

(2012) 02 DEL CK 0165
In the Delhi High Court
Case No : LPA No. 1301 of 2007

Indian Oil Corporation Ltd and Another	APPELLANT
Vs	
Sushila Kumar and Another	RESPONDENT

Date of Decision : 01-02-2012

Acts Referred:

Citation : (2012) 02 DEL CK 0165

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Abhinav Vashisht, with Mr. Rajat Naved, Ms. Prachi V. Sharma, for the Appellant; Anil K. Kher with Mr. D.R. Bhatia, Ankur Bansal and Mr. Siddhartha Jain, for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sahai Endlaw, J.—This Intra-Court Appeal impugns the judgment dated 31st August, 2007 of the learned Single Judge allowing WP(C) No. 469/2005 preferred by the respondent no.1 and directing the appellant to restore the LPG distributorship to the respondent no.1 and to also attach back to the said distributorship the customers who had been distributed to other dealers. Notice of this appeal was issued. It appears that the respondent no.1 had initiated contempt proceedings owing to non compliance of the direction issued by the learned Single Judge. However, on 11th February, 2008 the counsel for the respondent no.1 stated that he would not press the contempt till the disposal of this appeal. The appeal was vide order dated 25th August, 2008 admitted for hearing. The counsels have been heard.

2. The appellant on 27th November, 1989 / 20th March, 1990 issued a letter to the respondent no.1 of its intent to allot rights of distributorship of LPG at Noida to the respondent no.1 on compassionate grounds, the respondent no.1 being a war widow. Ultimately a Distributorship Agreement dated 7th July, 1994 was signed between the appellant and the respondent no.1 whereunder the appellant appointed the respondent no.1 as Distributor of LPG in the distribution area of

Kondli, New Kondli and adjacent areas. The respondent no.1 commenced operations under the said agreement.

3. A notice dated 27th April, 2001 was issued by the appellant to the respondent no.1 averring that respondent no.1 was not supervising the day to day operations of distributorship, as was required under the Agreement and asking the respondent no.1 to show cause as to why action against her be not taken therefore. The respondent no.1 vide her reply dated 2nd May, 2001 denied any breach of the agreement on her part and furnished certificate of the bank to the effect that she was personally operating the bank account of the distributorship as proprietor and also filed her income tax and sales tax returns and other documents showing her day to day involvement with respect to the said distributorship business. The appellant vide its letter dated 5th June, 2001 informed the respondent no.1 that in view of her reply, further action pursuant to the show cause notice had been deferred and "warned" the respondent no.1 that in case at any later date it was found that she was in breach of any term of the agreement, further action including of termination of distributorship shall be taken.

4. The respondent no.1 claims that her daughter was settled in New Zealand and was in the family way and needed respondent no. 1's help; the respondent no.1 thus approached the appellant for permission to go abroad. It was further the case of the respondent no. 1 that on 13th July, 2001 the Area Sales Officer of the appellant inspected the distributorship and noted on the inspection report that the respondent no.1 had authorized one Mr. Tarun Kumar to look after the functioning of the distributorship. The respondent no.1 contends that the same amounted to the consent by the appellant to the respondent no.1 proceeding abroad. The respondent no.1 further claims to have confirmed the said fact vide her letter dated 15th June, 2001 to the appellant. The respondent no.1 thereafter on 17th June, 2001 left for New Zealand. The appellant, vide its letter dated 30th July, 2001 terminated the distributorship inter alia on the ground that the respondent no.1 was not available during inspections on 19th June, 2001, 2nd July, 2001 and 18th July, 2001 and the aforesaid Mr. Tarun Kumar was managing the day to day affairs of the business and which was in breach of the distributorship agreement.

5. The respondent no.1, after more than three years of the said cancellation of her distributorship filed WP(C) No.469/2005 (supra) impugning the said cancellation and seeking mandamus for restoration thereof. Of course, the respondent no.1 in the writ petition pleaded having immediately (after cancellation of distributorship on 30th July, 2001) sent a letter dated 1st August, 2001 clarifying that she had proceeded abroad with the permission of the appellant and thus the appellant could not have cancelled the distributorship on the ground of her absence. Representations are also stated to have been made in the said period of three years to the various other authorities against cancellation of distributorship. The appellant contested the said writ petition pleading that the

respondent no.1 had transferred her rights and interest of the distributorship without permission of the appellant to some other person and was thus in breach of the terms and conditions of the Agreement; that the respondent no.1 had left the country without permission of the appellant; that the writ petition was highly belated; that the writ petition was not maintainable owing to the arbitration clause in the Agreement and otherwise justifying the cancellation.

6. The learned Single Judge allowed the writ petition observing/holding:

(i) that Article 226 is not regulated by any period of limitation, though relief can be denied if the litigant approaches after lapse of considerable time; considering that the husband of the respondent no.1 was a high ranking Army Officer and was killed in extremist violence and the respondent no.1 herself had to wait for more than five years before the distributorship was allotted to her and that she was single and dependent on her employees to carry on her business, the petition could not be dismissed as barred by laches;

(ii) that the inspection report shortly before the departure of the respondent no.1 showed that the respondent no.1 had informed the appellant of her impending foreign visit; that the appellant had not been able to show any rule or condition in the agreement compelling the distributor to seek leave from the appellant;

(iii) that as long as the distributor is in overall control and supervises the outlet efficiently, the distributorship could not be terminated;

(iv) that the circumstances clearly showed a biased attitude and utter non application of mind on the part of the appellant in cancelling the distributorship of the respondent no.1.

Accordingly the said cancellation was held to be arbitrary and unreasonable and was set aside.

7. During the pendency of this appeal, the counsel for the respondent no.1 was on 13th May, 2008 asked to verify whether the respondent no.1 was then residing in India and to also produce her passport or photocopy thereof. The said direction was reiterated on 19th August, 2008 and 4th February, 2010. Thereafter on 23rd March, 2010 the respondent no.1 was directed to file an affidavit indicating the dates when she left India and the dates when she was in India from the year 2000 onwards.

8. In compliance of the directions aforesaid, a copy of the Indian passport, a copy of the New Zealand passport and a copy of the Certificate of Registration of the respondent no.1 as an Overseas Citizen of India were produced. In the affidavit, the respondent no.1 stated that she had been staying in New Zealand with her daughter as after the cancellation of distributorship she had no source of income and she "had no other children in India to take care of her and to look after her in her old age". The following dates of travel into India and departure from India were given.

ARRIVALS

DEPARTURES

11.03.1997

24.02.1997

06.11.1997

16.10.1997

16.09.1999

19.08.1999

20.03.2001

06.03.2001

29.04.2001

29.03.2001

Not known

17.06.2001

28.01.2002

18.04.2002

05.11.2003

26.01.2004

19.11.2004

02.01.2005

01.11.2005

31.01.2005

01.11.2006

31.01.2007

06.11.2007

15.01.2008

22.11.2008

07.01.2009

28.11.2009

17.01.2010

9. The senior counsel for the appellant in the circumstances, without adverting to the order of the learned Single Judge has contended that from the documents so produced it is borne out that the appellant is holder of a New Zealand passport since the year 2007; that she has since the year 2001 or so been residing in New Zealand; that all this shows that she had no intention of coming back and this alone constitutes a ground for holding that she is now not entitled to restoration of distributorship. Considerable emphasis is also laid on the long delay of over three years after cancellation in filing the writ petition. Reference is made to: (i) State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., to buttress the argument of non maintainability of writ petition owing to the existence of the arbitration clause in the distributorship agreement; (ii) Mrs. Sanjana M. Wig Vs. Hindustan Petro Corporation Ltd., to contend that the questions whether the respondent no.1 was herself operating the distributorship or not was a disputed question of fact requiring evidence and which cannot be adjudicated in writ jurisdiction; (iii) Chairman, U.P. Jal Nigam and Another Vs. Jaswant Singh and Another, to contend that after delay of more than three years the writ petition ought to have been dismissed on that ground alone; and (iv) M/s. Samant and Another Vs. Bombay Stock Exchange and Others, to contend that mere making of repeated representations cannot extend the period of limitation and cannot explain the delay.

10. Per contra, the senior counsel for the respondent no.1 has invited attention to the facts as set out hereinabove to contend that there are no disputed questions of fact requiring any evidence to be led; that the appellant in the counter affidavit in the writ petition had sought to justify the cancellation on the ground of sale by the appellant of the distributorship rights to another but it was not the ground taken in the termination letter dated 30th July, 2001 (supra). It is contended that the husband of the respondent no.1 was killed by terrorists on 7th November, 1988; that inspite of recommendation for allotment of an LPG distributorship to her in the year 1989 it was finally allotted after five years in 1994; that from 1994 till 2001 there was not a single complaint against the respondent no.1; that the entire facts and circumstances show that some officers of the appellant had decided to terminate the distributorship by hook or by crook to benefit somebody else and the grounds had been concocted therefore. It is further argued that no document whatsoever had been produced to allege that the respondent no.1 was not signing the day-to-day documents of the business. It is further shown that the respondent no.1 even though not required to, had vide her letter dated 8th June, 2001 informed the appellant of her need to travel abroad. Attention is also invited to the inspection report of 13th July, 2001 which also records that the respondent no.1 was out of India and of which she had already informed and had authorized Shri Tarun Kumar to look after functioning of the distributorship. It is thus contended that the notice of termination is contrary to the inspection report itself. It is also argued that no further notice to show cause was issued to the respondent no.1 and termination could not have been done on the basis of the earlier show cause notice and upon receipt of reply

whereto the appellant had decided not to take any further action. Attention is yet further invited to various documents filed by the respondent no.1 alongwith the response to the show cause notice earlier issued all of which show the personal day-to-day involvement of the respondent no.1 in the business of distributorship. Reliance is placed on *Shallmar Gas and Others Vs. Indian Oil Corpn. Ltd and Another* in which case in the face of the war widow continuing to hold majority share, her non involvement in day to day affairs owing to old age was held to be not in breach of the agreement and on *Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others*, in which the alternative remedy available of arbitration was held to be not precluding the maintainability of the writ petition. Reliance is also placed on *Indian Oil Corporation Ltd. Vs. Dharam Chand Gupta*, where termination of distributorship agreement found to be not in accordance with the principles of natural justice was set aside. The senior counsel for the respondent no.1 has, during the hearing, also handed over a reply dated 12th September, 2008 of the appellant to an RTI query, stating that there was no specific policy on LPG distributor subsequently acquiring status of NRI and that no LPG distributorship had been terminated on the ground of distributor having subsequently acquired the status of NRI.

11. We have considered the rival contentions. While we do not find any blemish in the order of the learned Single Judge and are thus not inclined to set aside the same on the ground of any error therein but the events which have subsequently unfolded, in our opinion do require consideration for the outcome of this appeal. The respondent no.1 has been out of the distributorship business now for the last 12 years. In the said 12 years her customer base has eroded and the said customers were transferred to other distributors. It can safely be assumed that depending upon the total number of customers, additional distributors may have been introduced.

12. It is also undisputed that the respondent no.1 has spent most of the last 12 years abroad. So much so that for the last 5 years she is also a foreign citizen. The reason given in her affidavit for such absence from India is, "absence of any children in India to look after her in her old age". We have thus wondered whether the relief granted by the learned Single Judge is today justified. In our opinion no. It cannot be lost sight of that the said distributorship was given to her by way of largesse and on compassionate ground and was not by way of any right. It is also sufficiently borne out that the said distributorship has served the respondent no.1 well; it had helped her in rehabilitating herself and her children. Now, when the grounds for which compassion was then shown to the respondent no.1 have disappeared, we have wondered whether any case for restoration of the distributorship when the respondent no.1 in the interregnum has settled herself elsewhere, is justified. Our answer again is no. In fact the long delay of over three years on the part of the respondent no.1 in approaching the Court itself shows that the need/requirement by the respondent no.1 for the said distributorship had disappeared then only. It is not as if the respondent no.1 between the date of cancellation and the date of filing of the writ petition did not

visit India. The dates aforesaid disclosed by her reveal three visits to India between that time. The petitioner still did not file any proceedings. The only inference can be that she was then not in a position, neither to remain in India nor to recommence business. The respondent no.1 though may be justified in feeling hurt at the treatment meted out to her on the part of the appellant but the said hurt would still not justify the restoration of distributorship. It is a well known fact that such distributorships are awarded even today on compassionate ground and we are of the view that restoration of distributorship in today's date and time to the respondent no.1 would definitely be at the cost of some other deserving person. We are conscious that the said distributorship was not limited in point of time. However at the same time it did not create any right in favour of the respondent no.1; it was a terminable contract. Even though the appellant is found to have acted unfairly and unjustly in effecting such termination but that alone would not lead to the restoration.

13. It is a settled proposition in law that this Court, in exercise of power of judicial review as we are exercising now, is entitled to mould the relief according to the facts and circumstances and to deny relief even though finding any error in the action of which judicial review is sought. The powers of this Court while exercising jurisdiction under Article 226 are wide. This Court, to do substantial justice between the parties, can decline relief even where entitlement in law is made out (see *Chandra Singh Vs. State of Rajasthan and Another*, and *ONGC Ltd. Vs. Sendhabhai Vastram Patel* (2005) 6 SCC 454) and similarly grant relief inspite technical violation. Similarly, in *Taherakhatoon (D) by Lrs. Vs. Salambin Mohammad*, even at the time of dealing with the appeal after grant of special leave, it was held that the Court was not bound to go into the merits and even if entering into the merits and finding an error, was not bound to interfere if the justice of the case on facts does not require interference or if the relief could be moulded in a different fashion. This Court has echoed the same views in *Filmistan Exhibitors Ltd. Vs. N.C.T. and Others*, by holding that even if there is a violation of law, this Court is not bound to exercise discretionary jurisdiction and in *DTC Retired Employees' Association and Others Vs. Delhi Transport Corporation* by refusing to interfere in exercise of discretionary powers inspite of holding the reasons given by the Labour Court to be not convincing. We find the present case to be one such case where inspite of finding error in the action of the appellant of cancellation of distributorship, we still do not find a case for restoration of distributorship to be made out. Such restoration would require the respondent no.1 to again shift to India and for which she has as aforesaid expressed incapability in the absence of anyone to help her. It cannot also be lost sight of that as part and parcel of the said business, the respondent no.1 was required to arrange space etc. and all of which in all probability would have dissipated in the last so many years.

14. The present status of the respondent no.1, as a citizen of a foreign land cannot also be ignored. The same shows an intent to permanently remain away from India. Foreign citizenship is entirely different from non residency. There are

a large number of restrictions on foreign citizens establishing/carrying on business in India. However since the counsels have not addressed on the said aspect, we do not foray into it further. Suffice it is to say that such changed status also comes in the way of restoration of the largesse earlier bestowed on the respondent no.1.

15. For the reasons aforesaid we allow this appeal and set aside the order of the learned Single Judge insofar granting the relief to the respondent no.1. However, having found fault with the actions of the appellant and which have led to the respondent no.1 litigating with the appellant, we award to the respondent no.1 legal costs of Rs. 50,000/- payable by the appellant within four weeks of today.