

(2000) 04 GUJ CK 0102

In the Gujarat High Court

Case No : Letters Patent Appeal No. 160 of 1989 in Special Civil Application No. 3943 of 1982

M.S. Desai and Co.

APPELLANT

Vs

Hindustan Petroleum Corp. Ltd.

RESPONDENT

Date of Decision : 11-04-2000

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 162, 226, 299

Citation : (2002) 4 GLR 3612

Hon'ble Judges : J.M. Panchal, J;A.M. Kapadia, J

Bench : Division Bench

Advocate : V.B. Patel and D.G. Chauhan, for the Appellant; B.J. Shelat and G.N. Shah, for the Respondent

Final Decision : Dismissed

Judgement

J.M. Panchal, J.—The judgment under challenge in this appeal which is filed under clause 15 of the Letters Patent is rendered by the learned Single Judge on November 24, 1988 in Special Civil Application No. 3943 of 1982 whereby challenge made by the appellant to the order dated November 24, 1982, terminating petroleum products dealership agreement, is negated.

2. The appellant is a partnership firm registered under the provisions of the Partnership Act. The respondent Corporation carries on the business of refining and sale of petroleum products. The Corporation is a lessee of a plot of land situated by the side of National Highway No.8 at Bareja. The Corporation has installed apparatus and equipments such as three electric operated dispensing pumps, storage tank, air compressor, air gauge, battery charger, etc. The respondent Corporation had appointed the appellant as its dealer at the said premises for retail sale and/or supply of petroleum products on the terms and conditions mentioned in agreement dated October 1, 1964. Thereafter various dealership agreements were entered into between the respondent Corporation on the one hand and the appellant firm on the other. The last of such agreement

was dated August 2, 1976. A sample of petrol sold at the retail outlet of the appellant was taken on July 22, 1981 and was subjected to laboratory test. The report received on October 30, 1981 indicated that the petrol sold at the appellant's retail outlet was adulterated. Therefore, on November 10, 1981 an explanation was sought for from the appellant and supply of petroleum products to the appellant was suspended. Against suspension of supply of petroleum products, the appellant had made representation dated November 16, 1981. On July 1, 1982 a notice was issued to the appellant to show cause as to why the dealership agreement should not be terminated. That notice was issued as per clauses 26, 42, 44 and 55(A) of the dealership agreement. The appellant had submitted reply on July 7, 1982 and requested the respondent to restore supply of petroleum products. As the supply of petroleum products was not restored, the writ petition out of which the present appeal arises i.e., Special Civil Application No. 3943 of 1982 was filed by the appellant in the High Court on September 21, 1982. No final decision was taken by the respondent - Corporation though show cause notice was issued to the appellant because of the institution of the petition by the appellant. In the petition, the appellant had relied upon instructions dated 1.3.1982 issued by Ministry of Petroleum wherein inter-alia it was stipulated that a repeat sample should be taken and on its failure dealership agreement should be terminated. It was pleaded on behalf of the appellant that there was no second lapse on its part and therefore the Corporation had no authority to issue notice calling upon the appellant to show cause as to why the dealership agreement should not be terminated. The learned Single Judge of this Court had, by an interim order dated November 2, 1982, directed the respondent Corporation to treat the petition as the appellant's representation and pass a speaking order after taking into consideration guidelines issued by the Ministry of Petroleum on March 1, 1982, and determine whether this was a case of first lapse or a second lapse. The interim order passed by the High Court in the petition is on page 277 of the appeal compilation. Thereafter a speaking order dated November 24, 1982 was passed by the respondent-Corporation terminating the appellant's dealership. That order is on page 45 of the appeal compilation. The order dated November 24, 1982 terminating the appellant's dealership was brought on record by amending the petition. That order was challenged on diverse grounds before the learned Single Judge. In the reply affidavit four preliminary objections to the maintainability of the petition were raised by the respondent Corporation. Out of the four preliminary objections, the first two i.e., (1) that the respondent Corporation was not a State and (2) that the relationship between the parties was governed by a contract and, therefore, the Court's jurisdiction was not attracted, were pressed before the learned Single Judge. The contention that the respondent Corporation was not a State was negatived but the contention that writ petition was not maintainable as relationship between the parties was governed by a contract between them was upheld. The writ petition was, therefore, dismissed by the learned Single Judge as not maintainable by judgment dated December 21, 1983. Feeling aggrieved by the said judgment, the appellant preferred Letters

Patent Appeal No. 98 of 1984 before the High Court. The Division Bench hearing the appeal considered following question:

"Can the alleged arbitrary action of a Government Company which is a State within the meaning of Article 12 of the Constitution, emanating from the alleged breach of binding executive instructions issued to it by the Central Government for regulating the Company's dealings with third parties with whom such Company might have entered into contracts, be brought in challenge under Article 226 of the Constitution of India for testing it on the anvil of Article 14 of the Constitution?"

The Division Bench referred to the decision of the Supreme Court in *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, wherein three categories of cases in which question of maintainability of writ application against the State authorities acting as contracting parties were considered. Those categories were (i) where the petitioner makes a grievance of breach of promise on the part of the State in case where on assurance or promise made by the State he has acted to his prejudice and predicament but the agreement is short of a contract within the meaning of Article 299 of the Constitution; (ii) where the contract entered into between the person aggrieved and the State is in exercise of a statutory power under certain Act or rules framed thereunder and the petitioner alleges a breach on the part of the State and (iii) where the contract entered into between the State and the person aggrieved is non-statutory and purely contractual and the rights and liabilities of the parties are governed by the terms of the contract and the petitioner complains about breach of such contract by the State. In *Radhakrishna's* case it was held that out of the aforesaid three categories of cases, cases falling under the third category cannot be considered in proceedings under Article 226 of the Constitution while the first two categories of cases can be considered in such proceedings. The Division Bench hearing the Letters Patent Appeal, on the peculiar facts of the case as alleged in the petition, held that neither category (ii) nor category (iii) was attracted, but the case was governed entirely by a new category of cases, i.e., category (iv) viz., where a contract is entered into between an instrumentality of the State which is a State within the meaning of Article 12 of the Constitution and a private party and the grievance of the private party to the contract is that the contract is terminated in an arbitrary manner by such instrumentality of the State acting contrary to the binding executive instructions issued by its principal viz., the Government and which results in arbitrary exercise of powers by the instrumentality of the State violating the guarantee of Article 14 of the Constitution. After holding that the case pleaded by the appellant in the case was governed by above mentioned fourth category, the Division Bench set aside the order passed by the learned Single Judge dismissing the petition in limine and held that petition under Article 226 of the Constitution was competent for redressing the grievance of the appellant. Because of the decision of the Division Bench rendered in Letters Patent Appeal No. 98 of 1984 the petition was again listed for decision on merits before the learned Single Judge of the High Court. The learned Single Judge

noticed that the first set of instructions dated March 27, 1980 was the minutes of the meeting dated March 27, 1980 on the subject of marketing discipline and uniform action by field office on reported cases of malpractices at petrol/HSD/kerosene retail outlet and as it was not exhaustive but illustrative in nature, the respondent Corporation was entitled to evolve its own standards for termination of dealership agreement or fall back upon the agreement itself for taking appropriate action in case of adulteration of petroleum products. According to the learned Single Judge, these instructions were prevailing on the date when the misconduct had taken place on July 22, 1981 and when test report was received on October 30, 1981 as well as when explanation was sought on November 10, 1981 and was submitted by the appellant on December 28, 1981. The learned Single Judge, therefore, concluded that the Government instructions dated March 1, 1982 for prevention of adulteration at retail outlets enabling the respondent Corporation to terminate dealership on failure of repeat sample were not applicable. The learned Single Judge further noted that the third set of instructions dated October 4, 1982 issued by the Government of India, Ministry of Petroleum also provided that in cases of proven adulteration, even for the first offence, the punishment should be one of termination of supplies and dealership and as the instructions contained in para 1 of Shri R.K. Bhargav's D.O. letter dated March 1, 1982 were amended and as order terminating dealership was passed on November 24, 1982, the action of the respondent Corporation in terminating the dealership was justified in view of the third set of instructions dated October 4, 1982, read with different clauses of the agreement. In view of these conclusions, the learned Single Judge has dismissed the petition by judgment dated November 24, 1988 which has given rise to the preset appeal.

3. Mr. V.B. Patel, learned Senior Advocate for the appellant, contended that the petition does not relate to breach of contract but relates to enforcement of policy decision as well as arbitrary action of terminating dealership agreement contrary to the binding policy and therefore the petition is maintainable. It was pleaded that the respondent had no power or authority or jurisdiction to issue the show cause notice in the absence of repeat test failure which is a jurisdictional fact in view of the policy dated March 1, 1982 issued by the Ministry of Petroleum, regulating procedure regarding marketing discipline for uniform action for prevention of adulteration at retail outlets and, therefore, the impugned judgment should be set aside. According to Mr. Patel, learned Senior Counsel for the appellant, the so-called amendment in Government policy dated March 1, 1982 alleged to have been made on October 4, 1982 is not a policy decision issued by the concerned Ministry in exercise of the executive powers but is merely an agreement/understanding arrived at, at a meeting of the Chief Executives of different Companies and, therefore, the decision terminating dealership agreement could not have been justified on the basis of so-called amendment made on October 4, 1982. What was maintained was that the lapse committed prior to the so-called amendment of Government policy dated March 1, 1982 on October 4, 1982 is not procedural but provides a ground for

termination of dealership in the case of first lapse and as the policy issued on March 1, 1982 was procedural and created a vested interest, the petition ought to have been allowed by the learned Single Judge. In the alternative it was argued that even if the so-called amended instructions were valid, the same cannot be applied to the facts of the case in view of the principle that no one can be penalised on the ground which was not a misconduct on the day on which the sample was taken, an explanation was called for and show cause notice was issued and, therefore, the decision to terminate the dealership agreement should be set aside. According to the learned counsel for the appellant, the impugned order terminating the dealership is made on several grounds in relation to which no opportunity of hearing was given to the appellant and the principle of audi-alteram-partem being a part of Article 14 of the Constitution, the order terminating dealership should have been set aside by the learned Single Judge. It was emphasised by the learned counsel for the appellant that the discretionary power to terminate the dealership was exercised improperly, mistakenly and by making up mind in advance and, therefore, the appeal should be accepted. It was also stressed that the appellant was appointed as a dealer since 1964 and in past had not committed any lapse till the date sample was taken and as the respondent Corporation has failed to act fairly and reasonably in accordance with the spirit of the policy and as the punishment of termination of dealership is out of proportion and harsh, the appeal should be allowed and the respondent should be directed to restore the dealership in favour of the appellant. In support of these submissions, learned counsel for the appellant placed reliance on (i) Kumari Shrulekha Vidyarthi and Others Vs. State of U.P. and Others, , (ii) Comptroller and Auditor-general of India, Gian Prakash, New Delhi and Another Vs. K.S. Jagannathan and Another, , (iii) Express Newspapers Pvt. Ltd. and Others Vs. Union of India (UOI) and Others, , (iv) M Mohammed Hanif Vs. The State of Assam, , (v) Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, , (vi) New Samundri Transport Co. (P) Ltd. Vs. The State of Punjab and Others, , (vii) Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, , (viii) Nasir Ahmad Vs. Assistant Custodian General, Evacuee Property, Uttar Pradesh, Lucknow and Another, and (ix) Govidsingh Ramsinghbhai Vaghela v. G. Subbarao, Assistant Collector, Dholka and others, XI GLR 897.

4. Mr. B.J. Shelat, learned counsel for the respondent Corporation, contended that a petition under Article 226 of the Constitution for specific performance of dealership agreement is not maintainable and therefore the appeal should be dismissed. It was urged that instructions in force on the date when sample was taken would be relevant for the purpose of deciding the question whether the decision of the Corporation to terminate dealership agreement is proper or not and as the first set of instructions dated March 27, 1980 on the subject of marketing discipline and uniform action by field office on reported cases of malpractices at Petrol/HSD/Kerosene retail outlets were not exhaustive but illustrative and did not deal with adulteration, the respondent Corporation was

free to evolve its own standards for terminating dealership or to fall back upon the agreement for the said purpose and, therefore, the decision to terminate the dealership agreement was just and proper. It was pleaded that second set of instructions dated March 1, 1982 had no relevance as it was subsequent to the date of not only taking of sample but also to the notice seeking explanation which was issued on November 10, 1981 and, therefore, the learned Single Judge was justified in not granting any relief to the appellant on the basis of the instructions dated March 1, 1982. According to the learned counsel for the respondent Corporation, when the impugned order terminating the dealership agreement was passed on November 24, 1982, the instructions dated March 1, 1982 were amended by instructions dated October 4, 1982 and, therefore, the action of the respondent Corporation in terminating the dealership agreement in case of proven adulteration by the appellant even for a first offence, was justified. What was asserted on behalf of the respondent Corporation was that as is indicated in the order dated November 24, 1982 by which dealership agreement was terminated, the appellant had committed several malpractices and thereby committed breach of clause 42 of the agreement and, therefore, the respondent Corporation was justified in terminating the dealership agreement in view of clauses 3, 26, 42, 44 and 55 (A). The learned counsel for the respondent referred to the show cause notice and submitted that past misconducts were also referred to in the said notice and, therefore, it is wrong to contend that past misconducts were for the first time referred to in the impugned order terminating dealership agreement without giving opportunity of being heard to the appellant. In the alternative, it was pleaded that malpractices or other incidents were mentioned in the impugned order as part of history or background or conduct of the appellant and, therefore, mention about the same in the order terminating the dealership agreement would not vitiate the order provided the main ground which had nexus to the alleged offence and the penalty were expressly stated and if the delinquent had opportunity to meet with the same by giving reply. It was claimed that in the present case the appellant was given opportunity to give explanation and as there was complete compliance with principles of natural justice, the impugned order was not vitiated in any manner. The learned counsel for the respondent emphasised that the question whether there is any breach of principles of natural justice or not has to be judged in the light of interim direction given by the Court in the petition which required the Corporation to treat the petition as a representation of the appellant and if in the light of averments made in the petition past misconducts are referred to it cannot be said that there is any breach of principles of natural justice. It was maintained that in this case from the beginning, the appellant has admitted that petrol was adulterated by solvent and as the explanation offered by the appellant was not found to be convincing, the same was not accepted and in view of the adulteration in petrol, the respondent Corporation was justified in terminating the dealership agreement. Mr. Shelat, learned counsel for the respondent Corporation, emphatically pointed out that in such matters High Court does not exercise appellate jurisdiction over the decision of the Corporation but is

concerned only with decision making process and as decision making process is not vitiated in any manner, the appeal should be dismissed. In support of these submissions, the learned counsel placed reliance on (i) Radhakrishna Agarwal and Others Vs. State of Bihar and Others, , (ii) Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , (iii) Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others, , (iv) Tata Cellular Vs. Union of India, , (vi) Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, , (vii) Larsen & Toubro Limited v. Gujarat State Petroleum Corporation Limited and others, LPA No. 53 of 2000 decided by Division Bench comprising D.M. Dharmadhikari, C.J. & C.K. Thakkar J., (viii) Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, , (ix) M/s. Navnitlal & Co. v. Indian Oil Corporation and another, Special Civil Application No. 4757 of 1982 decided by R.C. Mankad, J. (as he then was) on December 22, 1982 and (x) M/s. Navnitlal & Co. v. Indian Oil Corporation and another, Letters Patent Appeal No. 467 of 1982 in Special Civil Application No. 4757 of 1982 decided by Division Bench comprising M.P. Thakkar C.J. (as he then was) and D.H. Shukla, J. on December 29, 1982.

5. We have heard the learned counsel for the parties and taken into consideration the documents forming part of the original petition as well as instructions which are on the record of the case.

6. As observed earlier, the Division Bench in Letters Patent Appeal No. 98 of 1984 has held that where a contract is entered into between the instrumentality of the State which is State within the meaning of Article 12 of the Constitution and a private party and the grievance of the private party to the contract is that the contract is terminated in an arbitrary manner by such instrumentality of the State acting contrary to the binding executive instructions issued by its principal viz., the Government and has arbitrarily exercised the power by violating the guarantee of Article 14 of the Constitution, a petition under Article 226 of the Constitution raising such a grievance is maintainable. We may state that the decision which was rendered by the Division Bench in Letters Patent Appeal No. 98 of 1984 is accepted by the respondent Corporation and was not subjected to challenge before higher forum. Under the circumstances, it is not necessary for us to go into the question of maintainability of the writ or to refer to several decisions of the Supreme Court cited at the bar wherein a view is expressed to the effect that a petition for enforcement of public policy is maintainable.

7. The main question which falls for our consideration is whether the grievance made by the appellant that dealership agreement is terminated in an arbitrary manner contrary to the binding executive instructions dated March 1, 1982 is well founded. In order to resolve this controversy, it would be relevant to notice different instructions which are relied upon by the parties and to ascertain as to which instructions would be applicable to the facts of the present case. Before undertaking this exercise, we propose to examine the scope and ambit of directions which are being issued by the administrative authorities. The modern phenomenon in administrative process is an emergence of the institution of

directions. Directions are less formal than rules. Administrative authorities issue directions for a variety of purposes and in a variety of ways, for example, through letters, circulars, instructions, orders, memoranda, directives, bulletins, guidelines, manuals, pamphlets, public notices, press notes, clarifications, etc. Directions may be specific being applicable to a specific person or matter or may be general in nature laying down some general norm or principle or policy, practice or procedure to be followed in all similar cases. The directions are part and parcel of the internal administrative procedure of a Government Department. When a number of officials are engaged in executing a law and taking decisions thereunder, directions may serve the purpose of laying down some criteria to be followed by these officials in discharge of their functions so that there may be some uniformity of approach in disposing of similar cases by various officials. Directions are issued under the Government's administrative and not legislative power. Articles 73(1) and 162 confer administrative power on the Central and the State Government respectively. For example, Article 73(1) says that subject to the provisions of the Constitution, the executive power of the Union extends to matters with respect to which parliament has power to make laws. Similarly, under Article 162, the executive power of the State extends to matters with respect to which a State Legislature has power to make laws. The administrative power of a Government is thus coextensive with its legislative power. Having examined the scope and purpose of the instructions, we shall now proceed to consider different instructions which are on the record of the petition.

8. An attempt was made on behalf of the appellant to contend that first instructions were issued on November 18, 1978 and not on March 27, 1980 as was pleaded by the learned counsel for the respondent. Reference to instructions dated November 18, 1978 is to be found on page 80 of the appeal compilation. However, learned counsel for the Corporation has informed the Court that those instructions related to lubricants/oil and had nothing to do with adulteration at all. Therefore, we have proceeded on the footing that the first instructions were issued on March 27, 1980. The first set of instructions dated March 27, 1980 is the minutes of the meeting dated March 27, 1980 on the subject of marketing discipline and uniform action by field office on reported cases of malpractices at petrol/HSD/kerosene retail outlets. It is on page 85 of the appeal compilation. The meeting was attended by the representatives of Indian Oil Corporation, Bharat Petroleum Corporation, Indo-Burmah Petroleum Corporation and Hindustan Petroleum Corporation. A consensus was arrived at on uniform action to be taken in the cases of malpractices. Some of the illustrative irregularities and malpractices such as (i) overcharging in price of MS/HSD/LUBES/SKO/LDO, (ii) Short measure (beyond tolerance permitted by W&M Department), (iii) Stock variation, (iv) unauthorised purchase, sale/exchange of products, (v) Issuance of product in excess of quantities permitted by State Government, (vi) Withholding of saleable stock, (vii) Not selling according to inter section priorities given in State Government and (viii) Display of Daily stock/prices, were noted and against each of such malpractice some broad guidelines for taking action were

indicated. The malpractices noted were illustrative and not exhaustive and this was specifically noted in the minutes of the meeting dated March 27, 1980. These instructions did not deal with the termination of dealership on the ground of serious misconduct of adulteration of petroleum products at the retail outlets and malpractices being illustrative in character the oil companies were left free to determine how the case of misconduct of adulteration of petroleum products should be dealt with and discretion should be exercised depending on the facts of each case. It would not be correct to say that as serious misconduct of adulteration of petroleum products was not mentioned in instructions dated March 27, 1980, the respondent Corporation was not entitled to terminate dealership agreement if there was one serious lapse of adulteration on the part of the appellant. The instruction being illustrative and not exhaustive the oil companies were free to evolve their own standards or to fall back upon the agreement for the purpose of taking action, in case misconduct of adulteration in petroleum product was noticed. Therefore, when the misconduct had taken place on July 22, 1981, and when the test report dated October 30, 1981 indicating that the petrol sample was adulterated was received, it was open to the respondent Corporation to take action against the appellant in terms of the agreement.

9. At this stage it would be advantageous to refer to certain clauses of the agreement which was entered into between the appellant and the respondent.

Clause 2 "The Corporation both hereby grant to the dealer leave and licence and permission for the duration of this agreement to enter on the said premises and to use the premises and outfit for the sole and exclusive purpose of storing, selling and handling the products purchased by the dealer from the Corporation, save as aforesaid the dealer shall have no right, title or interest in the said premises or outfit and shall not be entitled to claim the right of lessee, sub-lessee, tenant or any other interest in the premises or outfit, it being specifically agreed and declared in particular that the dealer shall not be deemed to be in exclusive possession of the premises." Clause 26 "All the products supplied by the Corporation to the dealer hereunder shall be in accordance with the specifications laid down by the Corporation from time to time. The dealer shall take every possible precaution against contamination of the Corporation's products by water, dirt or other things injurious to their quality and shall not in any way directly or indirectly alter the specifications of the said products as delivered. The Corporation shall have the right to exercise at its discretion at any time and from time to time quality control measures for products marketed by the Corporation and lying with the dealer. The opinion of the District Manager for the time being at the Corporation's District Office at Ahmedabad as to whether any product of the Corporation has been contaminated shall be final and binding upon the dealer. In the event of the said District Manager finding that the contamination has been due to any act or default of the dealer or of his servants or agents the Corporation shall have the right, without being bound to do so, to remove the contaminated product and to dealer or otherwise deal with the same

without making any payment therefore to the dealer and without prejudice to the Corporation's right to terminate this agreement forthwith."

Clause 42 "The dealer undertakes faithfully and promptly to carry out, observe and perform all directions or rules given or made from time to time by the Corporation for the proper carrying on of the dealership of the Corporation. The dealer shall scrupulously observe and comply with all laws, rules, regulations and requisitions of the Central/State Government and of all authorities appointed by them or either of them including in particular the Chief Controller of Explosives, Government of India, and/or Municipal and/or any other local authority with regard to the storage and sale of such petroleum products."

Clause 44 "It shall be a paramount condition of the agreement that the dealer himself (if he be an individual) or both partners of the dealer firm if the dealer is a partnership consisting of two partners only or the majority of the partners of the dealer firm if the dealer is a firm consisting of more than two partners as the case may be shall take active part in the management and running of the retail outlet and shall personally supervise the same and shall not under any circumstances do so through any other person, firm or body."

Clause 55 (A) "Notwithstanding anything to the contrary herein contained, the Corporation shall be at liberty to terminate this agreement forthwith upon or at any time after the happening of any of the following namely:- (A) If the dealer shall commit a breach of any of the covenants and stipulations contained in the agreement, and fail to remedy such breach within four days of the receipt of a written notice from the Corporation in that regard".

On the day on which the sample was taken and explanation was called for it was within the jurisdiction and power of the respondent Corporation to terminate the dealership agreement in terms of different clauses of the agreement because the first set of instructions dated March 27, 1980 were illustrative and not exhaustive and did not deal with action to be taken in the case of serious misconduct of adulteration of petroleum products. Therefore, we are of the opinion that in view of different clauses of the dealership agreement read with first set of instructions dated March 27, 1980, the respondent Corporation was justified and had authority to terminate the dealership agreement.

10. The appellant has heavily relied upon the second set of instructions dated March 1, 1982 which were issued for prevention of adulteration at retail outlets. The same are to be found on pages 30 and 79 of the appeal compilation. On page 30, we find following caption "Ministry of Petroleum Directive of the Companies on the 18th February 1982 and directive on the 1st March 1982." "Prevention of Adulteration at retail outlets." "Petrol". A reference to the third instructions dated October 4, 1982 which are on page 53 of the appeal compilation would indicate that a meeting of the Chief Executives of different companies was held on February 18, 1982 on the basis of which instructions contained in para 1 of Shri R.K. Bhargav's D.O. letter No. O-24020-(3)/82 dated

1st March 1982 were issued. The second instructions dated March 1, 1982 provided that if the sample failed in the laboratory test a caution letter was to be issued and supplies of petroleum products to the concerned retail outlet was to be suspended for 15 days. It further provided that a repeat sample should be taken from retail outlet and if the repeat or subsequent sample also failed in laboratory test then supply should be suspended and notice should be issued to the dealer calling upon the dealer to show cause as to why dealership agreement should not be terminated. It is true that in this case no repeat sample was taken from the retail outlet of the appellant nor it is the case of the respondent Corporation that repeat sample taken from the retail outlet of the appellant had failed in the laboratory test. However, it is to be noted that before the second set of instructions was issued the misconduct on the part of the appellant had already taken place i.e., sample was found to be adulterated. The second set of instructions dated March 1, 1982 came into force at the time when notice was issued calling upon the appellant to show cause as to why dealership agreement should not be terminated. In our view, issuance of show cause notice cannot be considered to be a relevant event for the purpose of deciding the question as to which instructions would be applicable so as to nullify the action taken by the respondent Corporation. In order to find out as to which instructions would be applicable, the date of commission of misconduct or the date of passing final order would be relevant and the question of application of instructions cannot be decided with reference to the date on which intermediary steps such as, issuance of show cause notice, etc., are taken. Under the circumstances, we are of the opinion that it was not necessary for the respondent Corporation either to take repeat sample or wait till second incident of adulteration had taken place for the purpose of terminating dealership agreement. Having regard to the totality of the facts and circumstances of the case, the show cause notice can neither be termed as illegal nor contrary to the instructions dated March 1, 1982 because those instructions were not applicable to the present case at all.

11. Even if it is assumed for the purpose of argument that the second set of instructions dated March 1, 1982 were applicable to the facts of the present case, we are of the firm opinion that the action taken by the respondent Corporation in terminating the dealership agreement is not liable to be voided on the ground that it is contrary to those instructions. It hardly needs to be emphasised that the consumers are entitled to unadulterated petroleum products for which they pay high prices. If petrol is adulterated with diesel it has two effects. The consumer gets lower quality of petrol and pay higher price. Such malpractice is rightly not tolerated by the petroleum companies. Moreover, the adulteration not only pollutes the air but is also seriously viewed by the legislature which can be seen from different control orders promulgated under the provisions of the Essential Commodities Act, 1955. If instructions dated March 1, 1982 were to be followed, no steps could have been taken till another case of adulteration was found against the appellant. It is a common knowledge that with scanty staff it is not possible for the authorities to take sample every

day from all retail outlets and subject them to laboratory test. Therefore, to say that dealership agreement cannot be terminated till second lapse is found is contrary to the overwhelming public interest and policy. The instructions dated March 1, 1982 are contrary to public interest as well as public policy namely that adulteration should be viewed seriously. Therefore, those instructions cannot be enforced by way of writ of Court. On the basis of such instructions no relief can be granted to the dealer who has admittedly adulterated petroleum product, in a petition under Article 226 of the Constitution. To put it differently, if the respondent Corporation is called upon to adhere to the instructions dated March 1, 1982, it would give further opportunity to the appellant to adulterate petroleum products and perpetuate malpractices which cannot be done in a petition under Article 226 of the Constitution. Therefore, even if it is held that the second set of instructions dated March 1, 1982 are applicable to the facts of the present case, the appellant is not entitled to any relief in the present petition. For these very reasons no relief can be granted to the appellant on the basis of instructions of 1998 which are sought to be produced on the record of the case by affidavit of Smt. Sulochanaben K. Desai.

12. The third set of instructions are contained in the D.O. letter No.G-24020/3/82- Dist. dated October 4, 1982 of Secretary, Government of India, Ministry of Petroleum, Chemicals & Fertilisers (Department of Petroleum), New Delhi. As per the said letter, the question of penal measures to be taken in case of proven adulteration was discussed in the meeting of Chief Executives held on September 21-22, 1982 and it was agreed that in view of increasing reports of the cases of adulteration and with a view to effectively deal with these cases even for a first offence the punishment should be one of termination of supplies and dealership. In view of this decision taken in the Chief Executives' meeting the instructions contained in para 1 of Shri R.K. Bhargav's D.O. letter No. O-24020-(3)-82 Dist. dated March 1, 1982 were amended by letter dated October 4, 1982 which was addressed by the Secretary, Government of India, Ministry of Petroleum, New Delhi. The contention that the letter dated October 4, 1982 does not contain instructions but merely records an agreement/understanding arrived at at a meeting of the Chief Executives of the companies and, therefore, it cannot amend the earlier instructions dated March 1, 1982, has no substance. As noted earlier, administrative authorities issue directions for variety of purposes and in a variety of ways i.e., through letters, circulars, instructions, orders, memoranda, directives, bulletins, guidelines, manuals, pamphlets, public notices, press notes, clarifications, etc. Therefore, the instructions contained in the letter dated October 4, 1982 of Secretary, Government of India, Ministry of Petroleum, Chemicals & Fertilizers (Department of Petroleum), New Delhi, will have to be considered as having been issued in exercise of executive power. The very nature of executive instructions is that they are not part of the statute or enactment. Executive instructions and actions cannot be read like legislation nor are enacted like legislation. Executive guidelines are formulated in exercise of the executive powers with a view to

guiding the authorities concerned and it can be amended from time to time for which no set procedure is required to be followed as in the case of statutory provisions. By these instructions, the instructions dated March 1, 1982 were amended and it was provided that even for a first offence of adulteration the punishment should be one of termination of supplies and dealership. It is relevant to note that these instructions were in force on November 24, 1982 when the order terminating dealership agreement was passed. In our view, therefore, the decision taken by the respondent Corporation is completely in consonance with the instructions dated October 4, 1982 and cannot be termed as arbitrary or unreasonable. The dealership is a contract which is liable to be terminated by the Corporation in terms of the agreement itself. Clause 55 of the agreement provides that notwithstanding anything to the contrary therein contained the Corporation shall be at liberty to terminate the agreement forthwith upon or at any time if the dealer contaminates or tampers with the quality of any of the products supplied by the Corporation. This contractual power to terminate dealership was not touched by the first set of instructions dated March 27, 1980. Though at the time of issuance of show cause notice, instructions of March 1, 1982 were issued, revised instructions were issued before the proceedings were finalised. As observed earlier, the instructions dated March 1, 1982 virtually gave licence to dealer to indulge into malpractice of adulteration as it was not open for the Corporation to terminate the licence till adulteration was detected at least once. In our view, giving effect to the instructions dated March 1, 1982 would amount to deleting clause 55 of the agreement and give licence to the dealer to indulge into adulteration which was never the intention of the authority issuing instructions. At the time when the misconduct was committed i.e., July 22, 1981, instructions of March 1, 1982 were not there and, therefore, the appellant was fully aware that even for a single act of adulteration, dealership was liable to be terminated. In spite of that, with full knowledge, misconduct of adulteration was committed by the appellant. The authority was bound to comply with the instructions which were operative on the date on which the action was taken and the order of termination of agreement was passed on November 22, 1982 before which the revised instructions were already issued on October 4, 1982. Those instructions being binding on the respondent Corporation it could not have ignored them and passed an order of not terminating the agreement. The Division Bench in the decision rendered in Letters Patent Appeal No. 98 of 1984 has also held that if the Corporation acts contrary to the binding instructions issued by its principal, i.e., Government, the action would be arbitrary and subject to challenge under Article 226 of the Constitution. Therefore, if the dealership agreement had not been terminated in terms of instructions dated October 4, 1982 the action of the respondent Corporation would have been liable to be challenged in a petition under Article 226 of the Constitution. Under the circumstances, the decision of the respondent Corporation to follow instructions dated October 4, 1982 cannot be regarded as either unreasonable or arbitrary or capricious in any manner. The appellant cannot make any grievance that instructions dated October 4, 1982

were not applicable to the facts of the case because the instructions did not impose anything more than which was existing at the time of misconduct. As discussed earlier, at the time of misconduct of adulteration of petroleum products there were no instruction which dealt with the misconduct of adulteration. Therefore, there was an absolute contractual discretion conferred upon the authorities of the Corporation to terminate the dealership agreement on the ground of misconduct of adulteration. Instructions dated October 4, 1982 are also consistent with the contractual terms and directs that in case of adulteration even for the first offence result would be termination of supplies and dealership agreement. In our view, the learned Single Judge was justified in holding that the date of show cause notice is not at all relevant or material and the most material and relevant dates are the date of misconduct as well as the date on which impugned order was passed.

13. The contention that the impugned termination of dealership agreement is made on several grounds in relation to which no opportunity to show cause was given by the respondent and, therefore, the appeal should be accepted, is devoid of merits. It is true that in *M/s. New Samundri Transport Co. (P) Ltd.*, (supra) Supreme Court has observed that action to suspend or cancel permit on the basis of general allegations without particularising is violative of principles of natural justice. However, this principle is not applicable to the facts of the present case. Show cause notice which is on the record of the case shows that past misconducts were also referred to though they were not particularised as was done in the impugned order. It is not the case of the appellant that the malpractices which are mentioned in the impugned order were never committed by it. Those facts were within the knowledge of the appellant and not disputed. Even in the explanation offered by the appellant it was never claimed that in past malpractices were not committed by it or were not noticed by the authorities. Therefore, in such circumstances, giving of opportunity to explain malpractices does not arise. The question of breach of principles of natural justice has got to be viewed from another angle also. From the relevant dates which have been noticed earlier, it is evident that after the explanation was called for on November 10, 1981 and after the explanation was offered by the appellant but before any final decision was taken, the appellant had filed Special Civil Application No. 3943 of 1982 out of which the present appeal arises. As the petition was pending before the High Court, the respondent Corporation had avoided taking final decision in the matter. The High Court while making interim order dated November 2, 1982, had directed the respondent Corporation to treat the petition as representation of the appellant and pass a speaking order. Moreover, in the reply to the notice, the appellant had prayed to show mercy and requested the Corporation not to terminate the dealership agreement. Therefore this is not a simple case where instances are not particularised in the show cause notice but are mentioned in detail in final order and Court is called upon to decide question of breach of principles of natural justice. Here, several circumstances namely, filing of petition, direction by the Court, etc., had

intervened before final order was passed. Under the circumstances, reference to past misconducts in the order terminating dealership agreement cannot be termed as contrary to principles of natural justice. It is relevant to notice that when the petition was directed to be considered as representation of the appellant and when the respondent Corporation was called upon to pass a speaking order it was necessary for the respondent Corporation to take into consideration every relevant aspect of the matter, including past misconducts. Therefore, reference to past misconducts cannot be considered as extraneous material having weighed with the respondent Corporation in passing the impugned order. In the judgments cited at the bar by the learned counsel for the appellant, it is held by the Supreme Court that misconduct sought to be relied upon should be particularised and opportunity of hearing must be given regarding misconduct which is sought to be relied upon by the authority before final action is taken. However, if that principle is applied to the peculiar facts of the present case read with the interim directions which were issued by the High Court in the petition we do not find breach of the principles of natural justice. Moreover, a reasonable reading of the impugned order makes it clear that past instances are referred to as a part of the history or background or conduct of the appellant and are mentioned in the order in order to justify the action which was proposed to be taken by that order. But the main ground which has nexus to the alleged offence and the penalty have been expressly stated and as the appellant had opportunity to meet with the same by giving reply, in our view, there is complete compliance with the principles of natural justice and no prejudice can be said to have been caused to the appellant.

14. In *Air India Limited* (supra), the Supreme Court has explained the scope of a petition under Article 226 of the Constitution and held that even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making of a legal point. Earlier we have already come to the conclusion that principles of natural justice are not at all violated but even if it is assumed for the purpose of argument that there was some defect in the decision making process of the respondent Corporation, discretionary powers under Article 226 need not be exercised by us because it will not further public interest. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not and only when it comes to the conclusion that overwhelming public interest requires interference the Court should interfere.

15. The contention that the order terminating dealership agreement runs in the face of interim order of High Court and therefore is bad in law has no substance. At the time when interim order was passed, instructions dated October 4, 1982 could not be pointed out to the Court as they were of recent origin then. Moreover, it was contemplated by the interim order that order terminating dealership agreement could be passed and therefore a further direction was given not to implement the same for a period of fifteen days if it was passed. By

the interim order, the respondent-Corporation was called upon to consider the petition as representation of the appellant and pass final order. Therefore, the final order, based on the applicability of instructions and consideration of petition as well as explanation of the appellant cannot be construed as contrary to the interim order. It is well settled that an interim order passed is always subject to the final result of the petition. The petition is dismissed by the learned Single Judge holding that instructions dated March 1, 1982 were not applicable to the facts of the case. Therefore, on the basis of interim order, the appellant is not entitled to any relief.

16. The submission that the explanation offered by the appellant that its employee had, by mistake poured diesel in petrol tank and there was no wilful default on the part of the appellant ought to have been accepted is devoid of merits. As per the terms of the agreement, it was the duty of the appellant to supervise all operations being carried on at the retail outlet. Whether explanation offered should be accepted or not is within the province of competent authorities and a Court hearing a petition under Article 226 of the Constitution does not sit in appeal over such decision. Therefore, it cannot be held that the explanation offered ought to have been accepted and dealership agreement should not have been terminated.

17. The last contention that the punishment of terminating dealership agreement is disproportionate as well as harsh has also no merits. The respondent has followed last instructions dated October 4, 1982 and terminated dealership agreement because adulteration of petroleum products is a serious misconduct. There is nothing to indicate that the respondent has not acted fairly or has acted arbitrarily. Having regard to the facts of the case, the action of terminating dealership agreement cannot be termed either as disproportionate or harsh necessitating interference of the Court in the present appeal.

18. The decision of the respondent Corporation to terminate the dealership agreement indicates that everything is considered i.e., terms of contract, three instructions, factum of having taken sample and found adulterated, notice dated November 1, 1981, etc. The order was not made improperly, mistakenly nor with closed mind nor contrary to principles of natural justice. In order to enable the appellant to make effective representation, even punishment proposed was also indicated in the show cause notice which cannot be termed as the respondent having made up its mind in advance as is contended on behalf of the appellant. The Court in a petition under Article 226 of the Constitution does not exercise appellate powers and the Court can examine whether decision making process is vitiated in any manner or not. The action of the respondent Corporation is neither found to be arbitrary nor irrational nor irrelevant and, therefore, is not liable to be voided in the present appeal. In fact the prayers claimed in paragraph 26 of the petition would indicate that the petitioner wants direction against the respondent to resume supplies of petroleum products to the appellant and not to terminate the dealership agreement. In substance, the

appellant wants restoration of the dealership agreement executed between the parties and we are of the view that such a relief cannot be granted in a petition under Article 226 of the Constitution. The principle of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, as observed by the Supreme Court in *Tata Cellular (supra)* there are inherent limitations in exercise of that power of judicial review. Duty of the Court is to confine itself to the question of legality. Its concern should be: whether a decision making authority has (1) exceeded its powers, (2) committed an error of law, (3) committed a breach of the rules of natural justice, (4) reached a decision which no reasonable Tribunal would have reached; or (5) abused its powers. The discussion made above does not indicate that the decision making authority has exceeded its powers or that it has committed any error of law or breach of the rules of natural justice or reached a decision which no reasonable Tribunal would have reached or abused its powers. Therefore, no case is made out by the appellant to interfere with the impugned judgment. The result is that the appeal is liable to be dismissed.

19. Learned counsel for the appellant has made a grievance that in spite of interim direction the respondent Corporation has not paid rent for the superstructure which belongs to the appellant and, therefore, appropriate directions should be given to the respondent Corporation to pay the amount of rent. Mr. G.N. Shah, learned counsel for the respondent Corporation, has produced a letter dated April 11, 2000 wherein it is mentioned that the amount of rent has been paid to M/s. M.S. Desai, Bareja on monthly basis and for the month of March 2000 rental of Rs.200 has been paid vide cheque dated March 2, 2000. The letter produced by the learned counsel for the respondent Corporation is ordered to be taken on the record of the case. The grievance made by the learned counsel for the appellant is that the partner of the appellant firm is at America and, therefore, the rental should be paid to his power of attorney holder. In this connection we clarify that it would be open to the appellant to make suitable representation to the respondent Corporation and the same shall be decided by the respondent Corporation in accordance with law. However, it is clarified that if the rentals are not paid to the appellant, the same shall be paid in compliance with the interim order which was passed by the High Court in Miscellaneous Civil Application No. 1364 of 1996.

20. For the foregoing reasons, the appeal fails and is dismissed with no orders as to costs.