
(2016) 12 MP CK 0033
In the Madhya Pradesh High Court
Case No : WP No. 9473 of 2014

M/s. Govind Saraf Kisan Seva Kendra	APPELLANT
Vs	
Indian Oil Corporation Ltd.	RESPONDENT

Date of Decision : 09-12-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Essential Commodities Act, 1955 — Section 3

Citation : (2017) AIR(MP) 25 : (2017) 1 MPLJ 713

Hon'ble Judges : Vivek Rusia, J.

Bench : Single Bench

Advocate : Shri B.L. Pawecha, Learned Senior Counsel with Shri Yogesh Mittal, Advocate, for the Respondent; Shri A.S. Kutumble, Learned Senior Counsel with Shri M.M. Bohra, Advocate, for the Petitioner

Final Decision : Allowed

Judgement

Vivek Rusia, J. - The petitioner has filed the present petition being aggrieved by the order dated 13.03.2014, by which the dealership of the petitioner was terminated and order dated 17.12.2014, by which the appellate authority has dismissed the appeal.

Facts of the case are as under:

1. That the petitioner was appointed as retail outlet dealer for sale of petrol and high speed diesel by the respondent/Indian Oil Corporation (herein after in short "IOCL"), vide agreement dated 21.11.2008. The petitioner was awarded by a certificate in the year 2011 for earning maximum number of fuel revenue.
2. That in the year 2012, a machine named as "MIDCO S.No.1136 Midko 980 C" was installed in the petitioner's pump by way of transfer from M/s. Digendra Fuel & Service Station petrol pump. The said machine was installed on "as it is" basis. The verification report was prepared on 11.10.2012. At the time of installation, the reading of meter of machine was 2808681.

3. The officers of the respondent company conducted random investigation on 08.02.2013 and 11.07.2013 and found no violation of Marketing Discipline Guideline 2013. Thereafter, another investigation was conducted within a month on 21.08.2013 and Panchnama was prepared and four irregularities were found during investigation. Following irregularities were recorded in Panchnama:

"1. MS L&T DU having Sl. No.130-1P 0585 was being operated without W&M seal there was no calibration and stamping by W& M department. Only factory seal of GVR affixed at the time of manufacture was there in this DU.

2. Double gear machine (an unauthorized fitting) found in the MS Midco DU having Sl. No. 1136.

3. Positive stock variation of 1241 litre beyond permissible limit in MS.

4. Negative stock variation of 2205 ltrs beyond permissible limit in HSD."

4. The copy of the inspection report dated 21.08.2013 is filed as Annexure P/14. The petitioner was served with the show cause notice dated 21.08.2013 which he replied vide letter dated 16.09.2013. The explanation as given by the petitioner was found satisfactory in respect of point no.1, 3 and 4, but however, in respect of irregularity mentioned at point No.2 regarding double gear mechanism found in MS Midco DU having Sl. No. 1136, explanation was not found satisfactory by "IOCL". The respondent issued second show cause notice dated 05.12.2013 as the action amounts to tampering with dispensing unit under the provisions of MDG-2012, under clause 5.1.4 and as to why the dealership should not be terminated. The petitioner submitted the detailed reply dated 26.12.2013. Vide order dated 13.03.2014, the dealership of the petitioner in the name and style of M/s. Govind Saraf Kisan Seva Kendra, Zirapur Road, Machalpur, District Raigarh stand terminated forthwith. The reasons assigned for the termination of the dealership is reproduced below:

"We have considered your reply dated 26.12.2013 to the above show cause notice and also applied our mind to arguments tendered by you during the personal hearing held on 16.01.2014. In rebuttal, you have mentioned repeated your averments mentioned in reply to fact finding letter that the subject DU was installed after shifting it from M/s. Digendra Fuel & Service Station, Biora, Distt. Rajgarh and that it was in sealed condition and as such, latent defects could not be noticed.

Your above contention is not acceptable for the reason that during all the earlier inspections by our officials, calibration by W&M Department and preventive maintenance by OEM/Midco representative, the fact of additional/unauthorized fitting in the DU was not reflecting.

From the above, we have come to the conclusion that you do not have any satisfactory reasons on our show cause notice. Your above actions/in-actions amounts to violation of clauses 15, 16 and 46 of dealership agreement read with clause 5.1.4 of MDG-8th January 2013. It has also earned bad name to our

Corporation and its product."

5. Being aggrieved by the aforesaid termination, the petitioner preferred appeal to the appellate authority, Mumbai. Vide order dated 17.12.2014, the appeal filed by the petitioner was also dismissed by the appellate authority. The appeal was dismissed on the ground that the existence of double gear in DU was observed by the inspection team and was accepted by the appellant. Hence, there was no need of further fact finding enquiry in the matter by any committee. The request of verification about short delivery due to installation of double gear was also rejected by the appellate authority. Whether the double gear machine was active or dead was also not enquired by the appellate authority at the request of petitioner.

6. Being aggrieved by the aforesaid rejection of the appeal, the petitioner has approached this Court by way of present petition.

7. After notice, the respondents filed the detailed reply contending that the petitioner has violated the clause No.15, 16 and 46 of dealership agreement and also clause 5.1.4 and 8.2 of MDG-8th January" 2013. The petitioner was given opportunity of hearing by the disciplinary authority as well as by the appellate authority and after due application of mind, the impugned orders were passed. It is also submitted that the writ petition is not maintainable as there is a specific remedy of reference to arbitration under clause 62(a) of the agreement. The writ jurisdiction under Article 226 of the Constitution of India cannot be invoked in a contractual matter. The relationship between the petitioner and respondent is by way of agreement, no mandamus can be issued in favour of the petitioner for restoration of the supply of retail outlet and prayed for dismissal of the writ petition.

8. Shri A.S. Kutumble, learned senior counsel appearing on behalf of the petitioner submitted that while passing the termination as well as appellate order, the authorities did not applied their minds. The MS Midco DU machine was installed by the respondent by way of shifting from other fuel and service station. Thereafter, they conducted investigation on 08.02.2013 and 11.07.2013, but no irregularities were found. The petitioner had no knowledge about the installation of double gear in the machine as the respondent company itself had installed the machine itself. The petitioner was running the firm with due diligence and honesty and he was awarded by the certificate of highest sale by the respondent company itself. It was submitted that there was no test report given by any laboratory. The request of the petitioner for inspection by committee about the shortage in delivery or whether the double gear mechanism was active or dead has wrongly been turned down by the appellate authority. The dealership was the sole earning of the petitioner to earn his livelihood and which has been arbitrarily taken by the respondent, therefore, the writ petition is the only remedy available to the petitioner. In support of his contention, the petitioner has placed reliance over the judgment passed by the apex Court in case of Harbanslal Sahnia v. Indian Oil Corporation Ltd, reported in AIR 2003 SCC 2120, Ram Lal Agrawal v.

Indian Oil Corporation Limited, reported in 2014(4) ALD 139 & P. Laxmikanth Rao v. Union of India, reported in ALD-2011-3-505.

9. Per contra, Shri B.L. Pawecha, learned senior counsel appearing on behalf of the respondent has vehemently argued that the petitioner has made incorrect statement in the memo of writ petition that the respondent did not gave him any opportunity of hearing before passing the impugned order and hence, the writ petition is liable to be dismissed on this ground alone in view of law laid down by the apex Court in case of Hari Narain v. Badri Das, reported in AIR 1963 SCC 1558, where the apex Court has revoked the special leave granted on the basis of misstatement found in the application for special leave. He has also placed reliance over the judgment of this Court passed in the case of Ramchandra v. Goradhanlal, in Civil Revision No.662 of 1975, where the civil revision was dismissed on account of untrue and misleading statement made in the revision petition. He has further raised preliminary objection about the maintainability of the writ petition for want of alternate efficacious remedy of arbitration for want of arbitration clause in the agreement. In support of this contention, he has placed reliance over the judgment passed in the case of Indian Oil Corporation Ltd. v. Amritsar Gas Service & Ors., reported in (1991) 1 SCC 533 & Kamaruddin Mugal v. Indian Oil Corporation Ltd. & Anr., passed in W.P.No.3539/2014.

10. On merit, it is argued that presence of double gear in the machine is sufficient to establish that it is being installed by the petitioner to get undue advantage and the petitioner also is beneficiary of it. This Court cannot act as appellate/revision Court over the decision of "IOCL" & prayed for dismissal of the writ petition.

ORDER

11. That the respondent has alleged that the petitioner has made misleading as well as incorrect statement in the writ petition about the fact that he was not given any opportunity of hearing before passing the impugned order. The said statement was made by the petitioner in ground No. C, but in para 5 of memo of petition where the facts of the case are pleaded, the petitioner did not made any statement that he was not given any opportunity of hearing. On the contrary, he has stated that he received first and second show cause notice and submitted the replies in response to those show cause notices. The petitioner has filed copy of show cause notice as well as copy of replies in the writ petition, therefore, it cannot be alleged that he has given incorrect statement or tried to suppress the fact about issuance of show cause notice and denial of opportunity of hearing. The petitioner may have intention to say that adequate & meaning full opportunity of hearing was not given to him. At the time of argument also, Shri Kutumble did not argued on the point that the petitioner was not given any opportunity of hearing, therefore, the averment made in Clause 6 does not came under the category of misleading or making incorrect statement.

12. So far as the availability of the alternate efficacious remedy, by way of

arbitration is concerned, the apex Court in the case of Harbanslal Sahnia (Supra) has held that rule of exclusion of writ jurisdiction by availability of the alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction.

Para 7 of the aforesaid judgment is reproduced below:

"So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the Fundamental Rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act and is challenged [See Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors., (1998) 8 SCC 11. The present case attracts applicability of first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings.

(emphasis supplied)

13. Therefore, in view of the above judgment, the writ petition filed by the petitioner is maintainable. The objection taken by the respondent is hereby rejected.

14. That it is not disputed that the said machine named S.No.1136 Midko 980 C was installed by the respondent company itself. Verification certificate was issued by the measurement department of the State Government on 11.10.2012 followed by 26.02.2013. Thereafter, twice, investigation was done by the respondent on 08.02.2013 and 11.07.2013 and no irregularities were reported. In an investigation dated 21.08.2013, four irregularities were found by the investigating team and on the basis of which, the show cause notice was issued to the petitioner. Out of four irregularities, reply of 3 irregularities, submitted by the petitioner was found satisfactory. Only in respect of fitting of double gear mechanism in the meter unit, the reply was not found satisfactory. The petitioner submitted the reply to the effect that he has not installed any double gear in the machine. The entire machine was installed by the respondent company itself with a reading of 289035 and there is no shortage of delivery found in the machine. The respondent did not find the reply, submitted by the petitioner, satisfactory, but while rejecting the contention of the petitioner, no reason has been assigned by the Chief Divisional Retail Sales Manager. The entire contention has been

rejected only in three words "not found satisfactory". The reply to the second show cause notice was also not found satisfactory by the respondent and the same was rejected on the ground that "you did not have any satisfactory reasons".

15. Before the appellate authority, the petitioner has requested for investigation by a committee to check whether there is any shortage of delivery or double gear mechanism is active or dead. The appellate authority has turned down the said request and believed the report given by their own investigation team.

16. The dealership of the petitioner was terminated in violation of clause 5.1.4 of the MDG- 8th January"2013.

The said clause is reproduced below:

"5.1.4.

Additional/Unauthorised-fittings/Gears Found In Dispensing Units/tampering With Dispensing Unit

Any mechanism/fittings/gear found fitted in the dispensing unit with the intention of manipulating the delivery.

Removal, replacement/manipulation of any part of the Dispensing Unit including microprocessor chip/electronic parts/OEM software will be deemed as tampering of the dispensing unit.

In case of this irregularity sales from the concerned dispensing unit to be suspended, DU sealed, Samples to be drawn of all the products and sent to lab for testing."

17. The aforesaid clause provides that any machine/fitting/gear fitted in the dispensing unit with intention of manipulating the delivery. According to this clause, there has to be an intention for manipulating the delivery behind installation of any extra machine/fittings/gear in the dispensing unit. Mere finding of gear in the dispensing unit is not sufficient, there has to be a material before the authorities to establish that by insertion of such mechanism/gear, the delivery of the dispensing unit was affected or reduced.

18. In the present case, there is no such material available on record to proof that due to double gear mechanism, there was any shortage in delivery. No finding was recorded by the authority, who has terminated the agreement as well by the appellate authority. This clause further provides that in case of those irregularities sale from the concerned dispensing unit DU would be sealed and send to the laboratory for the testing. In the present case, the DU was not sealed and did not send to the laboratory for testing. There is no lab testing report available on the record. The petitioner's request for obtaining report about short delivery or the gear is active or dead has been turned down by the authorities, therefore, there is no material or satisfaction of the authority that because of gear, there was any intention of manipulating the delivery by the petitioner,

coupled with the fact that the machine was installed by the company itself by way of transfer from another fuel station.

19. The entire plea of the petitioner was rejected only on the ground of double gear was found in DU machine. There is no finding of deliberate insertion or shortage of delivery and whether double gear was active or dead. Similar issue came up before the High Court of Andhra Pradesh in the case of Ram Lal Agrawal (Supra) and the action of the respondent was found to be arbitrary exercise of power and the writ petition was allowed.

Para 30 of the aforesaid judgment is reproduced below:

"The facts on record disclose that no variation was noticed in the quantity of fuel discharged from the dispensing unit. As seen from the extracted portion of the order of termination of dealership, plea of petitioner was rejected on possible effect of presence of double gear. It is not proved as to when such double gear was inserted. Order does not record a finding of deliberate insertion and actual manipulation of delivery of fuel. Order proceeds as if mere existence of double gear in dispensing unit is sufficient to terminate the dealership. Whereas, according to Clause 5.1.4, existence of double gear is a critical irregularity if there was intention to manipulate the delivery. Thus, as held by this court in W.P.No.20350 of 2010, the irregularity alleged against the petitioner does not amount to critical irregularity. Unless what is proved is critical irregularity, it does not result in termination of dealership. As held in W.A.No.318 of 2011, mere existence of external part in the dispensing unit of petitioner outlet that it was introduced by dealer is irrational and merely because petitioner would alone stand to benefit from the short supply, no adverse inference can be drawn against petitioner. In an issue which results in penal consequences, no adverse inference can be drawn on assumptions and presumptions. It is appropriate to notice that no variation in dispensing of fuel was noticed by the inspecting team. Thus, findings recorded are ex facie illegal and amounts to arbitrary exercise of power."

20. In view of the above findings, the impugned action of the respondent is highly arbitrary, harsh and without application of mind. The orders impugned passed for terminating the dealership of the petitioner are perverse and there is no material to support these findings. The entire action has been taken on the basis of wrong presumptions. Hence, the impugned orders dated 13.03.2014 and 17.12.2014 are hereby set aside. The dealership of the petitioner is hereby restored.

21. Accordingly, the petition stands allowed.