

(2010) 11 OHC CK 0064

In the Orissa High Court

Case No : Writ Petition (C) No. 5328 of 2009

Indian Oil Corporation Ltd.

APPELLANT

Vs

Freedom Filling Station

RESPONDENT

Date of Decision : 02-11-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Specific Relief Act, 1963 — Section 14(1), 41

Citation : (2011) 1 ILR (Ori) 93

Hon'ble Judges : R.N. Biswal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

R.N. Biswal, J.—The Petitioner challenges the order dated 24.11.2008 passed by the learned Adhoc Addl. District Judge, Fast Track Court No. III, Bhubaneswar in F.A.O. No. 11/49 of 2006 confirming the order dated 20.7.2006 passed by the learned Civil Judge (Junior Division), Bhubaneswar in I.A. No. 281/2005 arising out of C.S. No. 241 of 2005 directing the parties to maintain status quo in respect of M/s. Freedom Filling Station till disposal of the suit.

2. The Petitioner, Indian Oil Corporation Limited (hereinafter referred as I.O.C.), a registered Government Company having its registered office at Mumbai carry on business of sale and distribution of petroleum products throughout India by engaging dealers and distributors. The Petitioner was the Defendant and opp. party was the Plaintiff in C.S. No. 241 of 2005. As per the case of the Plaintiff, on 23rd February, 2001, it was appointed by the defendant as dealer for retail sale and supply of petroleum products at Bhubaneswar. On 21.3.2005, the Assistant Manager (Quality Audit) of the I.O.C. made a routine visit and collected sample of Motor Spirit/Petrol (MS) from the retail outlet of the Plaintiff and subsequently sent the same to laboratory for testing. On 31.3.2005, the Plaintiff received a letter from the opp. party wherein it was specifically pointed out that the Full Boiling Point (FBP in short) as per Laboratory Test Report was found to be 2250C

against the maximum limit of 2150C, and, as such, the product was offspecification when other criteria remaining the same. So, in the said letter, Plaintiff was asked to show cause within 7 days from the date of its issue as to why penal action should not be taken against it leading to termination of the dealership. It was also mentioned in the said letter that it was the second case of sample failure, the first one being in the month of February, 2004 in respect of the Plaintiff's retail outlet. According to the Plaintiff in the first alleged failure report neither the Marketing Discipline Guidelines (MDG in short) was followed nor the request of the Plaintiff to test retained T.T. sample was complied with. The Laboratory Test Report, on the basis of which the letter dated 31.3.2005 was issued bore no name of the retail outlet. Furthermore, in the said report, FBP was found to be 2200C as against the maximum limit of 2150C, but in the notice in place of 2150C it has been mentioned as 2250C.

3. Apprehending that basing on the said vague Laboratory Test Report, the Defendant would terminate the dealership of the Plaintiff, it filed the aforesaid suit with prayer to declare that the letter dated 31.3.2005 issued by the Defendant was illegal, null and void and to restrain the Defendant from taking any penal action against it. Along with the suit, the Plaintiff filed a petition under Order 39 Rule 1 and 2 of Code of CPC with prayer to restrain the Defendant from terminating the dealership till disposal of the suit. The said petition was registered as I.A. No. 281 of 2005. Notice was issued to the Defendant in the said I.A to show cause but as it did not appear, order of status quo in respect of M/s Freedom Filling Station was passed on 30.5.2005 which continued from time to time till it was made absolute.

4. The Defendant appeared on 31.1.2006 and filed show cause in I.A. No. 281 of 2005, inter alia, contending that it was the owner of the outlet and one Bhagaban Pattnaik was awarded the dealership in respect of retail outlet in question on freedom fighter quota. On his death, his widow and two M/S. INDIAN OIL CORPN. v. M/S. FREEDOM FILLING STATION [R.N.BISWAL,J.] sons executed the dealership agreement with the Defendant on 23.2.2001 and they carried the said business in the name of the firm, M/S Freedom Filling Station. As per the said agreement, the Plaintiff was to sell the products of the Defendant strictly in compliance with the terms and conditions of the agreement and the provisions of the MDG. But, it adulterated the petroleum products and sold the same to the customers which was detected in November, 2000 and August, 2003. Again on 19.2.2004, Ms Sample collected from retail outlet in question was found to be adulterated on laboratory test for which fine of Rs. 20,000/-was imposed on the Plaintiff and the same was paid by it. Further, on 21.3.2005, sample of MS Xtra premium was taken from the said retail outlet which failed the laboratory test whereas the Tank Truck Retention sample passed laboratory test. On 31.3.2005, the I.O.C. issued a notice to show cause to the Plaintiff as to why action would not be taken against it for adulterating petroleum products. The reply given by the Plaintiff vide letters dated 4.4.2005 and 8.4.2005 having been found not satisfactory, the dealership agreement was terminated vide order dated

20.1.2006 with immediate effect. The possession of retail outlet in question was taken over by I.O.C. on 21.1.2006 at 9.20 A.M. in presence of police. On the same date at 10.30 A.M., it was handed over to M/s. Ramamani Motors, one of the Indian Oil dealers to run the same on adhoc basis. On 22.4.2006, the Plaintiff again forcibly entered into the said retail outlet for which intimation was given to O.I.C., Capital Police Station and S.P., Khurda. Accordingly, the Defendant prayed to dismiss the I.A.

5. After hearing learned Counsel for both sides, the learned Civil Judge (Junior Division), Bhubaneswar held that sample collected from the retail outlet of the Plaintiff on 21.2.2005 was tested on 28.2.2005 and allegedly failed the laboratory test. Sample Collected on 17.3.2005 and 18.3.2005 from the depot passed the laboratory test at Kolkata. But those samples were received on 5.4.2005, i.e., beyond 10 days of collection in regional laboratory at Kolkata. As per the M.D.G. the sample should have been reached in the laboratory within 10 days of collection. So, according to the trial court the Plaintiff raised a fair question which would be decided at the time of hearing of the suit and allowed I.A. No. 281 of 2005 vide order dated 20.7.2006 and made the interim order absolute. Being aggrieved with the said order, the Defendant filed an appeal before the District Judge, Khurda at Bhubaneswar which on being transferred to Adhoc Addl. District Judge Fast Track Court No. III, Bhubaneswar was renumbered as 11/49 of 2006. After hearing learned Counsel for the parties, the appellate court dismissed the appeal and confirmed the orders of the trial court, inter alia, holding that the I.O.C. failed to prove a single document to show that any customer complained against the Plaintiff to have sold any adulterated petroleum products. The present writ petition has been filed by the Appellant against the said appellate order.

6. Learned Counsel for the Petitioner submitted that as per Clause-3 of the agreement entered into between the parties on 23.2.2001, the agreement shall remain in force for 5 years and continue thereafter for successive periods of one year each until determined by either party by giving three month's notice in writing to the other of its intention to terminate the agreement and upon expiration of such notice period the agreement and the licence granted shall stand cancelled and revoked. Moreover, Clause 56 (i) of the said agreement envisages that notwithstanding anything to the contrary, the I.O.C. shall be at liberty to terminate the agreement if the dealer deliberately contaminates or tampers with the quality of the Corporation's products. Furthermore, as per M.D.G. in case of second adulteration, the dealership agreement is liable to be terminated. So, the contract is determinable in nature. Since the agreement was determinable, the court below ought not to have granted temporary injunction in view of the provision contained u/s 41(e) of the Specific Relief Act. In support of his submission, he relied on the decision in the cases of Indian Oil Corporation Limited v. Amritsar Gas Service and Ors. (1991) 1 SCC 353 Rajasthan Breweries Ltd. Vs. The Stroh Brewery Company, , Mittal Services v. Escotel Mobile Communication Ltd. AIR 2003 Delhi, 410 and some other cases.

7. Learned Counsel for the Petitioner next submitted that the Civil Judge (Junior Division), Bhubaneswar held that the opp. party had a prima facie case on the ground that on 17.3.2005 and 18.3.2005 samples were collected from the depot, but the same were received in the laboratory on 5.4.2005, i.e., beyond 10 days of collection, which is against the M.D.G. According to learned Counsel for the Petitioner nozzle sample collected on 21.3.2005 failed laboratory test, both in Paradip and Calcutta laboratories vide reports under Annexures-J and L respectively, whereas the depot sample and the genuine T.T. sample met the laboratory test under Annexure-K and K-1. The density in manufactured T.T. sample vide Annexure-M has been tallied with the failure nozzle sample vide Annexure-J, as such the opp.party has manufactured the said T.T.samaple relating to the report under Annexure-M. The density of the depot sample along with the genuine T.T. sample does not tally with the manufactured T.T.sample.

8. Learned Counsel for the Petitioner next submitted that in issuing temporary injunction the tests to be applied are (i) whether the Plaintiff has a prima facie case (ii) whether the balance of convenience is in favour of the Plaintiff (iii) whether the Plaintiff would suffer irreparable injury, if his prayer for temporary injunction is disallowed. The learned Civil Judge (Junior Division), Bhubaneswar did not discuss about balance of convenience and irreparable loss. The appellate court also did not discuss the same, except stating that the opp. party had a prima facie case, it would sustain irreparable loss, if the stay was not granted and that the balance of convenience leaned in its favour. So, learned Counsel for the Petitioner urged to allow the writ petition.

9. It is found from Clause-3 of the dealership agreement entered into between the parties, on 23.2.2001 that the agreement shall remain in force for five years and continue thereafter for successive periods of one year each until determined by either party by giving 3 months" notice in writing to the other of its intention to terminate the agreement and upon expiration of such notice period the agreement and the licence granted shall stand cancelled and revoked. Further, as per Clause 56(1) of the said agreement, the Petitioner shall be at liberty to terminate the agreement if the dealer deliberately contaminates or tamper with the quality of any of the Corporation"s product. Furthermore, as per M.D.G. in case of second adulteration, the dealership agreement is liable to be terminated, as such, the contract is determinable in nature.

10. Learned Counsel for the opp.party submitted that the order of imposition of fine for the so-called first adulteration has not yet been finalized. Opp.party has filed a representation on 25.1.2005 for review of the said order, but, it has not yet been disposed of. In the meantime more than five years have already elapsed. As it appears the opp.party has not taken any step to see that the representation is disposed of soon. Moreover, admittedly opp.party has already deposited the fine amount of Rs. 20,000/-. So, at this stage, prima facie it is found that the opp. party had adulterated petroleum product earlier, in the month of February 2004 for which it paid the fine of Rs. 20,000/-imposed.

Whether the sample collected from the outlet of the opp. party on 21.3.2005 was in fact adulterated or not shall be decided at the time of trial of the suit. Prima facie it appears that it was found adulterated. Even if it is presumed that it was not adulterated, still then the order of status quo cannot stand, as would be discussed now.

11. Section 41(e) of the Specific Relief Act envisages that an injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforceable. Section 14(1)(C) of the said Act lays down that a contract which is in its nature determinable cannot be specifically enforced. Admittedly, the contract between the parties in the present case is determinable in nature. In the decision Indian Oil Corporation Limited (supra), the apex court held that:

The finding in the award being that the Distributorship, agreement was revocable and the same being admittedly for rendering personal service, the relevant provisions of the Specific Relief Act were automatically attracted. Sub-section(1) of Section 14 of the Specific Relief Act specifies the contracts which cannot be specifically enforced, one of which is "a contract which is in its nature determinable". In the present case, it is not necessary to refer to the other clauses of Sub-section(1) of Section 14, which also may be attracted in the present case since Clause (c) clearly applies on the finding read with reasons given in the award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the Appellant-Corporation is contrary to the mandate in Section 14(1) of the Specific Relief Act and there is an error of law apparent on the face of the award which is stated to be made according to the law governing such cases. The grant of this relief in the award cannot, therefore, be sustained.

Similarly, in the case of Rajasthan Breweries Ltd.(supra)the Delhi High Court held that:

Even in the absence of specific clause authorizing and enabling either party to terminate the agreement in the event of happening of the events specified therein, from the very nature of the agreement, which is private commercial transaction, the same could be terminated even without assigning any reason by serving a reasonable notice. At the most, in case ultimately it is found that termination was bad in law or contrary to the terms of the agreement or of any understanding between the parties or for any other reason, the remedy of the Appellants would be to seek compensation for wrongful termination but not a claim for specific performance of the agreements and for that view of the matter learned Single Judge was justified in coming to the conclusion that the Appellant had sought for an injunction seeking to specifically enforce the agreement. Such an injunction is statutorily prohibited with respect of a contract, which is determinable in nature". Similarly, in the case of Mittal Services (Supra) the Delhi High Court held that: "Apart from the fact that the Plaintiff was appointed

as a franchisee for the territory of District Kaithal only on a non-exclusive basis as is evident from Clause 5.2 of the agreement, and the Defendant had discretion to appoint as many franchisees for that very area as it deemed proper, the agreement being of a determinable nature, is not specifically enforceable. In view of Section 14(1)(C) (S. 41(e)) of the Act and by virtue of Section 41(e) (14(1)(c)) of the Act, no injunction of the nature prayed for by the Plaintiff can be granted. Thus, finding no prima facie case in favour of the Plaintiff, the application is liable to be dismissed.

As per the above decisions, even if it is presumed that there was no second adulteration, in the present case, still then the trial court ought not have granted status quo order and the appellate court ought not have confirmed it, since the agreement between the parties was determinable in nature.

12. Furthermore, learned Civil Judge has not discussed about the irreparable loss and balance of convenience, so also the appellate court. Even if it is presumed that there is a prima facie case in favour of opp.party, still then in absence of proving that balance of convenience leans in its favour and that it would sustain irreparable injury, if injunction is not granted, the order of granting injunction is bad in law. Admittedly, opp.party is a dealer in respect of petroleum products under the Petitioner. Because of refusal of interim relief, if the opposite party had sustained any loss, it could have been compensated by money had it won the suit ultimately. So, there was no question of sustaining irreparable injury. Even if it is presumed that the inconvenience which was likely to be caused from withholding the injunction than that which was likely to arise from granting it, still then since there was no question of sustaining irreparable injury, the order of status quo cannot stand.

13. Under such circumstances, the writ petition is allowed and the orders of both the trial court as well as appellate court are set aside and the order of status quo passed in respect of M/s. Freedom Filling Limited is vacated. Learned Civil Judge (Junior Division), Bhubaneswar shall dispose of C.S. No 241 of 2005 as expeditiously as possible preferably within a period of four months from the date of receipt of this order. Accordingly, the writ petition stands disposed of. No cost.