(2011) 11 MAD CK 0051

In the Madras High Court

Case No : W.A. No. 733 of 2010

M/s. Saren Agency APPELLANT

Vs

Hindustan Petroleum Corporation Ltd. RESPONDENT

Date of Decision : 10-11-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Specific Relief Act, 1963 — Section 14

Citation : (2011) 11 MAD CK 0051

Hon'ble Judges : K.K. Sasidharan, J;D. Murugesan, J

Bench : Division Bench

Advocate : A.R.L. Susicdaresen, for Mr. A.L. Gandhimathi, for the Appellant; O.R. Santhanakrishnan, for the Respondent

Final Decision : Dismissed

Judgement

K.K. Sasidharan, J.—The dismissal of the writ petition challenging the termination of dealership in petroleum products on the ground of availability of alternative remedy by way of arbitration made the appellant to file this writ appeal.

RELEVANT FACTS :-

The appellant [hereinafter referred to as "dealer"], was appointed, as a retail dealer in Petroleum Products by M/s. Hindustan Petroleum Corporation Ltd. [hereinafter referred to as Corporation"]. While the dealer was conducting the retail outlet, the sales Officer of the Corporation inspected the business premises on. 4 May 2008. The Inspecting Officer, on verification of Motorspirit, POWER and High Speed Diesel and TURBOJET, found stock and density variation in POWER and TURBOJET and opined that it was beyond the permissible limits. The pumps disbursing POWER and TURBOJET were sealed, resulting in stoppage of sales through two nozzles. The Sales Officer submitted a report to the Corporation and on the basis of the said report, a show cause notice was issued to the dealer on 31 May 2008, calling upon him to offer his explanation with regard to the irregularities found during the course of inspection. The dealer submitted his explanation on 11 June 2008 wherein it was indicated that load received on 5 May 2008 for the invoice No. 8.001214 reported shortage of 189 litres and that was the reason for the stock variation. The negative stock variation of 1254 litres in TURBOJET was also explained. The explanation was found not satisfactory and as such, the corporation decided to conduct further enquiry in the matter. The Corporation issued show cause notice on 11 August 2008 calling upon the dealer to offer his explanation as to why the dealership should not be terminated. The dealer submitted his reply on 26 August 2008. In the meantime, the dealer filed a writ petition in W.P.No. 14983/2008 for issuance of a Writ of Mandamus to resume supplies. The said writ petition was allowed as per order dated 4 September 2008.

2. The dealer was given a personal hearing on 24 September 2008. The Sales Officer of the Corporation inspected the business premises of the dealer once again on 26 September 2008 for the purpose of resuming supplies and the said inspection found stock variation of POWER as well as TURBOJET. The Sales Officer in his detailed Inspection Report indicated the excess reading in spite of suspending the sales as early as on 14 May 2000. Thereafter, the dealership was terminated as per proceedings dated 10 October 2008. The said order was challenged in W.P.No. 24661 of 2008.

3. Before the writ court, the dealer contended that the very fact that there was an excess reading found during the Second inspection indicates that the earlier reading was not correct. The dealer disputed the reading taken on 14 May 2008 in the light of the subsequent inspection on 26 September 2008. According to the dealer, the positive variation was a reason invented by the Corporation to terminate the dealership as there was no transaction in the retail outlet subsequent to the order of suspension made on 14 May 2008.

4. The Corporation filed a counter in answer to the allegations and averments as contained in the affidavit filed in support of the writ petition. The Corporation challenged the very maintainability of the writ petition in view of Clause 66 of the Memorandum of agreement, prescribing the mode of resolution of disputes. According to the Corporation, the remedy of the dealer is to get the appointment of an arbitrator to be nominated by the Managing Director of the Corporation and as such, the very writ petition is not maintainable. The Corporation further submitted that the inspection conducted on 4 May 2008 proved stock variation in POWER and TURBOJET and it was beyond permissible limit. It was also found that L&T MS Nozzle was delivering 30 ml short and the other L&T HSD nozzle was delivering 30ml excess. The Corporation conducted close review of the sales for the period commencing from January 2008 and the said examination clearly proved the irregularities committed by the dealer. It was further contended that the dealer was given sufficient opportunity to explain his position and a detailed order was passed considering the explanation made by him.

5. The learned single Judge on a careful consideration of the factual matrix opined that the disputed questions cannot be the subject matter of a writ petition

especially on account of the alternative remedy available by way of arbitration. In short the dealer was given liberty to make an application for appointment of an arbitrator in terms of the agreement entered into between the parties. Feeling aggrieved by the said order, the dealer has filed the present intra-court appeal.

SUBMISSIONS :-

6. The learned senior counsel for the dealer would contend thus :-

(i) The remedy of arbitration provided in the dealership agreement is not a bar for entertaining the writ petition under Article 226 of the Constitution of India. Therefore the learned single Judge grievously erred in dismissing the writ petition on the ground of availability of alternative remedy;

(ii) The inspection conducted on 26 September 2000 was subsequent to the personal hearing given to the dealer. Even though excess reading was recorded during the inspection, conducted on 26 September 2008 and a report to that effect was submitted before the Court, no opportunity was given to the dealer to submit his views and the order of termination was made abruptly;

(iii) A reading of the inspection report dated 14 May 2008 would prove that there was no variation and the report, if read in the light of the complaint made by the dealer about the short receipt of 189 litres of petrol, would falsify the allegation at irregularity;

(iv) The inspection conducted on 26 September 2008 showed excess reading. Admittedly, supplies were not mad a during the period commencing from 14 May 2008. The Corporation has no case that the dealer procured products from other agencies and carried on business even during the period of suspension. Therefore, it is clear that there was an inherent defect with the disbursing pump and the said aspect was not considered by the Corporation.

7. The learned Standing Counsel for the Corporation would contend thus:-

(i) The Inspection report dated 14 May 2008 indicates the various irregularities that took place in the outlet operated by the dealer;

(ii) The impugned order was passed only after giving reasonable opportunity to the dealer to explain his position;

(iii) Even a personal hearing wee given to the dealer before passing the impugned order;

(iv) The inspection on 26 September 2008 was only for the purpose of resuming supplies. The said inspection also found variation in density of POWER beyond permissible limit. Stock variation was also noticed. However the said report was not the subject matter of termination proceedings and as such, violation on the part of the Corporation to give further opportunity to the dealer before passing the order would not vitiate the final order of termination;

ANALYSIS - FACTS : -

8. The dealer was appointed by the Corporation for retail sales of its Petroleum Products at Kalapet in the Union Territory of Pondicherry. The Memorandum of agreement, dated 1 October 2004 contains the terms and conditions governing the contract clause 66 of the Agreement deals with disputes and the manner of resolving the same.

9. The outlet of the dealer was inspected by the Senior Sales Officer of the Corporation on 14 May 2008. The inspection was conducted in the immediate presence of the authorized representative of the dealer. The dealer has no grievance that it was an exparte inspection without proper representation on his side. In fact, the report contains the signature of the agent of the dealer. The Inspecting Officer found stock variation in POWER and TURBOJET and such variations were beyond the permissible limits. Nozzle relating to MS and HSD were either delivering short or in excess. The Corporation thereafter conducted a close review of the sales effected by the dealer during the period from January 2009. The inspection and the examination of records resulted in issuing a show cause notice to the dealer. The dealer in his reply disputed the shortage and other irregularities. Subsequent to the receipt of reply a second show cause notice was issued to the dealer on 11 August 2008, calling upon him to explain as to why the dealership should not toe terminated. In the said show cause notice, the Corporation has very clearly indicated that the explanatic\\given was not convincing and that was the reason for issuing the subsequent notice. The dealer submitted his explanation on 26 August 2008. The explanation was nothing but a reproduction of the earlier reply notice. Thereafter, the dealer was heard in person.

10. It is true that, another inspection was conducted on 26 September 2008. The said inspection revealed certain further irregularities like variation in density beyond permissible limit. In fact positive variations were also found in respect of stock, in spite of the fact that the supplies were discontinued with effect from 14 May 2008.

11. The learned senior counsel contended that the dealer should have been given an opportunity to explain his position with respect to the subsequent inspection conducted on 26 September 2008, before passing the final order. We are not inclined to accept the said submission. The dealer would be justified in his contention in case the report of the inspection conducted on 26 September 2008 was also taken as basic materials for the purpose of terminating the dealership. Though the order of termination contains passing reference about the inspection conducted on 26 September 2008, there is nothing to indicate that the irregularities noticed during the said inspection was also taken as a ground to terminate the dealership. Therefore, the subsequent: inspection made on 26 September 2008 and the failure on the part of the Corporation to give an opportunity to the dealer to explain his position would not vitiate the order of termination.

12. The learned single Judge was of the view that the dealer should approach the

Corporation for appointment of an arbitrator instead of filing a writ petition. The learned single Judge has given adequate reasons for arriving at such a conclusion.

RELEVANCY OF THE AUTHORITIES :-

13. The learned senior counsel for the dealer placed reliance on the following judgments in support of his contention that the writ petition is maintainable in spite of the binding agreement containing a provision for arbitration.

14. Harbanslal Sahnia and another vs. I.O.C. Ltd. and others 2003 (1) CTC 189:-

In Harbanslal Sahnia, the Supreme Court observed that in an appropriate case, in spite of the availability of an alternate remedy. High Court may still exercise its writ jurisdiction in case the writ petition seeks enforcement of any of the fundamental rights or there is violation of principles.) of natural justice or the orders or proceedings are wholly without jurisdiction or the vires of the Act is challenged.

In the said case, cancellation of distributorship was mainly on account of the discourtesy shown to the officers of the Corporation. The Supreme Court found that the dealer has made a statement expressing regrets for any incidental departure from normal behaviour and undertook that they would be more careful in future. The Supreme Court opined that; the dealership was terminated on account of an irrelevant, and non-existent case. It was only in such circumstances, the Supreme Court observed that the High Court should have entertained the writ petition without driving the dealer to the proceedings for arbitration.

15. Indian Oil Corporation Ltd., Chennai vs. Bommai Khathirvelu and ors. [W.A.No. 731 of 2006, dated 20 June 2006]

The issue in Bommai Khathirvelu relates to the constitution of a partnership without the permission of the Corporation. The distributorship in question was given to an Ex-serviceman on account of the injury sustained by him during the Indo-Pak Kargil war. The explanation submitted by the distributor that he has taken finance from a money lender and the agreement was not a partnership was accepted by the learned single Judge and it was confirmed by the Division Bench. While considering the question regarding maintainability of the writ; petition the Division Bench observed that access to justice by way of public law remedy would not be denied when a lie involves public law character and when the forum chosen by the parties would not be in a position to grant appropriate relief.

16. Kala Agencies, Poonamallee vs. The Deputy General Manager [LPG], I.O.C. Ltd. and another [W.A.No. 344 of 2008 dated 30 April 2008]

The LPG Distributorship of Kala Agencies was suspended on account of certain allegations of misconduct. The writ petition challenging tha order of suspension was dismissed. While considering the appeal, the Division Bench found that the mandatory procedure was not complied with and as such, the Bench observed that writ petition would be maintainable in sprite of the alternative remedy of arbitration.

17. Hindustan Petroleum Corporation Ltd. rep. By its Chief Regional Manager, Chennai and others vs. M/s.Sarath Agencies [W.A.No. 1848 of 2009, dated 30 September 2010]

In Sarath Agencies, the termination order was passed without furnishing the required documents as requested by the dealer. The dealer was not given a personal hearing also. The learned single Judge entertained the writ petition and quashed the order. The Division Bench found that clear copies of the documents were not furnished to the dealer. Similarly in spite of request for personal hearing, no such hearing was given. Therefore, it was only on account of the violation of principles of natural justice, the writ petition was entertained.

18. M/S. Hindustan Petroleum Corporation Ltd. Mumbai and another vs. Geetha Kasturirangan [W.A.Nos.1250 and 1251 of 2008, dated 11 March 2010]

In Geetha Kasturirangan, it was found that, the sample and the related tests were not conducted as per the prescribed procedure. In the said circumstances, the writ petition was entertained in spite of existence of an alternative remedy.

19. Aluminium Industries Ltd. Madras vs. Minerals & Metals Trading Corporation of India Ltd. and 2 others [1997 (II) CTC 636]:-

In Aluminum Industries, no objection was given by the contesting respondent regarding the maintainability of the writ petition. Similarly, there was no, plea that the writ petition involves disputed question of fact. Therefore, the Full Bench observed that the writ petition is maintainable in spite of an alternative remedy.

20. M.P. State Agro Industries Development Corporation Ltd. and Another Vs. Jahan Khan,

The Supreme Court in Jahan Khan indicated that alternative remedy does not operate as a bar for exercise of writ court''s jurisdiction of judicial review, in cases relating to enforcement of fundamental rights, failure of natural justice and in case the impugned proceedings are wholly without jurisdiction or the vires of an Act is challenged.

21. ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others,

The Supreme Court in ABL International Ltd. indicated that in appropriate cases, writ Court has jurisdiction to entertain a writ petition involving disputed question of fact and there is no absolute bar in regard thereto. In the said decision, the Supreme Court further observed that writ petition involving serious disputed questions of fact which require consideration of evidence, which is not on record will not normally be entertained under Article 226 of the Constitution of India.

22. The learned counsel for the Corporation placed reliance on the following authorities :-

(i) The Competent Authority Vs. Hameed Abdul Kader and Appellate Tribunal for Forfeited Property,

(ii) Unreported judgment dated 19.04.2007 in W.A.No. 3812 of 2004 [M/s. Kasturi Agencies, rep. By its Manager vs. Indian Oil Corporation];

(iii) Unreported judgment dated 24.04.2009 in W.A.No. 495 of 2008 [Kurshed Sharfudeen and another vs. IBP Company; Ltd. and others];

(iv Dr. R. Padmavathy Vs. The Secretary to Government, State of Tamil Nadu, Health and Family Welfare Department and The Director of Medical and Rural Health Services,

(v) 2000 (1) MLJ 769 [S.Sitaraman vs. Hindustan Petroleum Corporation Ltd. and another];

(vi) Unreported judgment dated 01.02.2000 in W.A.No. 2609 of 1999

[S.Sitaraman vs. Hindustan Petroleum Corporation Ltd. and another];

(vii)

23. The judgments cited by the learned counsel for the Corporation relates to the power of judicial review especially in matters relating to contracts which are non-statutory in nature.

ALTERNATIVE REMEDY - WHETHER. A BAR IN ALL CASES : -

24. There is no dispute that in appropriate cases writ petition could be entertained notwithstanding the existence of an alternative remedy. The Rule is not universal in nature, It would depend upon the peculiar facts of tha case. Even in the judgments relied on by the learned senior counsel for the dealer, there are observations that in case serious disputed questions of facts are involved which requires recording evidence and there is an alternative remedy available, the parties should be relegated to the said remedy.

25. In the case on hand, the Corporation alleged serious irregularities in the matter of stock and sale of petroleum products. The allegations are on the basis of the inspection conducted by the officials. In fact, the subsequent inspection conducted on 26 September 2008 showed positive variation in spite of suspending the operation.

26. The allegation regarding discrepancy and irregularities were disputed by the dealer. The dealer has his own reasons and explanations. Therefore, it is essentially a question of fact and for resolution of such disputed questions, consideration of evidence is necessary. Such complicated matters cannot be decided by the writ court on the basis of affidavits and counter affidavits filed by the parties.

27. The dealer has entered into an agreement with the Corporation and the contract governs the relationship between the parties. Clause 66 of the agreement contains a provision for arbitration. The dealer has agreed to approach the Corporation for resolving the dispute and the Managing Director was given the right to nominate the arbitrator. When the parties have agreed for a particular course to redress their grievances, ordinarily, it should be the endeavour of the Courts to direct the parties to approach the agreed forum. However, that does not mean that alternative remedy is a bar in all cases to maintain the writ petition.

ANALYSIS - LAW :-

28. The Supreme Court in State of U.P. v. Bridge & Roof Co. (India) Ltd., (1996) 6 SCC 22, indicated that in case the contract itself provides with a mode of settlement of disputes arising from the contract, the parties should adopt that remedy. The Supreme Court said ::

21.... The contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration (clause 67 of the contract). The arbitrators can decide both questions or fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy - in this case, provided in the contract itself - is a good ground for the court to decline to exercise its extraordinary jurisdiction under Article 226. The said article was not meant to supplant the existing remedies at law but only to supplement them in certain well-recognised situations.

29. In Mrs. Sanjana M. Wig Vs. Hindustan Petro Corporation Ltd., while indicating that a writ petition is maintainable in spite of availability of an alternative remedy, the Supreme Court observed that in case a serious question of fact is involved, ordinarily a writ petition would not be entertained.

18. It may be true that in a given case when an action of the party is dehors the terms and conditions contained in an agreement as also beyond the scope and ambit of the domestic forum created therefor, the writ petition may be held to be maintainable; but indisputably therefor such a case has to be made out. It may also be true, as has been held: by this Court in Amritsar Gas Service and E. Venkatakrishna that the arbitrator may not have the requisite jurisdiction to direct restoration of distributorship having regard to the provisions contained in Section 14 of the Specific Relief Act, 1963; but whiles entertaining a writ petition even in such a case, the court may not lose sight of the fact that if a serious disputed question of fact is involved arising out of a contract qua contract, ordinarily a writ petition would not be entertained. A writ petition, however, will be entertained when it involves a public law character or involves a question arising out of public law functions on the part of the respondent.

30. The dealer has no case that reasonable opportunity was not given before passing the order of termination. There was no violation of the principles of: natural justice, Inspection was conducted in the immediate presence of the authorized representative of the dealer. Copy of the inspection report was duly given to the said representative. The dealer was given an opportunity to submit his version with respect to the irregularities pointed out by the sales Officer. The explanation submitted to the initial show cause notice was considered by the Corporation, When it was found that the explanation was not satisfactory, another show cause notice was issued to the dealer. The subsequent explanation given by the dealer was also considered and he was given a personal hearing. Therefore, it was only after considering the explanation and giving a personal hearing, the impugned order of termination was passed. The dealer now challenges the accuracy of the report on the ground that the subsequent, inspection conducted on 26 September 2008 showed positive variation. In fact, it is for the dealer to show as to how positive variation was found in spite of closing the outlet by the Corporation. In any case, these are all matters which require evidence and the issues could be resolved only after appreciating materials produced by the dealer as well as the Corporation. Such disputed questions cannot be decided in a writ petition under Article 226 of the Constitution of India. The decisions relied on by the learned senior counsel for the dealer were made on the peculiar facts of the case and in fact, in some of the decisions, the principal issue itself was the violation of the principles of natural justice and the procedure for testing the samples. The writ petition was entertained in such peculiar factual situations.

31. There is no doubt that in case the in intrumentality of the State acts contrary to public good, public interest and unfairly, unjustly and their actions are discriminatory and violative of Article 14 of the Constitution of India in its contractual or statutory obligation, writ petition would be maintainable in spite of the availability of alternative remedy.

32. The dealer has no case that the officials of the Corporation were determined to terminate the dealership and the inspection was with such a pre-determined notion. It was a routine inspection. The subsequent inspection has no relevance insofar as the termination is concerned. Therefore, we are of the view that the learned single Judge was fully justified in dismissing the writ petition. We do not find any reason to take a different view in the matter. In the upshot, we dismiss the writ appeal. No costs. Consequently, M.P.Nos.1 and 2 of 2010 are also dismissed.

