(2008) 04 PAT CK 0002

In the Patna High Court

Case No : LPA No''s. 304 and 305 of 2007

M/s Bharat Petroleum Corpn. Ltd. APPELLANT

Vs

M/s Lall Auto Trading Company and Others RESPONDENT

Date of Decision : 02-04-2008

Acts Referred:

Citation : (2008) 2 PLJR 561

Hon'ble Judges : Chandramauli Kr. Prasad, Acting C.J.;Sheema Ali Khan, J

Bench : Division Bench

Advocate : Y.V. Giri, Sanjay Singh and Md. Waliur Rahman, for the Appellant; Basant Kumar Choudhary, Sidhendra Narayan Singh and Anil Kumar Singh, for the Respondent

Final Decision : Dismissed

Judgement

Prasad, A.C.J.

1. Both the appeals arise out of the common order and, as such, they have been heard together and are being disposed off by this common judgment. M/s Lall Auto Trading Company & Ors., aggrieved by the order dated 13th of August, 2005 issued by the Territory Manager (Retail), Patna, Bharat Petroleum Corporations Limited terminating dealership agreement dated 8.1.2002 for sale of Petroleum products including Motor Spirit from the Petrol Pump situated at Kankarbagh in the town of Patna and the supplementary agreement dated 30th of June, 2003 for sale of high speed diesel at Fatuha have preferred the writ application before this Court. Said writ application was registered as CWJC No. 11210 of 2005. M/s Lall Auto Trading Company filed another writ application for quashing the order dated 13th of August, 2005 terminating dealership agreement for running a diesel retail outlet at Fatuha, which was registered as CWJC No. 15468 of 2006.

2. Both the writ applications filed by M/s Lall Auto Trading Company, hereinafter referred to as the dealer, were heard together and by a common judgment dated

30.3.2007 both the writ applications have been allowed and the orders impugned have been quashed.

3. Respondents of the writ petitions i.e. M/s Bharat Petroleum Corporation Limited and its Officers, hereinafter referred to as the "Corporation", aggrieved by the aforesaid orders have preferred separate appeals. Both the appeals have been heard together and are being disposed off by this common judgment.

4. Shorn of all unnecessary details, facts giving rise to the present appeals are that Dispensing Pump and Selling License agreement was entered between the Corporation and the Dealer and the latter was awarded the retail outlet premises of the Corporation at Kankarbagh for sale of Petroleum products. Subsequently, the dealer is operating the sale from two locations, namely, Kankarbagh and Fathua. On 20.6.2005 a routine inspection was carried out at the retail outlet site at Kankarbagh by the Area Sales Officer and Engineering Officers who found following irregularities at the said retail outlet:-

"(i) One Z line DU (HZ L&T 2056) for SPEED (MS) was delivering short by 130 m.l. in each 5 Litres of product delivered.

(ii) On further investigation it was found that a double gear system was wrongly and illegally fitted on the Z-line unit into the system with a view to short deliver the product while the Metering unit will show correct quantity in the ''Display Panel'' of the Dispensing Unit.

(iii) A negative Stock variation of 506 Litres was found in the Motor Spirit UG Tank."

5. The inspecting team on further investigation also found that the said Dispensing Unit has been tampered by dismantling the dispensing unit which was reassembled by fitting a mechanical devise to cause short delivery of product to the extent of 130 milliliters for each liter of product. Clarifications on the irregularities found in course of the inspection were sought for from the dealer. The dealer furnished its explanations and clarifications and justified the irregularities found during the course of inspection, inter alia, on the ground that the partner was suffering from health problem due to which he could not visit the retail outlet on regular basis. According to the explanations, short delivery of product and tampering with the Dispensing unit were the handy work of his employees and it was done without his knowledge. In regard to the stock variation the plea of the dealer was that underground tank, an old tank was originally used for storage of high speed diesel and subsequently converted for storage of unleaded petrol.

6. The explanations and clarifications furnished by the dealer were considered by the Corporation and found unbelievable, devoid of facts and completely lacking merit. Accordingly the Corporation in terms of 13(a)(vii) and (viii) of the Dispensing pump and selling license agreement terminated the dealership agreement and the supplementary agreement with effect from 13th of June,

2005.

7. It is relevant here to state that the Ministry of Petroleum and Natural Gas has approved Marketing Discipline Guidelines, 2001 vide its letter dated 12.4.2001. Annexure IV of the Marketing Discipline Guidelines, 2001, inter alia, enumerates the major irregularities and minor offence and had provided for the penal action to be taken in cases of major and minor irregularities. The Corporation besides other Oil Companies, namely, Indian Oil Corporation, Hindustan Petroleum Corporation and I.B.P. while circulating the aforesaid Marketing Discipline Guidelines, 2001 wrote as follows:

"Sub: MDG 2001

This is to inform you that Ministry of Petroleum & Natural Gas has approved MDG 2001 vide its letter No. P-21025/4/95-Dist. dated 12.4.2001.

In view of the above, attached please find:

(i) X XX

(ii) XXX

(iii) XXX

(iv) Details of Penal Action for Major & Minor Irregularities (Annexure). The details mentioned at point iv above are general guidelines and notwithstanding what has been stated above, the Competent Authority of the concerned Oil Company can take appropriate higher punitive action against erring dealer including in the first or any instance. Further, in case of irregularities not specifically mentioned/covered above, the Competent Authority shall impose proper penalty and/or issue, warning letter after enquiry and in accordance with the principles of natural justice.

8. Serial No. 4 of the Marketing Discipline Guidelines 2001 under the established minor offence reads as follows:

Penal Action

Sl. No Nature of irregularity 1st 2nd 3rd

4 Short delivery products (W seals intact) Sales & supply should be stopped from the dispensing unit till recalibration is carried out by W&M Dept. Fine of Rs. 5,000 & suspension of sales and supplies of all products for 15 days. Sales & supply should be stopped from the dispensing unit till recalibration is carried out by W&M Dept. Fine of Rs. 10,000 & suspension of sales and supplies of all products for 30 days. Sales & supply should be stopped from the dispensing unit till recalibration is carried out by W&M Dept. Fine of Rs. 25,000 & suspension of sales and supplies of all products for 45 days In extreme cases, where it is proved that the dealer has tampered with the seals and delivery system, termination of dealership in the fourth instance. "

9. It is relevant here to state that the Marketing Discipline Guidelines, 2005 was later on issued which came into force with effect from 1.8.2005. It also provided for penal action for malpractices and irregularities at retail outlets of Motor Spirit and high speed diesel. Serial Nos. 2 and 4 of the said guidelines which are relevant for the purpose read as follows:-

Sl. Nos. Penal Action 1st 2nd 3rd

2. (a) Short delivery of products (W&M seals intact) Sales & supplies should be suspended from the dispensing unit till recalibration is carried out by W&M Dept. in the presence of an officer of the oil company. - -

b) Delivery of products (Weights & Measures Seals tampered) Termination (irrespective of delivery being short/correct/excess.

4. Additional/ Unauthorised fittings/gears found in the dispensing unit Termination.

10. As stated earlier the inspection of the outlet was conducted on 20.6.2005 in which irregularities as enumerated above were found.

11. It was contended before the learned Single Judge that as the inspection was made on 20.6.2005 the Marketing Discipline Guidelines, 2001 shall hold the field and only in a case when a dealer is found to have tampered the seals and delivery system for the fourth time that dealership can be terminated. Both the contentions have been sustained by the learned Single Judge and it has been held that any penal action could have been taken against the dealer on the basis of the Marketing Discipline Guidelines, 2001.

12. It was further observed that even if the act was not a simple case of short delivery of product but tampering of weight and measuring unit, the irregularity being of the first instance maximum penalty which could have been imposed was fine of Rs. 10,000/-, suspension of sale and supply of product for 15 days. This Court further observed that the termination of the agreement could have been made only after the irregularities is found on third occasion.

13. Mr. Y.V. Giri, Senior Advocate, appearing on behalf of the appellant submits that the power to terminate agreement is to be found in the agreement itself and the Marketing Discipline Guidelines issued in 2001 and 2005 are guidelines for invoking the power to terminate the agreement. It is contended that irregularities found during inspection have not been specifically mentioned and covered under the Marketing Discipline Guidelines, 2001 and, as such, the Corporation did not err in terminating the agreement.

14. Mr. Basant Kumar Choudhary, Senior Advocate, appearing on behalf of the Dealer, however, contends that Marketing Discipline Guidelines, 2001 will govern the field. He submits that the irregularities found during the course of inspection were in the nature of minor irregularities as enumerated in serial No. 4 of minor offences quoted above and termination of dealership is permissible only when the

dealer tampers with the seal and delivery system for the fourth time. It has been contended that only at the first instance when the aforesaid irregularities were found, the dealership has been terminated.

15. Having appreciated the rival submission, I find substance in the submission of Mr. Giri. The irregularities and the action of terminating the dealership have taken place prior to coming into force of Marketing Discipline Guidelines, 2005. Hence the present case shall be governed by 2001 Guidelines. The relationship between the dealer and the Corporation is that of the principal and agent. It was created by virtue of the agreement and the power to terminate the agreement has to be found out in the same. The Marketing Discipline Guidelines has been issued for exercise of power preserved by the agreement. The Corporation being an instrumentality of the State, its action has to be guided by reasons and keeping said object in mind Marketing Discipline Guidelines have been issued.

16. It may be stated here that while adopting the Marketing Discipline Guidelines the Corporation has reserved its right to impose penalty in case the irregularities found are either not specifically mentioned or covered under the Marketing Discipline Guidelines, 2001. In the present case the dealer has not only tampered with the delivery system but in fact has illegally fitted "a double gear system" on the line unit" with a view to short deliver the product while the Motoring Unit will show correct quantity in the display panel of the Dispensing unit". Thus it is not a case of simple short delivery of product. In my opinion, the irregularity "tampered with the seals and delivery system" in Serial No. 4 under the heading "minor offence" in the Marketing Discipline Guidelines, 2001 will not cover tampering by employing "double gear system fitted on the z line unit", with an object to make short supply.

17. In view of what I have found, I am of the opinion that the irregularities found is not specifically mentioned and covered under Marketing Discipline Guidelines, 2001. In any view of the matter, the Corporation has reserved its right to take appropriate higher punitive action against dealer, even at the first instance. Here in the present case the act of the dealer is deliberate and calculated and in that view of the matter, the termination of the dealership agreement cannot be said to be anyway illegal or arbitrary.

18. It is worth mentioning here that Marketing Discipline Guidelines are issued taking into account the past experience and anticipated misdemeanour of a dealer. Additional gear in the dispensing unit shall result into termination of the dealership according to the Marketing Discipline Guidelines, 2005. This nature of irregularities has not been indicated in the Marketing Discipline Guidelines, 2001. In my opinion this is an additional reason to hold that irregularities found in inspection is not specifically mentioned or covered under Marketing Discipline Guidelines, 2001.

19. I agree with the conclusion of the learned Single Judge that Marketing Discipline Guidelines, 2001 shall hold the field but I am of the view that the

irregularity found being not specifically mentioned and covered under the various irregularities provided under the said Guidelines the dealership was liable to be terminated. In my opinion, the Corporation, in the face of the irregularities rightly cancelled the dealership agreement. It is well settled that it is not the decision which is subject to judicial review but the decision making process. In my opinion, the decision making process does not suffer from any illegality and, as such, the ultimate decision taken, ought not to have been interfered with by this Court. In the result, the appeal is allowed, the order of the learned Single Judge is set aside and the writ petitions filed by the dealer stand dismissed. However, there shall be no order as to cost.

Sheema Ali Khan, J.

I agree.

