petroleum Corporation Ltd and Others

RESPONDENT

Date of Decision : 09-09-2011

Acts Referred:

Citation : (2011) 09 CHH CK 0058

Hon'ble Judges : Satish K. Agnihotri, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Hon"ble Shri Satish K. Agnihotri, J.—Since W.P. (C) Nos.5997 of 2007 & 3396 of 2009 involve the same question of law and facts, they are being considered and decided by this common order.

2. In W.P. (C) No. 5997 of 2007 the petitioner challenges the legality and validity of the order dated 30-8-2007 (Annexure - P/1) whereby the dealership agreement of the petitioner has been terminated and further seeks a direction to the respondent Bharat Petroleum Corporation Limited (for short "the respondent Corporation") to restore the petitioner's agency forthwith and duly compensate in respect of the period the petitioner could not run its business.

3. In W.P. (C) No. 3396 of 2009 the petitioner seeks a direction to the respondent Corporation to return all the properties along with the cost of the stock of fuel taken over as claimed in the representation. Further, payment of appropriate interest at penal rate for illegally withholding the amount of the petitioner.

4. The facts, in brief, as projected by the petitioner in W.P. (C) No. 5997 of 2007, for adjudication of both the writ petitions, are that the petitioner is the authorized retail outlet firm carrying its business at Bilaspur in the name & style of `Gagan Fuels". The petitioner was authorized by the respondent Corporation for the sale of motor spirit and/or high speed diesel, motor oils, greases and

other motor accessories. The retail outlet (for short "RO") of the petitioner was working properly and effectively from the date of its inception i.e. 1998 and following the norms prescribed in the Marketing Discipline Guidelines (for short "MDG"). Even the petitioner firm has been awarded by the respondent Corporation with 'award of excellence + best youth dealer' in the financial year 1998-99 for the sale of petrol, diesel & oil in Bilaspur sales area.

5. According to the petitioner in the year 1999-2000 some dispute arose between the petitioner and the respondent Corporation regarding sale & supply of lubricants. On 23-1-2002 (Annexure - P/4) the respondent Corporation called explanation. Thereafter, several disputes arose between the parties and even the respondent Corporation has mismanaged the account of the petitioner. Again a show cause notice dated 8-4-2002 was issued, to which the petitioner submitted its reply. However, without considering the facts and circumstances, the sales & supply of the products to the RO of the petitioner was suspended for a period of 15 days, by order dated 1-5-2002 (Annexure - P/6).

6. Against the said order, the petitioner preferred a writ petition before this Court being W.P. No. 959 of 2002. According to the petitioner, in the said writ petition stay order was passed in favour of the petitioner. However, looking to the business activities, the said writ petition was subsequently withdrawn by the petitioner and the respondent Corporation had also revoked the suspension order by order dated 28-6-2002 (Annexure - P/7).

7. In the year 2005 on account of heavy rains, there was leakage of water into the tanks of petrol & diesel, as a result of which, water & mud entered into the petrol & diesel tanks. The petitioner immediately informed to the respondent Corporation by letter dated 30-6-2005 (Annexure - P/8) for taking corrective action in this regard so as to avoid any type of adulteration in the petrol & diesel, but no action has been taken by the respondent Corporation. Thereafter, the petitioner sent several letters for doing the needful. However, all of a sudden the Mobile Lab Team of the respondent Corporation inspected the RO of the petitioner on 9-2-2007 between 12.00 Noon to 3.30 A.M. and drew the samples from the RO of the petitioner. At that time also, the petitioner informed the Mobile Lab Team about the leakage of water into the tank and requested them to draw the samples after cleaning of the tanks. Despite the said fact, the In-charge of the Mobile Lab Team proceeded to draw the samples and the same was sent for testing within the prescribed time. In the testing, it was found that HSD failed in Marker Test. Inspection report (Annexure - P/13).

8. The contention of the petitioner is that the Mobile Lab Team has advised for suspending the sales & supply of the products to the RO of the petitioner, whereas the Mobile Lab Team has no authority to give advice for suspension of the sales & supply of all the products as per the guidelines.

9. Being aggrieved by the inspection report dated 9-2-2007, the petitioner preferred a petition before this Court being W.P. (C) No. 1519 of 2007. During

pendency of the said writ petition, the respondent Corporation has terminated the dealership of the petitioner. Accordingly, the said writ petition was dismissed by this Court on the ground that the same became infructuous. Thereafter, the petitioner has filed the present writ petition i.e. W.P. (C) No. 5997 of 2007 challenging the termination of dealership agreement dated 30-8-2007 (Annexure - P/1).

10. Ms. Singhai, learned counsel appearing for the petitioner, would submit that the impugned order passed by the respondent No. 4 is totally arbitrary and baseless because without giving any due opportunity of hearing the same has been passed. The respondent Corporation is continuously harassing the petitioner and ultimately they have passed the impugned termination order. In fact, notice should be served on the dealer for his presence during the test and there should be admissible evidence for such service of notice on the dealer. However, in the case on hand, the respondent Corporation completely failed to give any notice to secure the presence of the dealer of RO during the test.

11. Ms. Singhai would further submit that there is also discrepancy in the result of marker test conducted by the lab Team as well as the report given by the Test Laboratory of Borkhedi, Nagpur. The report of marker test is 'light pink', whereas the test report of High Speed Diesel given by Borkhedi, Nagpur, in which marker test given as 'pink'. Thus, it is clear that both the test reports cannot be held for the basis of termination of dealership of the RO of the petitioner.

12. Ms Singhai would next submit that the petitioner after receipt of the show cause notice in his reply had requested for re-sampling and thereafter also vide letters dated 17-6-2007 & 6-9-2007, but the respondent Corporation had not drawn the samples from the petitioner's RO for re-testing. The petitioner has all the hopes that if the sample available with the petitioner is sent for testing, then the same might have passed the marker test, but the respondent Corporation had not taken any steps for re-testing of the samples on the request of petitioner.

13. Ms. Singhai would also submit that the provision under the MDG has not been observed in its true perspective. Second opportunity should have been given to the petitioner within three months from the date on which samples were drawn for the first time. Since it was not done, the termination order passed by the respondent Corporation cannot be held to be in consonance with the MDG. The respondent authorities have terminated the licence of the petitioner with mala fide intention and without affording proper opportunity of hearing and without following the basic principles of natural justice.

14. On the other hand, Shri Sanjay K. Agrawal, learned counsel appearing with Shri Sudeep Agrawal, learned counsel appearing for the respondents No. 1, 2 & 4, would submit that the authorized laboratory upon testing of HSD samples observed that the product as represented by the petitioner's RO fails to meet the requirement of HSD (BS II) Sulphur and also fails with respect to marker test. The failure of RO samples in marker test was observed not only by mobile

laboratory on 9-2-2007, but also by the authorized stationary laboratory on 14-2-2007 and, as such, the petitioner was found guilty of breach of agreement, as HSD sample taken from the petitioner RO failed to confirm the test in the recognized laboratory. Thus, the petitioner being guilty of breach of terms and conditions of agreement including that of adulteration.

15. Shri Agrawal would further submit that the samples were drawn from RO for further sending to stationary laboratory at Borkhedi, Nagpur and the said laboratory on 14-2-2007, after test, had given its test report. The said report indicates failure of HSD sample to meet the BIS specification with respect to Sulphur and marker test.

16. Shri Agrawal would next submit that the petitioner is a chronic defaulter in complying with the terms of the agreement and the HSD sample was found to be adulterated and taking into over all facts of the case, the order of termination has been passed. The petitioner did not make any request for re-testing or re-sampling while filing the reply to show cause notice and almost after three months the statement with regard to re-sampling/re-testing was made without giving any reason as samples were drawn in presence of the petitioner's representative and tested by the oil industries Mobile Laboratory and found failed in marker test. Samples were, thereafter, sent to stationary laboratory for further investigation and in which samples sent also failed. Therefore, the petitioner is not entitled to any relief and the petition may be dismissed.

17. I have heard learned counsel appearing for the parties, perused the pleadings and the documents appended thereto.

18. During pendency of W.P. (C) No. 5997 of 2007 the respondent Corporation proceeded to appoint Smt. Asunta Kujur as a dealer. Thus, an application (I.A.No. 6) was filed by the petitioner on 5-10-2010 for impleading Smt. Asunta Kujur as respondent No. 6. The said application was allowed by this Court on 26-10-2010 and notice was issued to the newly impleaded respondent No. 6. The same was duly served upon the said respondent on 2-4-2011 by dasti mode, which is evident from the covering memo dated 6-4-2011 filed by the petitioner. However, the respondent No. 6 has chosen not to appear in the matter.

19. Admittedly, after collection of samples, testing was done in Mobile Laboratory on 9-2-2007 in presence of the representatives of the dealer. In the report dated 9-2-2007 it was found that the marker test was positive (light pink). Appearance of test result was clear & bright and in the second column it was written as negative.

20. Relevant portion of the report dated 9-2-2007 (as per typed copy) reads as under :

Remarks Retail outlet HSD sample shows positive result in marker Test and in Kinematic Viscosity though R.O. sample pass marginally shows wide variation with the result of KV of tank 10 mg sample as mentioned above. In view above

the dealer has been advised to suspend the sales supplied all products till further advice.

(1) In view of the above as per M.D.G. the sample has been drawn for all product in MS/speed/HSD/lubricant from RD as per procedure with properly rinsed with respective product and sealed the samples in the presence of dealer/dealers representative. The sample has been distributed as under.

(i) One set of sample i.e. 2x1 ltr. MS 2x1 Ltr. Speed, x 11 ltr. HSD & 1x0.750 ltr. Tube are handed over to dealer for retained their safe custody.

(ii) One set of sample i.e. 2x1 ltr. MS 2x1 ltr. speed, 1x1ltr. HSD, & 1x0.750 ltr tube are sending to stationery Lab for testing.

(iii) One set of samples i.e. 2x1 ltr. MS 2x1 ltr. speed, 1x1 HSD & 1x0.750 ltr tube are handing over to concern BPC oil company for their retention.

(2) The seals samples are as under :-

MS sample 596275x(3) / 596209x(3)

(inside/outside)

Speed sample 596282x(3) / 596276x(3)

(inside/outside)

Lub mak 2T 596239x(3) / 596244x(3)

(inside/outside)

HSD 5 sample 596298x(3) / 596268x(3)

(inside/outside)

(3) The HSD tank long sample tested at automobile lab and resealed the sample of T/L No. CG 10 A3181 at last supplies vide Invoice No. 14500 18420 dt. 07.02.2007 and collected for sending to lab. The resealed seal No. is 596209x(2).

(4) The last supplies of tank lorry sample of MS/speed also collected for sending lab. The details are Invoice No. /Dt.

2 Ltr. M.S. Tank lorry No. CG10A 3181 Seal No. 635909x(2)
1450015420/07/02/07

2 Ltr. Speed Tank lorry No. CG10A 1167 seal No. 635911x(2)
141010128673/05.02.07

(5) The Lub MAK 2T samples seal No. is 596239x(3)/596244x(3) & Batch No. is 565642/02/08/2006.

(6) The dis. Stock of tanks and meter reading of DUS are given as under :-

Product Sr.No.

Tank No.

Dip (cm)

Stock (in all)

D.U.

Meter

reading

MS

1[20 kg.]

51.5 cum

3953 Ltr

1.Ltr.

2 Line 337886.2

Speed

1[15 kg.]

13.0 cm

430 Ltr.

2.Dual

L&T

812679.7

HSD

1(20 kg.)

68.0 cum

5826 Ltr.

1.dual

L&T

500774.8

1 L&T

2 Line

404103.4

Avery

2 - 264778.6

(7) The marker Test is carried out in the presence of dealer. The marker column No. 04080433 is used for marker testing sealed with paper seal and preserved it. It is used for HSD sample only.

(8) The activities initiated as above informed to state level coordinator, Chhattisgarh. Sr. Manager QC. WR & territory Manager Bhilai.

(9) The product has been purchased vide cash memo No. 13005/Dt. 09.02.07.

(10) One set of samples of MS/Speed/HSD/Lab has been handed over to dealer.

(11) The dealer has been advised to suspend the sales of all product and explained the above.

(12) The samples drawn above handed over to dealer and acknowledge the receipt of test report and samples.

(13) The seal No. 596274x(3) each put at decanting point of MS/speed & HSD and dealer has denied to put the sent at DUS nozzle. Hence not put the seal to nozzle of DU.

21. Thereafter, it appears that the authorities, being dissatisfied with the test report of mobile laboratory, second test was conducted at Quality Control Stationary Laboratory, Borkhedi, Nagpur on 14-2 2007.

22. It is not disputed by both the parties that there was no notice for being present in the test at Stationary Laboratory, Borkhedi, Nagpur on 14-2-2007. The report was prepared on the same day wherein there was some change in the test report.

23. The test report dated 14-2-2007 (as per photocopy) reads as under :

BHARAT PETROLEUM CORPN. LTD. (A Govt. of India Undertaking) QUALITY CONTROL LABORATORY BORKHEDI, NAGPUR

TEST REPORT HIGH SPEED DIESEL (HSD)-BS II

Issued to : TM (Retail)

Date : 15.02.07

Test Report No. : BOR/MDG/07/F 186

Date of Sampling (by client) : 09.02.07

Source of Sample : M/s. Gagan Fuels, Torwa, Bilaspur

Sampling Received on : 13.02.07

Sampling Analysed on : 14.02.07

Type of Sample : MDG

Location/Territory : Bhilai

Letter Ref.& DL : BT/MDG Dt.12.02.07

Test Results

Sr. No.

Characteristics

TEST METHOD (P;) of IS:144 8

Requirements as per IS- 1450:2005 (Latest version)

SL Name: HPCL Mandir Hasaud/Tank No. 15 & Date of Sampling 07.02. 07

TL No. : CG10A318 1 & Date of Sampling: 07.02.07

RO : TK- 1/DU2

1.

Appearance

VISUAL

Colour

Colour

Colour

2.

Colour, visual

VISUAL

Yellow

Yellow

Yellow

3.

Density 15oC, kg/m²

P : 16

820-860

a.

Observed at Laboratory

832.7

832.1

833.7

b.

Observed

by

Inspecting

Officer

834.1

c.

Recorded

at RO

(Morning

density)

833.4

d.

Recorded

at RO

(After

Last

Receipt)

833.7

e.

Recorded

at RO

(Before

Last

Receipt)

840.3

f.

TL receipt

(as

observed

at RO)

832.3

g.

Invoice

832.5

h.

Recorded

at Supply

Location

833.1

4.

Distillation, % v/v.

recovered:

P : 18

a.

at 350oC, Min

85

89.0

90.0

b.

at 370 oC, Min

95

96.0

97.5

5.

Flash Point Abel, oC

P : 20

35

40.5

38.5

40.5

6.

Kinematic Viscosity, cSt at 40 oC

P : 25

2 to 5

3.05

3.08

2.05

7.

Total

IP : 336

500

428

412

1854

8.

Marker Test

N(No Pink) colour

N(No Pink) colour

P(Pink) colour

Remarks :

1. Corresponding supply location (SL) Sample meets the requirements of HSD (BS II) w.r.t. tests carried out as per IS : 1460:2005 (Latest version), supply location (SL) sample passes w.r.t marker test.

2. Corresponding tank lorry retained (TL) Sample meets the requirement of HSD (BS II) w.r.t. tests carried out as per IS : 1460:2005 (Latest version), tank lorry retained (TL) sample passes w.r.t marker test.

3. Product, as represented by retain outlet (RO) sample fails to meet the requirements of HSD (BS II) w.r.t. sulphur as per IS : 1460:2005 (Latest version), retail outlet (RO) sample fails w.r.t marker test.

24. The respondents have proceeded on the basis of second test report dated

14-2-2007, as is evident from the show cause notice dated 17-3-2007 (Annexure - R-1/L). The irregularities, as mentioned in the said show cause notice reads as under :

III. Irregularities

Present irregularities

A. During surprise inspection by Industry Mobile Laboratory Team on 9.02.07, Retail Outlet sample of HSD was drawn and tested. Upon testing it was found that HSD failed in Marker Test and wide variation was observed in respect of Kinematics Viscosity when compared with tank Lorry Sample. Therefore samples of MS, HSD, SPEED and Lubricants were further drawn as per procedure and sent for testing to authorized stationary laboratory. The authorized laboratory upon testing of HSD sample drawn from the retail outlet observed that

1. Corresponding Supply Location (SL) sample meets the requirements of HSD (BS II) and also passes with respect to Marker test.
2. Corresponding Tank Lorry sample retained (TL) sample meets the requirements of HSD (BS II) and also passes with respect to marker test.
3. Product, as represented by Retail Outlet (RO) samples fails to meet the requirements of HSD (BS II) w.r.t. Sulphur and also fails with respect to Marker Test.

Test report is enclosed.

25. In Hindustan Petroleum Corporation Limited and Others v. Super Highway Services and Another, while considering the termination of dealership, the Supreme Court observed as under :

31. The cancellation of dealership agreement of a party is a serious business and cannot be taken lightly. In order to justify the action taken to terminate such an agreement, the authority concerned has to act fairly and in complete adherence to the rules/guidelines framed for the said purpose. The non service of notice to the aggrieved person before termination of his dealership agreement also offends the well established principle that no person should be condemned unheard. It was the duty of the petitioner to ensure that the Respondent No. 1 was given a hearing or at least serious attempts were made to serve him with notice of the proceedings before terminating his agreement.

33. The guidelines being followed by the Corporation require that the dealer should be given prior notice regarding the test so that he or his representative also can be present when the test is conducted. The said requirement is in accordance with the principles of natural justice and the need for fairness in the matter of terminating the dealership agreement and it cannot be made an empty formality. Notice should be served on the dealer sufficiently early so as to give him adequate time and opportunity to arrange for his presence during the test and there should be admissible evidence for such service of notice on the dealer.

Strict adherence to the above requirement is essential, in view of the possibility of manipulation in the conduct of the test, if it is conducted behind the back of the dealer.

26. Thus, the well settled principles of law, as laid down by the Supreme Court, is that the dealer of the RO should be given prior notice regarding the test so that he or his representative also can be present when the test is conducted.

27. In the case on hand, the final conclusion was drawn as per the test conducted at Stationary Laboratory, Borkhedi, Nagpur on 14-2-2007 for which no notice was given to the dealer at any stage and the test was conducted behind the back of the dealer. Thus, it can safely be held that the principles of natural justice was not complied with where the serious decision of termination of the dealership agreement was taken by the respondent Corporation.

28. In Hindustan Petroleum Corporation Limited (supra), it was found that there was no notice to the respondent for being present when the test was conducted. The Supreme Court held that the termination of dealership agreement was arbitrary, illegal and in violation of the principles of natural justice.

29. This Court in Mahamaya Service Centre v. Indian Corporation Limited & Others, observed as under :

26. It is a duty cast on the authorities of the State and the instrumentalities of the State that they should follow the proper procedure prescribed in the rules and regulations. The contravention of the same cannot be permitted. It is an uncontroverted legal position that where a statute requires to do a certain thing in a certain way, the thing must be done in that way or not at all.

30. In the case on hand, it is found that even no notice was given for appearance of the petitioner in the test at proper quality control laboratory, which was the bedrock to proceed further. Thereafter, a show cause notice was issued and as a sequel the agreement was terminated.

31. Applying the well settled principles of law to the facts of the present case and for the reasons mentioned hereinabove, the impugned termination of dealership agreement order dated 30-8-2007 (Annexure - P/1 in W.P. (C) No. 5997 of 2007) is quashed. Accordingly, the petitioner is entitled to all consequential benefits.

32. In the result, W.P. (C) No. 5997 of 2007 is allowed.

33. In view of the order passed in W.P. (C) No. 5997 of 2007, whereby the order of termination of dealership agreement dated 30-8-2007 was quashed, nothing survives for adjudication in W.P. (C) No. 3396 of 2009.

34. Accordingly, W.P. (C) No. 3396 of 2009 stands disposed of in terms of order passed in W.P. (C) No. 5997 of 2007.

35. There shall be no order as to costs.