

(2023) 08 GAU CK 0060

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 6192 Of 2022

Kabita Das

APPELLANT

Vs

Union Of India And 4 Ors.

RESPONDENT

Date of Decision : 21-08-2023

Acts Referred:

Constitution Of India, 1950 — Article 14, 19(1)(g), 226

Citation : (2023) 08 GAU CK 0060

Hon'ble Judges : Michael Zothankhuma, J

Bench : Single Bench

Advocate : D. Das., R. Sarma., S.S. Roy, S. Borthakur, P. Bharadwaj

Final Decision : Dismissed

Judgement

1. Heard Mr. D. Das, learned Senior Counsel assisted by Mr. R. Sarma, learned counsel for the petitioner. Also heard Mr. S.S. Roy, learned CGC for the respondent nos.1 & 2; Mr. S. Borthakur, learned counsel for the respondent No. 3 and Mr. P. Bharadwaj, learned counsel for the respondent Nos. 4 & 5.

2. The petitioner is aggrieved by the feasibility report dated 15.11.2018, on the basis of which Notice dated 25.11.2018 was published, for appointment of a Rural Retail Outlet (RO) dealer by the Bharat Petroleum Corporation Ltd. The retail outlet (petrol pump) that was to be set up was at Patiladaha Highway, within 5 kms from NH17 intersection, which is in close vicinity to the petitioner's petrol pump.

3. The petitioner's counsel submits that the petitioner has a petrol pump in the said area in the name of Patiladaha Ananta KSK. He submits that for opening up of a new retail outlet, the Government of India, Ministry of Petrol and Natural Gas had issued guidelines/criteria to be followed by Oil Manufacturing Companies vide letter No. P-19011/5/2010-IOC dated 06.04.2011, addressed to the Chief Executive Officers of the three Oil Manufacturing Companies (OMCs), i.e. Bharat Petroleum Corporation Ltd., Hindustan Petroleum Corporation Ltd. and Indian Oil

Corporation. In terms of the said letter dated 06.04.2011, a feasibility study was to be made by Oil Manufacturing companies for opening new retail outlets wherein, they were to consider the appropriate returns/financial viability of the new retail outlet. He submits that as per the letter dated 06.04.2011, a oil manufacturing company may work out a mechanism where the ED (Retail) of the three OMCs, may decide by consensus, on expansion of network in new areas like developing suburbs in cities, new highways, road bypass etc. He submits that though the respondent No. 3 has issued a notice for opening a new RO in a Rural area near the location of the petitioner's petrol pump, in terms of the feasibility report dated 15.11.2018 and the Notice dated 25.11.2018, the said feasibility report does not make a mention of the petitioner's petrol pump. He submits that the feasibility report had been made after considering two petrol pumps, which were at a further distance from the petitioner's petrol pump. As such, the respondent No. 3 should be directed to make a new feasibility report, in which the petitioner's petrol pump should be considered and thereafter, consider if it would be feasible to have a new RO.

4. Mr. D. Das, learned Senior Counsel submits that in terms of letter dated 06.04.2011 issued by the Government of India, Ministry of Petroleum & Natural Gas, the feasibility report to be made by an OMC to open a new RO required that all the neighbouring ROs should be considered. However, the respondent no.3 has not considered the petitioner's petrol pump, which is in close proximity of the new RO to be opened in pursuance to the notice dated 25.11.2018, while on the other hand, the respondent no.3 had considered two petrol pumps, one belonging to IOC and the other belonging to HPCL, while making the feasibility report. He submits that either the respondent no.3 fully complies with the letter dated 06.04.2011 or does not comply with it at all.

5. Mr. P. Bharadwaj, learned counsel for the respondent No. 4 submits that the petitioner's retail outlet was not taken into consideration by the respondent No. 3, while making the feasibility report dated 15.11.2018.

6. Mr. P. Bharadwaj, learned counsel for the respondent nos.4 & 5 submits that there is no set mechanism, procedure or practice for sharing the feasibility report made by one OMC with another OMC or seeking comments and clearance or objections from the other OMCs. He also submits that the impugned feasibility report made by the respondent no.3 had not been referred to the respondent nos.4 & 5 for comments, since it is an internal document of the respondent no.3. The counsel for the respondent nos.4 & 5 however submits that the respondent nos.4 & 5 became aware of the feasibility report made by the respondent no.3, after the filing of the writ petition. He submits that the respondent nos.4 & 5 does not have any objection to the feasibility report made by the respondent no.3 or with the notice dated 25.11.2018, for opening a new Rural RO by the respondent no.3.

7. Mr. S. Borthakur, learned counsel for the respondent No. 3 submits that the letter dated 06.04.2011, issued by the Govt. of India, Ministry of Petrol and

Natural Gas wherein, it is stated that the OMCs may make a mechanism for expansion of their network is only a guideline, which cannot be enforced in a Court. He further submits that the opening of a new RO by the respondent No. 3, in the vicinity of the petitioner's petrol pump, does not violate or infringe any of the petitioner's legal or fundamental right. He thus submits that the writ petition should be dismissed as no legal right of the petitioner has been violated.

8. The counsel for the respondent No. 3 also submits that as per the Memorandum of Agreement entered into between the petitioner and the Indian Oil Corporation (respondent No. 4) on 23.11.2015, the petitioner had agreed not to dispute, object or to challenge the appointment of other dealers at the same place or at any place made by the Indian Oil Corporation (IOC) or by any other oil company or corporation for the time being operating in India. He submits that the feasibility report dated 15.11.2018 made by the respondent No. 3 had been placed before the IOC, prior to issuance of the notice for appointment of a new Rural retail outlet dealership. As no objection to the feasibility report was made by the respondent No. 4, the petitioner was estopped from making a challenge to the feasibility report made by the respondent No. 3 and the consequential advertisement/ Notice issued by the respondent No. 3, for appointment of new Rural retail outlet dealership pertaining to Patiladaha Highway, within 5 kms from NH17 intersection.

9. Mr. S. Borthakur, learned counsel for the respondent no.3 submits that the IOC not having objected to the setting up of the new RO in terms of the feasibility report dated 15.11.2018 and the notice dated 25.11.2018, the petitioner could not have made any objection to the same as he was bound by the memorandum of agreement entered into between the petitioner and the IOC on 23.11.2015, wherein the petitioner had agreed not to dispute, object or to challenge the appointment of other dealers at the same place or at any place either by the Corporation or by any other Oil Company or Corporation being operated in India.

10. Mr. Borthakur also submits that the new RO to be opened by the respondent no.3, pursuant to the notice dated 25.11.2018 was to be a Rural RO. In terms of the PSU Oil Marketing Company's Manual for selection of Dealers for Regular & Rural Retail Outlets applicable to the respondent nos.3, 4 & the HPCL, the expected combined sales volume of the new Rural ROs (E Class) was to be 25 KI per month. On the other hand, the feasibility report done by the respondent no.3 for the new Rural RO to be set up in pursuant to the notice dated 25.11.2018 showed that there would have been expected combined sales volume of 80 KI per month. He also submits that the letter dated 06.04.2011, which has given guidelines for conducting feasibility studies for opening new ROs, is not applicable for opening new Rural ROs and is applicable to other ROs only

11. I have heard the learned counsels for the parties.

12. The basic grievance of the petitioner is that the proposal for opening of a

new retail RO/petrol pump by the HPCL has been done without the feasibility study/report in terms of the letter dated 06.04.2011 issued by the Government of India, Ministry of Petroleum and Natural Gas. The petitioner's case is that while the distance of the petitioner's petrol pump is only 800 metres from the proposed new RO to be opened by the HPCL, the respondent no.3 has only considered the combined sale volume of SAINI Service Station (BPCL), which is 10 km away from the proposed new site and AIE Valley Service Station (IOC), which is 3.7 km away from the proposed new RO. However, the petitioners' petrol pump which is only 800 metres away, has not been considered, while making the feasibility report for setting up a new petrol pump.

13. The Government of India, Ministry of Petroleum and Natural Gas issued letter No.P-19011/5/2010 IOC dated 06.04.2011 to the Chief Executive Officers of BPCL/HPCL/IOC, regarding the new criteria for conducting feasibility studies for new Retail Outlets/Preparation of new Marketing Plan, to be followed by the Oil Marketing Companies as reflected below :

(i) The OMC's should consider the appropriate returns for financial viability of a new RO which form the gross margin available to OMC's on MS/HSD is Rs.354/kl.

(ii) The OMC's should give greater emphasis on setting up of 'B' site RO's in preference 'A' site RO's as the cost would be much lower while returns would be similar. OMC's will have to work out a compensation mechanism for 'B' site RO's where the dealer is compensated adequately.

(iii) The OMC's may work out a mechanism where the ED (Retail) of the three OMC's may decide by consensus on expansion of network in new areas like developing suburbs in cities, new Highways, road bypass/Diversion or areas like developing suburbs in cities, new highways, road bypass/diversion or areas showing very high growth and existing infrastructure is adequate.

(iv) No restriction may apply for Rural RO's which are anyway low coast RO's and are giving adequate returns.

14. The Guidelines on selection of dealers for Regular and Rural Retail Outlets through draw of lots/bidding process as published on 24.11.2018 provides for identification of locations. Paragraph 1.A provides the locations for setting up Retail Outlets as identified by the Oil Companies based on commercial/minimum volume considerations. The applicable sale volume norms for petrol and diesel are as under :

(i) A&B Class Cities : Expected combined sales volume – 150 Kl p.m.

(ii) National Highway : Expected combined sales volume – 150 Kl p.m.

(iii) C Class Towns / State Highway - Expected combined sales volume – 100 Kl p.m.

(iv) Rural ROs (E Class) - Expected combined sales volume – 25 Kl p.m.

15. A bare perusal of the letter dated 06.04.2011 providing the criteria to be considered while conducting of feasibility studies for opening new Rural RO shows that no restriction would apply for opening Rural outlets as provided in Clause (iv) of the letter dated 06.04.2011. As such, for opening of new Rural RO, feasibility study is not required to be made in terms of the above letter. However, the guidelines on selection of dealers for Rural RO as provided in paragraph 1.A shows that the new Rural RO has to have an expected combined sales volume of 25 KI of petrol and diesel per month. The feasibility report made by the respondent no.3 shows that the proposed new Rural RO would have an expected combined sale volume of 80 KI per month. As such the eligibility requirement of opening a new Rural RO has been fulfilled in terms of the feasibility report dated 15.11.2018.

16. The only issue left to be decided is with regard to whether the petitioner's petrol pump should have been considered by the respondent no.3 while making the feasibility report, as it was the nearest to the proposed new RO. In this regard, the submission of the learned Senior Counsel for the petitioner merits consideration, as commonsense required the respondent no.3 to have also considered the affect of the business that the nearest petrol pump would have had on the new RO to be established, instead of giving more emphasis on two other petrol pumps, which were many kilometres away.

17. The above being said, the opening of a new RO would have been for the interest of the general public. The petitioner in paragraph 18 of the writ petition has stated that the petitioner had invested a huge amount of money and also obtained financial loan to the tune of Rs.30,00,000/- (Rupees thirty lakhs) for opening her outlet. If the petitioner had been given the impression that the OMCs could open as many outlets at any distance, then she may not have opted for making such a huge investment. The petitioner further states that the opening of another outlet in the vicinity of the petitioner's outlet was in complete violation of the criteria provided in the letter dated 06.04.2011 and the same hampered the petitioner's right under Article 14 & 19(1)(g) of the Constitution of India. On considering the averments made by the petitioner in her writ petition, as to why she opposes the opening of a new RO in the vicinity of her petrol pump, it is clear that she is worried about the impact that the same would have on her business.

18. On perusing the criteria laid down for conducting the feasibility studies for opening a new RO, this Court is of the view that the criteria laid down in the said letter dated 06.04.2011 is not enforceable in a Court, as it is only a guideline. Further, the counsel for the IOC has stated that the respondent nos.4 & 5 did not have any objection to the feasibility report made by the respondent no.3 and also with regard to the opening of a new Rural RO by the respondent no.3 on the basis of the notice dated 25.11.2018. In view of the above stand taken by the IOC and the agreement made between the petitioner and the IOC on 23.11.2015, which is to the effect that the petitioner had agreed not to dispute,

object or to challenge the appointment of other dealers at the same place or at any place made by the IOC or by any other Oil Company or Corporation operating in India, this Court is of the view that the petitioner cannot make a challenge to the feasibility report dated 15.11.2018 and the notice dated 25.11.2018. The petitioner's apprehension that his sale would be affected by the opening of a new RO by the respondent no.3 cannot, to my mind, justify the attempt by the petitioner to stop the opening of a new Rural RO, which would be for the benefit of the general public, vis-à-vis her private business. In any event, the opening of a new RO cannot be said to violate or hamper the petitioner's fundamental rights under Article 14 & 19(1)(g) of the Constitution of India.

19. In the case of Chief Commercial Manager, South Central Railway, Secunderabad & Others vs. G. Ratnam & Others, reported in (2007) 8 SCC 212, the Supreme Court has held that broadly speaking, administrative rules, regulations and instructions, which have no statutory force, do not give rise to any legal right in favour of the aggrieved party and cannot be enforced in a court of law against the administration. The executive orders appropriately so-called do not confer any legally enforceable right on any person and impose no legal obligation on the subordinate authorities for whose guidance they are issued. Such an order would confer no legal and enforceable right on the delinquent, even if any of the directions is ignored, no right would lie. Their breach may expose the subordinate authorities to disciplinary or other appropriate action, but they cannot be said to be in the nature of statutory rules having the force of law, subject to the jurisdiction of certiorari. It further held that it is well-settled that the Central Government or the State Government can give administrative instructions to its servants how to act in certain circumstances; but that will not make such Instructions statutory rules, which are justiciable in certain circumstances. In order that such executive instructions have the force of Statutory Rules, it must be shown that they have been issued either under the authority conferred on the Central Government or the State Government by some statute or under some provision of the Constitution providing therefor. Therefore, even if there has been any breach of such executive instructions, that does not confer any right on any member of the public to ask for a writ against the Government by a petition under Article 226 of the Constitution of India.

20. In the case of Central Coalfields Limited & Another vs. SLL-SML (Joint Venture Consortium) & Others, reported in (2016) 8 SCC 622, the Supreme Court has held that the power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest.

21. The Rajasthan High Court in the case of Rajasthan Petroleum Dealers Association through its Secretary, Jaipur vs. Union of India and others by order dated 20-9-2011 passed in S.B. Civil Writ Petition No. 10441/2010 has held as under:--

"15. The present writ petition is nothing but a camouflage to prevent possible competition by other retail outlets. The discretion and freedom of OMCS to set up

more outlets with the expansion of road network and consumer markets has neither been disputed nor it can possibly be disputed. From the material placed on record before this Court by the respondent Union of India and OMCs, it is clear that there is no breach of any guidelines, which are not even statutory in nature, by the OMCs while inviting applications for such retail outlets. The allegation that lesser sale targets have been fixed for such applicants than the standard quota does not make out any ground for prohibiting the OMCS for allotting such retail outlets. In their replies, the OMCs have clearly come out with a case that they undertook the cost benefit analysis for each retail outlet to be opened by comparison of possible sales with actual sales of existing retail outlets and profit to be earned by it and it is only upon finding such economic viability for such new proposed retail outlet that such advertisements have been issued with the approval of the Board of Directors of respective OMCs at the highest level and there is no arbitrariness or illegality pointed out in the decision making process. A fair and legitimate competition coupled with the need of increased number of retail outlets with the expansion and development of road network and consumer market cannot be denied or disputed."

In the present case, common sense required the respondent no.3 to have also considered the case of the petitioner's petrol pump in its feasibility report. Though the same has not been done, no right of the petitioner has been violated.

22. As can be seen from the judgments quoted above, a writ petition cannot be filed to prevent possible competition by other retail outlets and to protect private interest at the cost of public interest. Further, as has been held in *Chief Commercial Manager, South Central Railway, Secunderabad (supra)* the criteria for conducting a feasibility study in terms of the letter dated 06.04.2011 issued by the Government of India, Ministry of Petroleum and Natural Gas cannot be enforceable in the court of law, as it has not been issued on the basis of some statute or under some provision of the Constitution.

23. In the case of *Silppi Constructions Contractors vs. Union of India and Another*, reported in (2020) 16 SCC 489, the Supreme Court has held that the Supreme Court is normally loathe to interfere in contractual matters, unless a clear-cut case of arbitrariness or malafides or bias or irrationality is made out. The Supreme Court also stated that the Courts must realise their limitations and the havoc which needless interference in commercial matters can cause and accordingly held that Courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters.

24. In the case of *Jasbhai Motibhai Desai vs. Roshan Kumar, Haji Bashir Ahmed & Others*, reported in (1976) 1 SCC 671, and in the case of *Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra & Others*, reported in (2013) 4 SCC 465, the Supreme Court has held that only a person who has suffered, or suffers from legal injury can challenge the act/action/order etc. in a court of law. There must be a judicial enforceable right for enforcement and the existence of such a right is a condition precedent for invoking the writ jurisdiction of the Court. It further

held that a writ petition under Article 226 of the Constitution is maintainable either for the purpose of enforcing a statutory or legal right, or when there is a complaint by the appellant that there has been a breach of statutory duty on the part of the Authorities. In the present case, the petitioner has not been able to show that he has suffered or suffers from any legal injury or there has been a breach of any statutory duty on the part of the respondents. As such, the petitioner cannot be said to be an aggrieved person having locus standi to file the present writ petition.

25. In the case of Ganesh Chandra Hazarika vs. State of Assam and Others, reported in 1980 SCC OnLine Gau 11, this Court was to decide the legality of the order vacating the stay of the operation of the "No Objection Certificate" issued in favour of the respondent no.6, for installation of a petrol pump. The petitioner was aggrieved with the "No Objection Certificate" given to the respondent no.6 for installing a petrol pump near the petitioner's petrol pump. This Court on considering various judgments of the Supreme Court held that the right to install of a petrol pump at the said road junction, in which the petitioner had also installed a petrol pump, was as much as a fundamental right of the respondent no.6 as that of the petitioner, who had installed his own petrol pump. It further held that so long as the respondent no.6 exercised his fundamental right without impairing the like fundamental right of the petitioner, no injury could be said to have been caused to the petitioner, who had no locus standi to challenge the order vacating the stay of the operation of the "No Objection Certificate" issued by the Deputy Commissioner, Sivasagar.

26. The combined sale volume of the petitioner's petrol pump is 100 Kl, while the combined sale volume of the proposed new RO is 80 Kl. On considering the challenge made by the petitioner to the proposal of the respondent no.3 to open up a new Rural RO, without considering the petitioner's petrol pump, which is the closest petrol pump to the new RO to be opened, this Court is of the view that the person who can have any objection to the opening up of the new RO could only be those persons, who had taken part in the selection process for appointment as the successful dealer, in terms of the Notice dated 25.11.2018. The reason being that they are required to pump in money for making the new RO workable and as such, would have wanted that the respondent no.3 had a feasibility study/report made ensuring that the combined sales volume of petrol and diesel would not be less than 25 Kl. per month. In the present case, there is nothing to show that the sales in the proposed new RO would be less than 25 Kl per month. If the proposed new RO has a combined sales value of less than 25 Kl per month, then it would be to the advantage of the petitioner, as it would mean that the petitioner's petrol pump was not being given a run for its money. On the other hand, if the combined sales volume of the new RO is very high, then, it would be a cause of worry for the petitioner, as a lot of her business would in all probability be taken away. As such, the ground for challenge by the petitioner, to the proposal of the respondent no.3 to open a new Rural RO has no real basis. It is basically to ensure that there is no competition to her business, in close

proximity to her petrol pump. However, the opening up a new Rural RO would be in general public interest. In view of the criteria for making a feasibility study provided in the letter dated 06.04.2011 not being applicable for opening a new Rural RO and as no legal or fundamental right of the petitioner has been infringed, besides the reasons given in the foregoing paragraphs, this Court is not inclined to exercise it's discretion in the present case. The writ petition is accordingly dismissed.