

(2002) 02 MAD CK 0166

In the Madras High Court

Case No : C.R.P. No's. 2516 and 2868 of 2001

M/s Swamy Service Station

APPELLANT

Vs

Bharat Petroleum Corpn. Ltd. and another
Sri
Ramajayam Service Station Vs Bharat Petroleum Corpn. Ltd.

RESPONDENT

Date of Decision : 26-02-2002

Acts Referred:

Citation : (2002) 02 MAD CK 0166

Hon'ble Judges : Prabha Sridevan, J

Bench : Single Bench

Advocate : M. Venkatachalapathy, for Mr. D. Rajendran, Mr. T.V. Ramanujam and Mr. K. Venkataraman for Mr. K. Sampathkumar, for the Appellant; O.R. Santhanakrishnan, for the Respondent

Judgement

Mrs. Prabha Sridevan, J.—Both the petitioners in the C.R.Ps are dealers in petroleum products and the respondent is the Corporation which distributes petroleum products. Alleging that the samples taken from the petitioners' outlets were not in accordance with the standards applicable, the respondents had issued show-cause notices on both the petitioners. The petitioners apprehending that supply would be stopped, filed suits for declaration that the show-cause notice is null and void and for consequential injunction. The trial Court as well as the appellate Court refused to grant injunction and therefore, the revisions have been filed. Mr. T.V. Ramanujam, Senior Counsel and Mr. Venkataraman appeared for the petitioner in the CRP 2868/2001 and Mr. M. Venkatachalapathy, Senior Counsel appeared for the petitioner in CRP 2516/2001. Mr. O.R. Santhanakrishnan took notice and made his submissions on behalf of the Caveator/respondent.

2. The grievance of the petitioners is fairly identical. According to them, the samples were taken from the petitioners' bunks on 1.11.2000 and 3.11.2000 (C.R.P. 2516 & 2868 of 2001 respectively) and though a time limit is stipulated for sending the samples for testing as per the regulations, the test was

conducted beyond this time and therefore, since there is likelihood of a change in the physical properties of the fuel, the result obtained cannot be said to reflect the correct density and other parameters of the petroleum products drawn from the petitioners' bunks. The petitioners also refer to the Motor Spirits and High Speed Diesel Control (Regulation of Supply and Distribution and Prevention of Malpractices) Order 1998, wherein it is stipulated that samples should be drawn only if density is not found in order and that in the instant case, the respondents' results show that the density is in accordance with the standard specifications and therefore, the respondents ought not to have drawn the samples. The petitioners also submitted that when supply is effected, the delivery challan will denote the density, but not the RON result and the petitioners also have equipments only for three tests and not for RON. Therefore, in the absence of any material to show that the fuel supplied by the respondents match the standard specification as regards RON, the petitioners cannot be punished because there was a variation in the reading. It was also submitted that the show-cause notice did not enclose the test result and this was in violation of the principles of natural justice. If the petitioners had been furnished with the test report, there would have been some opportunity to meet the charges, but now the petitioners have been denied that. The respondents have not specified in what way the petitioners have committed breach of the terms of the agreement. While the petitioners conceded that under the agreement, the respondents have the power to terminate it, they would submit that it goes without saying that this power can be exercised only in a reasonable manner. One of the defences raised by the respondents was that the suit was pre-mature. To this, the petitioners would answer that anticipating stoppage of sales, the suit was filed and the moment injunction was vacated, the supply was immediately stopped and this would show that the apprehension is justified. They would also submit that injunction cannot be denied to them merely on the ground that they have the alternative remedy of damages. For one, it is impossible to quantify the damages that will be sustained by them if sales is stopped for 45 days and secondly, the loss of reputation that will be suffered by the petitioners if the bunk is closed on account of alleged adulteration cannot be calculated and they may lose their clientele. Thirdly, the loss that will be suffered by the employees of the petitioners who earn their livelihood cannot be measured and in contrast to this, the respondents will not suffer any hardship because, even after the trial, they can impose the punishment of stoppage of supply and there is no injury to the public because the specific sample which was alleged to be adulterated is no longer in existence. What is now supplied is fresh fuel and therefore, looked at from any angle, the petitioners are entitled to injunction.

3. It was also submitted that the petitioners have been picked for such arbitrary action by the respondents when there are other dealers who have been carrying on business without any hitch. The following decision was relied on: 2001 (3) L.W. 388 (The General Manager, I.B.P. Co. Ltd., and etc. vs. Tmt. Jayanthi Selvarajan, Proprietrix Kavitha Agencies Dealer, I.B.P. Co. Ltd.).

4. Mr. O.R. Santhanakrishnan, learned counsel for the respondents would submit that petroleum is an essential commodity and the words "adulteration" and "malpractices" are defined in the relevant Act. On 3.11.2000, inspection was done by the respondents. On 4.11.2000, the samples were sent for testing. On 14.11.2000, the results were forwarded by the Laboratory and on 25.11.2000, show-cause notice was filed. The show-cause notice gave them 7 days to reply. But without giving a reply, the respondents had filed the suit. Therefore, the suit itself was pre-mature. He also pointed out to the prayer in the injunction application which, though couched in a language which is seemingly for a relief of restrictive injunction, it is actually a prayer for mandatory injunction. He would submit that it is not as if the petitioners alone were singled out for harsh treatment. Wide spread inspection was done in all the retail outlets where petroleum products are supplied and about 8 to 10 outlets in Chennai failed to pass the test. Some of them have suffered the punishment of stoppage of supply for 45 days and have continued their business thereafter. He would submit that when damages can be quantified, remedy is not injunction. When the dealer has engaged in adulteration, he cannot ask for the equitable remedy of injunction. He also submitted that the provisions of Specific Relief Act do not provide for performance of negative covenants of the contract. Learned counsel submitted that the lab report is conclusive proof and that the RON index does not permit variation. He would also submit that mere apprehension that the agency might be terminated cannot be a "cause of action". He pointed out to the relevant Regulations which empower the Inspectors of the respondent Corporation to draw samples and he would submit that even assuming there existed a rule that did not permit drawing of samples, if the density was within the permissible parameters, when it has been shown that the RON level was below the specified level, the respondents are entitled to take action as per the contract. The learned counsel would submit that this was a case where public interest also has to be weighed in the balance and a dealer who indulges in malpractice or adulteration of petroleum products must be prepared to face the consequences of his action.

5. The counsel relied on several judgments to support his case: A. Abdul Samath and another Vs. Union of India and another, Pharmasivam and another Vs. Tamil Nadu Electricity Board and 2 others, 2000 (1) MLJ 218, 1999 MLJ (Supp.) 8 (SC) (Colgate Palmolive (India) Ltd. Vs. Hindustan Lever Ltd.), 1998 A.I.H.C. 4581 (Krishna Kumar Vs. Sr. Supdt. of Police, Bulandshahr), 2000 1 L.W 502 (Jenarathanan, B. Vs. The Senior Regional Manager, Hindustan Petroleum Corpn.), V. Veeraraghavan Vs. State Bank of India, Mettupalayam Branch, S. Sundaram Pillai and Others Vs. P. Govindaswami and Another, 1967 (1) MLJ 353 (Mac Laboratories (P.) Ltd. Vs. V.R. Nathan), Multichannel (India) Limited Vs. Kavitalaya Productions Pvt., Limited, 17-A Karpagambal Nagar, Mylapore, Chennai-4 and two others, , AIR 1978 Mad 374 (G.W. & Co. vs. C.D. Gopinath), Gujarat Electricity Board, Gandhinagar Vs. Maheshkumar and Co., Ahmedabad, (S.K. Gupta vs. M/s Hyderabad Allwyn Ltd.).

6. The learned counsel would also submit that the respondent in CRP 2516/2001

has filed three suits subsequently for the same relief suppressing the proceedings that are pending and therefore, is not entitled to any equitable relief. It was also submitted that the orders of the Courts below would show that the matter has been considered from all angles and therefore, it does not warrant any interference.

7. As far as CRP 2516/2001 is concerned, the lab report shows that the RON reading was only 72.8 when it should be 88 minimum and in CRP 2816/2001, as against a minimum of 88, the test results show that the RON reading is 85.7.

8. The parties are governed by the contract and Clause 13(a) and 13(a)(viii) read thus:

13(a). Notwithstanding anything to the contrary herein contained the Company shall be at liberty to terminate this Agreement forthwith upon or at any time on the happening of any of the events following:

13(a)(viii). If the Licensee shall commit or suffer to be committed any act which in the opinion of the Marketing Director of the Company for the time being in Bombay or any other person nominated for this purpose by the Company is prejudicial to the interest or good name of the Company or its products. The decision of such officer or person shall be final and binding on the licensee.

It is also provided in the contract that any decision so made by the officer of the respondent Corporation shall be final and binding. In this case, the case of the respondents is that the petitioners by adulterating the products, have committed acts which are prejudicial to the good name of the company and its products. "Adulteration" is defined in Section 2(a) of the Motor Spirit and High Speed Diesel (Regulation of Supply and Distribution and Prevention of Malpractices) Order, 1998 as "introduction of any foreign substance illegally or unauthorisedly resulting in the product not conforming to the requirements and specification of the product." "Malpractice" includes adulteration. According to the respondents, the samples were drawn from the retail outlets of the petitioners and they failed to meet the specifications. The above said Order deals with the manner in which sampling of products can be done. Section 5(1) provides that the officer who is authorised to inspect "shall draw the sample from the tank" nozzle, vehicle or the receptacle as the case may be, to check whether density and/or other parameters of the product conform to the requirements indicated in Schedule I" Schedule I deals with the requirements for Motor Gasoline and includes RON.

9. Guidelines were issued by the Commissioner, Food and Supplies and Consumer affairs, New Delhi for checking adulteration. It is found there that

In order to check complaints of adulteration, the inspecting officials will first test the product for quality and density at the retail outlet itself in the presence of the dealer with necessary equipments such as filter paper, hydrometer, thermometer which are available at the retail outlet and only if density is not found in order the samples should be drawn.

The grievance of the petitioners is, when the density has been found to be in order, the authorities did not have the power to draw samples. The power given to the officer under Regulation 5 is the power of search and seizure and the guidelines given which are referred to above apply where complaint of adulteration are received and samples are drawn. The counsel are also not able to clarify whether guidelines will prevail over the order. Be that as it may, samples had been drawn from the petrol bunk of the respondents and there cannot be any denial that they have the power to draw such samples and it has also been found that the petitioners failed the tests.

10. In 1998 A.I.H.C. 4501, the Division Bench of the Allahabad High Court held that the report of analysis submitted by any of the laboratories enumerated in the Control Order is conclusive and is admissible without any formal proof. The learned Judges had given detailed reasoning as to why even when the density of the adulterated product conforms to the prescribed standards, it is possible for the product to be adulterated and "the introduction of the foreign substance in petrol or diesel illegally/unauthorisedly simplicitor would amount to adulteration even though the product may conform to density standard as mentioned in Schedule I of the Control Order." This judgment also answers the grievance expressed on behalf of the petitioners that there is no way of ensuring that the products supplied was in the first place according to specifications. The following paragraph is relevant:

The Government Corporations are not expected and will not supply sub-standard or adulterated material and it can be presumed that the product supplied by them would be pure and would conform to the standards laid down by Indian Standards Institution. The dealer is only required to maintain the product in the same condition in which he had received it. There is no compulsion on any one to get a dealership of petrol or diesel. Any one who wants to be appointed as a dealer of an oil company does so by his own choice and after becoming a dealer he cannot be heard to complain that the control order by which he is governed does not give him a second opportunity to get the sample analysed again.

11. In fact, while dealing with similar complaints in a writ petition, this Court, in 2000 1 L.W. 502 (Jenarathanan, B. Vs. The Senior Regional Manager, Hindustan Petroleum Corpn.), accepting the ratio laid down in the above judgment of the Allahabad High Court issued certain instructions to the Government for introducing appropriate safeguards for protection of the interest of the dealers as well as that of the general public

by making necessary provisions in the control Order to collect and sample of the petroleum products at the time of delivery to the dealers, leave one such sample with the dealers and keep one sample with the oil company, which can be compared as and when the question of adulteration or contamination or any malpractice is complained of against the dealers, which would in fact avoid any evasion of any of the provisions of the Control Order.

The counsel for the respondents submitted across the Bar that he is instructed that steps have been taken in this regard.

12. In Application No. 506/2001 in C.S. 881/2000., this Court accepted the ratio that lab results are conclusive. In that case, samples were drawn on 1.11.2000 and after testing the samples failed to meet the specifications. On 4.11.2000, an explanation was sought for and the dealer was also informed that sales would be suspended for a period of 45 days from 1.11.2000 to 15.12.2000. The petitioners therein suffered the punishment of suspension. This Court held that they are entitled to resumption of supply thereafter:

I am of the view that the period of suspension namely, 45 days is sufficient and the supply of petroleum products can be restored to the plaintiffs on the agreements entered into between the parties.

Therefore, that was a case where in similar circumstances, resumption of supply was ordered subject to certain conditions only after the punishment was suffered.

13. In 2000(1) M.L.J 769 (Sitaraman Vs. Hindustan Petroleum Corporation Ltd.) writ petitions were filed by a dealer like the petitioners herein against the termination of the agreement. It was held that merely because the samples were sent for analysis somewhat belatedly, it could cause no prejudice to the petitioner, more particularly, when there is no specific evidence in that behalf. It was also held therein that the contract between the parties is a non-statutory contract and in that particular case, the respondent was the Hindustan Petroleum Corporation Ltd. whose dealership contracts provide for arbitration; The learned Judge held that the petitioner cannot insist on specific performance of the contract through a writ petition.

14. In AIR 2001 SCW 1240 (H.H.M. Shantidevi P. Gaikwad vs. Savjibhai Haribhai Patel), it has been held that a contract cannot be held to be void only on the ground that any clause in it gives to one party the absolute power to cancel it and that such a broad proposition of law that such a term is itself enough to void it, cannot be accepted.

15. An unreported judgment of the Kerala High Court in W.A. No. 1663 of 2001 (Bharat Petroleum Corpn. Ltd., Mumbai & Two Others vs. Kunnannvilakom Fuel Centre, Thiruvananthapuram) was also brought to the Court's notice which arose out of a writ petition. In that case, the dealer claimed that the variance between the samples that were tested and the specific standards was only marginal and therefore; some indulgence should be granted. The Division Bench of the Kerala High Court held thus:

It will not be proper for this Court to hasten to a conclusion that the difference is only marginal and that allowance in that regard could be extended to an erring retail outlet. These are areas where the Court has to go strictly by the standards prescribed by the competent authorities. In the absence of any material to hold otherwise, it will not be proper for the Court to make any observation regarding

the purity of a material, when admittedly, though by marginal difference, the sample does not conform to the prescribed standards.

16. All these decisions deal with the effect of lab results. In addition, the question of grant of injunction also has to be considered.

17. In 1999 M.L.J (Supp.) 8 (S.C.) (Colgate Palmolive (India) Ltd. Vs. Hindustan Lever Ltd.), it was held thus:

The basic consideration in the matter of grant of interlocutory injunction is non-expression of opinion as to the merits of the matter by the court since the issue of grant of injunction, usually, is at the earliest possible stage so far as the time frame is concerned. The other considerations which ought to weigh with the court hearing the application or petition for grant of injunction are as below: (i) extent of damages being an adequate remedy; (ii) protect the plaintiffs interest for violation of his rights though, however, having regard to the injury that may be suffered by the defendants by reason therefor; (iii) The Court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the others; (iv) no fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case the relief being kept flexible; (v) the issue to be looked from the point of view as to whether on refusal of the injunction, the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties' case; (vi) balance of convenience or inconvenience ought to be considered as an important requirement even if there is a serious question or prima facie case in support of the grant and (viii) whether the grant or refusal of injunction will adversely affect the interest of general public which can or cannot be compensated otherwise.

18. In Shiv Kumar Chadha and Others Vs. Municipal Corporation of Delhi and Others, , the Supreme Court held that a party is not entitled to an order of injunction as a matter of course and that Courts should always be willing to extend its hand to protect a citizen who is being wronged or is being deprived of a property without any authority in law or without following the procedure which are fundamental and vital in nature. But at the same time, the judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the Court.

19. In Sri Rama Machinery Corporation Limited Vs. Standard Chartered Bank and Another, , this Court had occasion to consider a prayer for injunction restraining the respondent Bank from dealing with the vehicle which was purchased under a hire purchase agreement and for a mandatory injunction to the Bank to deliver the vehicle belonging to the petitioner. It was urged that the respondent Bank had acted illegally and harshly and had even fraudulently created documents. The learned Judge on a reading of the agreement between the parties came to the conclusion that the Bank had an unrestricted power to seize the vehicle when there is default and when there is apprehension that the money jeopardised. The question of natural justice was also urged in that case and the following extract

from *Penumbra of Natural Justice* was cited: "The rules of natural justice should not be allowed to be exploited as a purely technical weapon to undo a decision which does not in reality cause substantial injustice" and it was observed that natural justice is not a static concept. The High Court refused to grant injunction holding that the lower Court had passed the orders within the limits of its power and on the basis of available materials and therefore refused to interfere.

20. In *Multichannel (India) Limited Vs. Kavitalaya Productions Pvt., Limited*, 17-A Karpagambal Nagar, Mylapore, Chennai-4 and two others, a Division Bench of this Court held that the Court has to consider: (1) whether there is any disputed question to be tried in the suit; (2) whether the Court's interference is necessary to protect party from species of injury; (3) whether comparative hardship can be compensated by way of damages.

21. In AIR 1988 Del 324 (*S.K. Gupta vs. M/s Hyderabad Allwyn Ltd.*), it was held that a breach of contract of agency can always be compensated in money and balance of convenience is in favour of respondent.

22. From the first set of decisions dealing with lab report result, it is seen that the report of the analysis submitted by any of the laboratory is conclusive and is admissible without any formal proof and that criteria of density alone cannot be taken into consideration. Therefore, prima-facie, there are records to show that the petitioners failed in the RON test, and the lab results have to be accepted. To what extent the Regulations bar the drawing of samples when the density test was passed is not clear. While the rules indicate that the officers of the respondent Corporation can draw samples, guidelines have been issued that if density test has been passed, samples should not be drawn. In this case, the density parameters appear to be correct, but yet, the samples were drawn and the results were adverse to the petitioners.

23. Mr. Venkataraman learned counsel for the petitioner in C.R.P. 2868/2001 would submit that if the density reading is correct, then there is no possibility of failing the RON test. These are areas of special knowledge and there is no basis for such an assertion. At this stage, the Court will only have to go by the lab results. The agreement has been typed in the paper book and one of the covenants imposed on the petitioners is not to adulterate the petroleum products. This is clause 10(g) and clause 10(k) is to abide by the prevailing Act and regulations. The respondent has covenanted to supply motor spirit or high speed diesel and other petroleum products provided the dealer faithfully observes and performs his part of the agreement. This is clause 11(c). Clause provides for termination of the license without assigning any reason what so ever by either party giving to the other not less than 90 days notice in writing. Section 13 provides for termination of agreement forthwith if the dealer or licensee is guilty of a breach of any of the covenants and stipulations on their part. Therefore, it is clear that the agreement provides for a unilateral right of termination and in such cases, the Courts have also upheld that the mere fact that there is an unfettered right to terminate the agreement is not by itself

sufficient to hold the contract as void, it was pointed out in these revisions that the petitioners alone had been singled out for such vindictive action and not anyone else. This was denied by the respondents. In the absence of other materials apart from the ipse dixit of the petitioners, it is difficult to hold that the respondents have acted vindictively or maliciously. The question whether the product supplied by the respondents was free from adulteration and whether there was scope for some malpractice, is answered in 2001(1) L.W. 502. The relevant extract is in para 11 supra wherein it was held that Government Corporations are not expected and will not supply sub-standard or adulterated material and it can be presumed that the product supplied by them would be pure and would conform to the standards laid down by Indian Standards Institution.

24. The appellate Court's judgment shows that the learned Judge has considered the matter from all aspects. The learned Judge was prima-facie satisfied that a dealer cannot complain that another opportunity was not given to him for having the samples analysed nor that the lab analysis report was obtained belatedly. As we have already seen, even the judgment of this Court in 2000 (1) M.L.J. 769 is to the effect that the fact that the lab samples were tested belatedly cannot vitiate the result. The Court below has also referred to the decision of the Allahabad High Court that the report of analysis of any laboratory is conclusive, and that it is the duty of the State to ensure that petroleum products are free from adulteration and it should also secure to the public the safety from impure products. Therefore, in these circumstances, the balance of convenience was also held in favour of the respondent. The learned appellate Judge has also considered the public interest in this regard and had therefore refused to grant injunction.

25. Much reliance was placed on the judgment reported in 2001 (3) L.W. 388 (The General Manager, I.B.P. Co. Ltd., and etc. vs. Tmt. Jayanthi Selvarajan, Proprietrix Kavitha Agencies Dealer, I.B.P. Co. Ltd.). In that case, injunction was granted restraining the respondent from terminating the agreement since the irregularity detected was the first instance of such breach. The agreement provided for fine of one lakh and suspension of sale for 45 days in the first instance and termination only in the second instance and therefore, injunction was granted restraining the Corporation from terminating the agreement. The petitioners referred to that decision to stress that this Court had held that samples shall not be drawn if density test was passed. But a reading of that judgment shows that injunction was granted mainly because even at the first instance, the agreement was terminated. The reference to "drawing of samples" is more in the nature of observation. In that case, the dealer had also asked for mandatory injunction to restore supply and that was not granted by the lower appellate Court and it was not even challenged in revision. There the question of restoration of supply was not in issue.

26. In this case, what the petitioners actually want as seen from the prayer is

really a mandatory injunction for continuance of supply of petroleum product. It is pointed out by the learned counsel for the respondent that this cannot be granted since the contract provides for stoppage of supply if the dealer is found guilty of violating the covenants. The learned counsel for the respondent also pointed out that the petitioner in C.R.P. 2516/2001 deserves no indulgence since after the suit was filed, two more suits were filed before the City Civil Court for a similar relief and therefore, such a party is not entitled to any indulgence. It is also seen that the lab report of the petitioner in C.R.P. 2516/2001 shows that there is a wide variation in the RON reading. The RON reading in the petitioner's sample is only 72.8 when the minimum should be 88. Therefore, there is absolutely no merit in this petitioner's case.

27. In C.R.P. 2868/2001, no allegation has been made that they have filed suits for the same relief in several Courts. The reading also shows that there is only a marginal variation in the test result. The RON reading of this petitioner's sample is 85.7 as against the minimum of 88. But here again, it is not possible to grant any relief to the petitioner on the ground of marginal difference since as held by the Division Bench of the Kerala High Court, these are areas where Courts have to apply the strict standards specified by the persons who are equipped to do so. The other ground urged was that even assuming without admitting that the petroleum samples were adulterated, that stock has long been exhausted and there is fresh stock in the outlet now and therefore, there was no justification to stop the supply at this stage. It is not possible to accept this argument since the agreement provides for action being taken by the Corporation if there is adulteration. The terms of the agreement cannot be ignored by saying that since in any event the adulterated product has already been supplied to the general public, no harm will be done now.

28. The second set of judgments relied on deal with the question of injunction. It is seen therefrom that even if two views are possible, sitting in revision, this Court cannot examine the correctness of the exercise of jurisdiction by the Court below as though it were sitting in appeal. If the conclusion arrived at by the Court below does not suffer from perversity or irregularity and is a possible conclusion on the given set of materials, then the exercise of discretion cannot be faulted with.

29. In 1990 (2) M.L.J. S.C. 1 (Wander Ltd. and Another Vs. Antox India (p) Limited), it was held thus: ...the appellate Court will not interfere with the exercise of discretion of the Court of the first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely or where the Court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle... The appellate Court will not be justified in interfering with the discretion under appeal solely on the ground that had it considered the matter at the trial stage, it would have come to a contrary conclusion.

When the various judgments both reported and unreported of this Court have consistently held that the lab reports are conclusive proof and injunction cannot be granted for continuance of supply, it will be improper to set aside the order of the Court below. The C.R.Ps are therefore dismissed. No costs.