

(2015) 05 CAL CK 0041
In the Calcutta High Court
Case No : F.M.As. 653 and 654 of 2012

Hindustan Petroleum Corporation Ltd. and Others	APPELLANT
Vs	
Dharamnath Singh and Others	RESPONDENT

Date of Decision : 05-05-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 100, 47
Penal Code, 1860 (IPC) — Section 187

Citation : (2015) 5 CHN 16

Hon'ble Judges : Tapen Sen, J; Siddhartha Chattopadhyay, J

Bench : Division Bench

Advocate : Ashoke Kr. Bandopadhyay, Senior Advocate and Apurba Kumar Ghosh, for the Appellant; Debabrata Saha Ray, Pingal Bhattacharya and Chandrachur Chatterjee, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Tapen Sen, J.—This appeal is directed against the judgment dated 30.08.2011 passed by a learned Single Judge of this Court in WP No. 22993(W) of 2007 (Dharamnath Singh Vs. Union of India and Ors.) whereby and whereunder the learned Judge set aside the Orders of suspension as well as termination of the license of the Respondent and directed the appellants to issue indent with immediate effect. The other appeal relates to WP No. 19933 and it is directed against the same judgment. While WP No. 19933(W) of 2007 was filed challenging the Order of suspension, the other Writ Petition being WP No. 22993(W) of 2007 was filed challenging the Order of termination of dealership issued on 05.10.2007 by the learned Senior Regional Manager and the duly constituted Attorney of Hindustan Corporation Limited (hereinafter referred for the sake of brevity as HPC and/or the appellants). Both the Writ Petitions were taken up together by the learned Single Judge who has passed the impugned Order.

2. The facts, in brief, is that in the year 1951, the Petitioner's father namely

Parsuram Singh was appointed as a Retail Outlet Dealer of Diesel and Petrol (HSD and MS) at G.T. Road, Andal More, Andal in the District of Burdwan. After his death, the Writ Petitioner/Respondent and his mother, Rampari Devi were jointly appointed as Dealers and after her death, the Writ Petitioner/Respondent was individually appointed as a Retail Outlet Dealer of HSD and MS in the year 1997. The Dealership is run in the name and style of M/s Parsuram Singh and it is being run by the Writ Petitioner/Respondent as its sole proprietor. The Writ Petitioner had stated before the Writ Court that the business of the petrol pump was being run without any allegation and/or complaints from anyone and to the fullest satisfaction of all the concerned. Various facts have been given with regard to the receipt of petrol and diesel and on the date of arrival of High Speed Diesel Oil on 17.08.2007, there was a residuary stock of 10.357 Kiloliters of diesel in the filling station and after arrival of a stock of 8 Kilo Liters on 17.08.2007 itself, the quantity of the stocks of High Speed Diesel Oil in the filling station had become 18.357 Kiloliters.

3. While running the petrol pump, on 18.08.2007 at about 1:30 PM some personnel of one SGS India Pvt. Ltd., claiming themselves as an agency engaged by HPC, visited the petrol pump and took samples from both the tanks of HSD as well as MS and without conducting Marker Test in a proper manner, came to a preliminary finding that the High Speed Diesel in one of the tanks was not proper. Thereafter, on the same day, the Senior Sales Officer, Durgapur Retail Sales Area (HPC) informed that on the basis of such Preliminary Test Report conducted by the agency, the sales and supplies to the retail outlet was being suspended with immediate effect. Before the Writ Court, the Writ Petitioner stated that his representative went to the Regional Office of the HPC and protested saying that the samples had been collected by an agency which had no authority and therefore no steps could have been taken by them on the basis of such samples or preliminary finding recorded by the Agency but, without considering such objection, the officers of the HPC allegedly conducted further Marker Test without following any procedure. Being aggrieved by the Order of suspension of supply, the Petitioner filed WP 19933(W) of 2007 and by an Order dated 13.09.2007, the Respondents/Appellants were directed to file their Affidavit-in-Opposition. An interim Order was passed to the effect that the Oil Company shall conclude the proceedings within three weeks and the Petitioner was directed to co-operate. A further Order was passed that if the proceedings were not completed within three weeks, then the impugned Order of suspension dated 18.08.2007 will be deemed to have been suspended w.e.f. the expiry of the said period of three weeks. Thereafter, on the verge of expiry of the said period of three weeks, a show-cause Notice dated 27.09.2007 was issued by the Senior Regional Manager of HPC asking the Petitioner to show cause as to why necessary action in terms of Clause 26, 27, 44, 58(i) and (m) of the Dealership Agreement dated 01.02.2007 be not taken. The Writ Petitioner had a grievance that actually less than 24 working hours were given to the Petitioner to submit his reply. Be that as it may, the Petitioner did file his reply on 02.10.2007

although it was a holiday being the Gandhi Jayanti and on 09.10.2007, the Petitioner received an Order dated 05.10.2007 issued by the Senior Regional Manager, HPC intimating the Petitioner that the Dealership Agreement dated 01.02.2007 had been terminated. Let it be recorded that after the death of his mother, the Writ Petitioner was appointed as a Retail Outlet Dealer in the year 1997 but before that, the actual license had been given in 1951 in the name of his father. Both the Writ Petitions were taken up together and by reason of the impugned Order passed on 30.10.2011, the suspension of supply as well as the Order of termination were both set aside. It is against the said Order that M/s Hindustan Petroleum Corporation has filed this appeal.

4. Mr. Ashoke Kr. Banerjee, learned Senior Counsel appearing for the Appellants, has drawn our attention firstly, to a Certificate purporting to be dated 03.11.2006 which has inter-alia informed all concerned that the Oil Marking Companies (HPC, IOC, BPC and IBP) had awarded a contract to M/s SGS India Pvt. Ltd. for supply of Marker, Test Kits and IAS Columns for carrying out Marker Tests at the Terminals, Depots and Retails Outlets including testing for presence of marker. Learned Counsel then submitted, with reference to the Memorandum of Agreement entered by and one HPC and the Writ Petitioner on 01.02.1997 (Annexure P1 appended to the Supplementary Affidavit) which was taken on record, that as per Clause 39 and 44 of the said Agreement, the Corporation was entitled, at all times, to enter into the premises and inspect the management of the retail outlet of the Dealer in all respects. Clause 44 stated that the Dealer would faithfully and promptly carry out and observe and perform all directions or rules given by the Corporation from time to time. According to Mr. Banerjee, the Writ Petitioner having entered into a contract, cannot take the plea that the Corporation did not have the authority to appoint M/s SGS India Pvt. Ltd. to conduct the test. Mr. Banerjee also drew out attention to Clause 58 of the Agreement which inter-alia gives liberty to the Corporation to terminate the Agreement if any of the violations mentioned in the sub-Clauses therein were committed by one of them being a breach of any of the covenants or stipulations contained in the said Agreement.

5. Learned Senior Counsel, Mr. Banerjee, then submitted that the Corporation being the principal, had an absolute right to appoint any person as its agent for purposes of carrying out inspections etc. because the Corporation, being a conglomerate, is not expected to keep watch of its Dealers day to day and therefore, with the avowed object of giving effect to the terms and conditions of the Agreement, it proceeded to appoint M/s SGS India Pvt. Ltd. Therefore, that appointment is really complementary to the Agreement and cannot be faulted by saying that the Corporation did not have the authority to appoint M/s SGS India Pvt. Ltd. as its Agent.

6. Learned Counsel relied upon a judgment passed by the Hon''ble Allahabad High Court passed in Civil Miscellaneous Writ Petition No. 16930 of 2009 (M/s Kishore Auto Sales and Ors. Vs. Bharat Petroleum Corporation Limited and Anr.).

By a judgment dated 14.05.2010, a Division Bench of that Court held, inter alia, that the inspection by the officers of the company, its servants or Agents may be for the purpose as provided in the Agreement and inspection by the Agents of the Company can thus be for the purpose other than search and seizure as provided in Paragraph 7 of the Control Order of 2005. The Division Bench of the Hon'ble Allahabad High Court also held that the company which had given Dealership had also the right to determine as to whether the terms and conditions of the Contract were being followed or not and thus, for inspection by the Company for finding out whether the covenants of the Contract were being followed or not, Paragraph 7 of the Control Order may not be applicable. Finally, the learned Division Bench of the Hon'ble Allahabad High Court dismissed the Writ Petition and upheld the Order by which the Dealership had been terminated by M/s Bharat Petroleum Corporation.

7. In the facts and circumstances and the points of law which are involved, we must, at the outset say that the judgment of the Hon'ble Allahabad High Court, at best, can be said to have a persuasive value but that judgment cannot be held to be binding upon us for reasons which are set out hereafter.

We must first of all take note of the relevant Control Order namely "The Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order of 2005". An "Authorized Officer" under the said Order has been defined to be an authorized officer who would mean an Officer authorized under the provision of Clause 7 of the said Order. Clause 7 of the said Order clearly lays down that for purposes of search and seizure,

"7. Power of search and seizure-

(1) Any Gazetted officer of the Central Government or a State Government or any police officer not below the rank of Deputy Superintendent of Police duly authorised, by general or special order of the Central Government or a State Government, as the case may be, or any officer of the oil company, not below the rank of sales officer, may, with a view to securing compliance with the provisions of this Order, or for the purpose of satisfying himself that this Order or any order made there under has been complied with or there is reason to believe that all or any of the provisions of this Order have been and are being or are about to be contravened."

Upon a perusal of Clause 7(1) of the said Order it is only a Gazetted Officer of the Central Govt. or a Gazetted Officer of the State Govt. or any Police Officer not below the rank of Deputy Superintendent of Police duly authorized by general or special order either of the Central Government or the State Government who can either enter or search the premises of a Dealer, take samples of the product and seize any of the stocks of the product and inspect, seize and remove Books, Registers, and any other Records or Documents of the Dealer etc. Sub-Clause 3 of Clause 7 of the said Order lays down that the provisions of Section 100 of the Code of Criminal Procedure, 1973 relating to search and seizure shall, as far as

may be, apply to searches and seizures under the said Order.

8. Apart from the aforesaid officers, an exception has been made which lays down that any Officer of the Oil Company not below the rank of a Sales Officer can also perform the same functions referred to above. However, that Clause nowhere authorizes an Agent of the Oil Company. An Agent of the Oil Company namely M/s SGS India Pvt. Ltd. can, therefore, by no stretch of imagination, be said to be an Officer of the Oil Company. A similar point felt for consideration before this Court in WP No. 1299(W) of 2009. By a judgment dated 29.04.2010, one of us (Tapen Sen, J.) held that the word "shall, as far as may be" was mandatory. That judgment was approved by a Division Bench in APO No. 247 of 2010 (APOT 343 of 2010).

Section 100 of the Code of Criminal Procedure, 1973 reads as follows:-

"100. Persons in charge of closed place to allow search.--(1) Whenever any place liable to search or inspection under this Chapter is closed, any person residing in, or being in charge of, such place, shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

(2) If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in the manner provided by sub-section (2) of section 47.

(3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched and if such person is a woman, the search shall be made by another woman with strict regard to decency.

(4) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.

(5) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(6) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person.

(7) When any person is searched under sub-section (3), a list of all things taken

possession of shall be prepared, and a copy thereof shall be delivered to such person.

(8) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Indian Penal Code (45 of 1860)."

9. In a judgment of the Hon'ble Supreme Court passed in the Case of Allied Motors Ltd. Vs. Bharat Petroleum Corporation Ltd., AIR 2012 SC 709 : (2012) 2 SCC 1 : (2012) AIRSCW 513 , it was held that samples were taken in complete violation of the mandatory procedural provisions of the aforementioned Orders. We are of the view that an Agent of the Corporation, namely M/s SGS India Pvt. Ltd. had absolutely no authority to take samples or make any seizure of any product contrary to the provision of Clause 7 of the aforementioned Order read with Section 100 of the Code of Criminal Procedure. Moreover, we must point out at this juncture itself that the Corporation certainly has the power to appoint Agents for its own administrative convenience but when such an appointment dares to oppose provisions of law, then the same ceases to be lawful in the context of the law in that regard which, in the instant case, are Sections 100 of the Code of Criminal Procedure and the Control Order referred to above. These are provisions/legislations framed by competent legislative Bodies and their legal handiwork cannot be allowed to be upset or usurped by actions of a Public Sector Undertaking which does not have any legislative power. Therefore appointing Agents and vesting them with powers of search and seizure clearly amount to usurpation of statutory powers framed by the Legislature which is impermissible. Therefore, the action of the Appellant Corporation proceeding to firstly suspend and then terminate the Dealership, was absolutely illegal and without jurisdiction. The manner in which an old Dealership running from 1951 was terminated shows that the action was taken in complete violation of the provisions of the law.

10. The learned Single Judge who has passed the impugned Order, therefore, rightly considered the submissions of the Writ Petitioner and held that there was no scope to engage any private agency to take out samples or to carry out tests and it was in that context that the learned Single Judge correctly held that the Order of suspension as well as the Order of termination of Dealership was not acceptable.

11. We are in full agreement with the views of the learned Single Judge. We do not find them to be erroneous. The same are upheld. As a consequence, this Appeal stands dismissed.

12. As a consequence, the other appeal being FMA 654 of 2012 is also dismissed.

13. There shall be no Order as to costs.

14. Urgent Certified Copy to be issued upon appropriate application(s) being

made in that regard.

Siddhartha Chattopadhyay, J.

I Agree.

Later:

After we had delivered the judgment in open Court, prayer was made on behalf of the Appellants for stay of this judgment.

We have considered such submissions and we do not find any reason to stay of operation of this judgment.

Prayer for stay is refused.

Siddhartha Chattopadhyay, J.

I agree.