

(2011) 03 GUJ CK 0052

In the Gujarat High Court

Case No : Special Civil Application No. 2412 of 2011

Natvarlal and Sons

APPELLANT

Vs

Bharat Petroleum Corporation Ltd. and Another

RESPONDENT

Date of Decision : 14-03-2011

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 226, 299
Specific Relief Act, 1963 — Section 14

Citation : (2011) 3 GLR 2212

Hon'ble Judges : Abhilasha Kunari, J

Bench : Single Bench

Advocate : Naveen Pahwa for M/s. Thakkar Assoc, for the Appellant; Ajay R. Mehta, for the Respondent

Final Decision : Dismissed

Judgement

Smt. Abhilasha Kumari, J.—Rule. Mr. Ajay R. Mehta, learned Advocate, waives service of notice of Rule for the respondents. On the facts, and in the circumstances of the case, and with the consent of the learned Advocates for the respective parties, the petition is being heard and finally decided today.

2. By preferring this petition under Art. 226 of the Constitution of India, the petitioner challenges the communication dated 17-2-2011 of the respondent-Bharat Petroleum Corporation Limited ("the Corporation" for short), whereby, the Dealership agreement between the petitioner and the Corporation has been terminated.

3. Briefly stated, the facts of the case are that the petitioner is a partnership firm running a retail outlet as per the license given to it by the Corporation, for sale of Motor Spirit (M. S.) and/or High Speed Diesel (H.S.D.), Motor Oils, Greases and other Motor Accessories, as the licensee of the Corporation, upon the premises of the retail outlet at Songadh, District : Bhavnagar. A dispensing pump and selling license agreement (dealership agreement) was entered into between the petitioner and the Corporation on 7-7-1978. Since then, the petitioner has been

running and managing the retail outlet. A surprise inspection was conducted by the Officers of the Corporation at the retail outlet of the petitioner on 24-3-2009, in the presence of the representatives of the petitioner. It was found during the inspection that the H.S.D. dispensing unit was delivering 100 ml. short delivery for every 5 liters, in three consecutive checks, which was beyond the permissible limit. It was also found that after switching off and restarting the dispensing unit, no shortfall of delivery was noticed. Due to the above, the Electronic Display Assembly of the said dispensing unit was removed, sealed in an envelope bearing the signatures of the officials of the Corporation and representatives of the petitioner who were present on the premises, and handed over to the Assistant Manager, Sales, Bhavnagar, for further investigation; who in turn, sent the sealed cover to the office of the Corporation in Mumbai. On receipt of the sealed cover containing the Electronic Display Assembly, it was opened in the presence of a Committee and handed over to M.I.D.CO. Limited, the manufacturer thereof, for investigation. The manufacturer submitted a report dated 19-5-2009, stating that the unit has been modified and tampered with electronically to give 100 ml. short delivery for every 5 liters delivered, that the software installed in the Electronic Register Assembly is not the original, and that the microcontroller chip hardware is not the original component as supplied by M.I.D. CO. Accordingly, the Company issued a show-cause notice dated 28-5-2010 to the petitioner, detailing the irregularities found during the inspection, and the findings in the report of the manufacturer. A copy of the said report was also enclosed along with the show-cause notice. The petitioner was asked to show-cause within a period of ten days from receipt thereof, as to why action, including that of termination of the dealership, should not be taken against it for commission of breaches as described in the notice. The petitioner gave a reply to the above notice, on 7-6-2010. The Corporation, after considering the same, found it to be unsatisfactory. It, therefore, took the decision to terminate the dealership agreement with the petitioner, by the impugned communication dated 17-2-2011, leading to the filing of this petition.

4. Mr. Naveen Pahwa, learned Advocate for the petitioner has made lengthy and detailed submissions, the gist of which is as below :

(1) As per the provisions of the Standards of Weights and Measures (Enforcement) Act, 1985 ("the Act" for short), read with the Gujarat Standards of Weights and Measures (Enforcement) Rules, 1990 ("the Rules" for short), the dispensing unit is one of the standard measures for the purpose of measuring quantity of M.S. and H.S.D. The dispensing unit is required to conform to the standards laid down under the Act and the Rules. As per the Rules, it is required to be verified at least once in a year. The seals are required to be applied by the Inspector, Weights and Measures, who is required to give a Verification Certificate in this regard. The dispensing unit cannot be removed, and in case of any problem, the Inspector is required to be called for inspection and for making recalibration thereof. Further, the Marketing Discipline Guidelines, 2005, issued by all the Oil Companies provide that in case of short delivery from the

dispensing unit, the officers of the Weights and Measures Department are to be called, who will then open the seals and recalibrate the equipment. In a case of short delivery, when the seal applied by the Inspector, Weights and Measures, is found intact, the punishment stipulated is suspension of supplies until recalibration is done and no other penalty is stipulated. The petitioner is running the retail outlet since 1978 and the officials of the Corporation are regularly visiting the same and carrying out inspection. During all inspections, the inspection reports have been favorable to the petitioner and the respondent-Corporation has always found the seals applied by the Inspector, Weights and Measures, intact and the delivery of M.S./H.S.D., as per standards.

(2) After conducting the inspection on 24-3-2009, the officers of the respondent-Corporation took away the Electronic Display Assembly from the dispensing unit of H.S.D. after breaking open the seals applied by the Inspector, Weights and Measures, without intimating the said authority in this regard. This action of the officials of the respondent-Corporation is not only contrary to the Act and Rules, but also to the Marketing Discipline Guidelines issued by the Oil Companies.

(3) If the seals applied on the dispensing unit of H.S.D. were found intact, then it was obligatory on the part of the officials of the respondent-Corporation to arrange for recalibration of the dispensing unit in the presence of the Inspector, Weights and Measures. After removing the Electronic Display Assembly of the dispensing unit of H.S.D., the entire retail outlet of the petitioner was closed for a period of 15 days. Thereafter, another dispensing unit for H.S.D. was installed and the petitioner was permitted to restart supplies of M. S. and H.S.D. The show-cause notice was issued after about one year of inspection and the reply given by the petitioner, explaining that no irregularity or malpractice has been committed by him have not been appreciated by the respondent-Corporation. The impugned decision to terminate the Dealership Agreement has been taken without affording an adequate opportunity of hearing to the petitioner.

(4) The report of M.I.D.CO. Limited does not suggest that there is any shortfall in the delivery. On the contrary, it is mentioned in the said report that while conducting the delivery test, the delivery is "as expected", and no abnormalities were found in the unit under inspection. The manufacturer has only inferred that the software installed in the Electronic Register Assembly is not the original supplied by it. The report has been given on the basis of inferences, whims and conjectures and there is no definite evidence of misconduct or malpractice on the part of the petitioner to warrant the extreme step of termination of the Dealership Agreement, in such an arbitrary manner.

(5) The procedure to be followed in case of defects in the dispensing unit has been laid down in Clause 4.3 of the Marketing Discipline Guidelines, 2005, which is that in cases of short delivery, the officials of the Corporation should immediately arrange for recalibration with the help of the Inspector, Weights and Measures. The penal action contemplated by Appendix-I to the Marketing Discipline Guidelines, 2005, is only suspension of supplies until recalibration is

carried out by the Inspector in the presence of officers of the Oil Company. Further, Part-I of the 8th Schedule to the Standards of Weights and Measures General Rules, 1987, defines dispensing pump as a measuring instrument and lays down the procedure for testing a dispensing pump and, provides for sealing and stamping. The Officers of the respondent Corporation could not have broken the seals in the absence of the Inspector, Weights and Measures, contrary to the procedure laid down in the Rules. The Controller of Legal Metrology, Maharashtra, in a communication dated 9-2-1999 to different Oil Companies, in response to a representation made by the Federation of All Maharashtra Petrol Dealers' Association (F.A.M.P.E.D.A.), advised that no checking of accuracy of quantity delivered by the Dispensing Pumps should be undertaken suo motu. The Additional Secretary, Government of India, has also written to the Controller of Legal Metrology, that the measuring unit and the, totalize of the fuel dispensing units shall be verified and sealed only by the Weights and Measures authorities in the State. The respondent-Corporation has acted in total contravention of all provisions of law, Rules, Guidelines and instructions in terminating the Dealership agreement. The entire exercise of taking away the Electronic Register Assembly in the absence of the Inspector, Weights and Measures, undertaken by the officials of the respondent-Corporation, is illegal and bad in law. The Electronic Register Assembly cannot be taken away from the dispensing unit without breaking the seal, which could not have been done in the absence of the Inspector, Weights and Measures.

(6) The impugned decision of termination of Dealership agreement is bad in law as it does not specify which clauses of the agreement have been breached by the petitioner. Even otherwise, the Marketing Discipline Guidelines are binding on all Oil Companies and would override the provisions of the agreement between the parties. As per the said guidelines, recalibration is the only penal action that could have been taken in a case of short delivery where seals are found to be intact. At the most, supplies could have been suspended, but there was no valid reason to terminate the dealership agreement. The said action of the respondent-Corporation, being illegal and arbitrary, deserves to be quashed and set aside.

In support of the above submissions, the learned Advocate for the petitioner has relied upon the following judgments :

- (1) Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others,
- (2) Hindustan Petroleum Corporation Ltd. v. Super Highway Services, 2010 (3) SCC 321

5. The petition has been strongly resisted by Mr. Ajay R. Mehta, learned Counsel for the respondents, by making the following submissions :

(I) The petition involves disputed questions of fact, which cannot be adjudicated by the Court in exercise of its writ jurisdiction. The prayers made by the petitioner, apart from that of setting aside the termination of dealership, are also for enforcement of the contract between the petitioner and the respondent-

Corporation, for which the petitioner could not have invoked the writ jurisdiction of the Court. The petitioner has an alternative remedy of approaching the Civil Court for redressal of its grievances, as the dispute between the petitioner and the respondent-Corporation is a private one within the realm of contract and does not fall in the domain of public law. Even otherwise, the powers of the Court while exercising judicial review in contractual matters are limited, except in cases of mala fides or arbitrariness, which ingredients are not present in the instant case, therefore, the petition deserves dismissal on this ground alone.

(II) During the surprise inspection carried out on 24-3-2009, it was found that the dispensing unit for H.S.D. was delivering 100 ml. short for every 5 liters in three consecutive checks. After switching it off and restarting it, no short delivery was noticed, indicating that the microcontroller chip attached to the Electronic Register Assembly was not the original component supplied by the manufacturer of the dispensing unit, clearly evidencing foul play by the petitioner. The microcontroller chip attached in the Electronic Register Assembly was manipulated/changed and the programming of the microcontroller chip was done by the petitioner in a manner that two types of delivery could be obtained from the same dispensing unit. One mode gave short delivery, and after switching off and restarting the dispensing unit, the delivery was changed to normal default mode. In this manner, innocent customers were being cheated and defrauded as they did not get the correct delivery of fuel. The report of M.I.D. CO. Limited, who is the manufacturer of the dispensing unit, substantiates these aspects. It is clearly stated in the said report that the software installed in the Electronic Register Assembly Unit and the microcontroller chip hardware is not the original supplied by them.

(III) The contentions and allegations made by the petitioner qua the Weights and Measures Act and Rules are totally baseless and deliberately made to mislead the Court. The action of termination of the Dealership was taken by the respondent-Corporation under the Dealership Agreement executed between the parties and not under any provisions of the Weights and Measures Act or Rules made hereunder. In any case, none of the provisions of the said Act or Rules are applicable in the present case, therefore, reference thereto in the context of the facts of the present case, is not relevant. The Electronic Register Assembly, which has been found to be tampered, was not sealed by the authorities under the said Act and Rules. The Electronic Register Assembly Unit can be removed without, in any way, affecting the seals applied by the Inspector, Weights and Measures. Hence, there is absolutely no contravention of any provisions of the Act and Rules on the part of the respondent-Corporation, nor was any such procedure, as referred to by the petitioner, required to be followed in the instant case.

(IV) In the reply dated 7-6-2010, filed by the petitioner to the show-cause notice dated 28-5-2010, no justifiable cause for short delivery has been pointed out. As the said reply was found to be unsatisfactory, the dealership agreement has been

terminated, which action is in line with the terms and conditions of the contract entered into between the parties. The petitioner has been afforded adequate opportunity of hearing which has been availed of by him, therefore, no breach of the principles of natural justice has been committed, as alleged.

(V) The petitioner has been found to have indulged in malpractice which is against the covenants of the contract and is prejudicial to the interest and good name of the Company and its product, apart from cheating innocent customers. The relevant clauses of the contract that have been breached by the petitioner have been clearly mentioned in the show-cause notice and the order of termination of dealership. The petitioner is an old and experienced dealer and is fully aware of, and understands, every aspect and clause of the contract as well as the consequences of breach thereof. It does not lie in the mouth of the petitioner to contend that it is not mentioned in the communication terminating the dealership which clause of the agreement has been breached. As such, there is a breach of all the Clauses mentioned in the communication, especially, Clause 13(a)(vii) and Clause 13(a)(viii). The said clauses have not been reproduced as an empty formality but have been mentioned as a breach thereof has been committed by the petitioner.

(VI) After the surprise inspection and removal of the Electronic Register Assembly from the dispensing unit for H.S.D., supplies were suspended to the retail outlet which remained closed for 15 days, as admitted by the petitioner. It is not as though the action of termination has been taken instantly by the respondent-Corporation. The dispensing unit was replaced and supplies were permitted to restart, and this situation continued till the issuance of the show-cause notice upon receipt of the report of M.I.D.CO. There is no question of recalibration being done and nor was there any requirement of calling the Inspector, Weights and Measures, as the seal applied by the said authority was intact. The Electronic display assembly can be removed without breaking the seal, as has been done in the present case by the officials of the respondent-Corporation. Therefore, there is no contravention of any provisions of the Act, Rules or guidelines, as alleged by the petitioner. In the reply to the show-cause notice the petitioner has not alleged that the seals were broken or any provisions of the Act, Rules or Guidelines had been contravened. It is only before this Court that a new case is being put up by the petitioner, which is far from the factual position. As there is a clear breach of contract on the part of the petitioner, as substantiated by the report of M.I.D. CO. Limited, the respondent-Corporation is well within its rights in terminating the Dealership Agreement, after affording due opportunity to the petitioner. The petitioner has been found to be indulging in malpractice, which constitutes a violation of the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2005, therefore, is not entitled for grant of any relief, much less equitable relief, in exercise of the extraordinary jurisdiction of the Court.

In support of the above submissions, the learned Advocate for the respondents

has placed reliance upon the following judgments :

(I) Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums,

(II) Tata Cellular Vs. Union of India,

(III) Jagdish Mandal v. State of Orissa, 2007 (14) SCC 517

(IV) Mrs. Sanjana M. Wig Vs. Hindustan Petro Corporation Ltd.,

6. In rejoinder, the learned Advocate for the petitioner has reiterated the submissions made by him earlier, by further emphasizing that in cases of short delivery, as per the Marketing Discipline Guidelines, the Inspector of Weights and Measures is required to open the seals and recalibrate equipments. These Guidelines are binding on the parties and would override the agreement between the petitioner and respondent-Corporation. The extreme action of termination of the Dealership Agreement could not have been resorted to, as recalibration is the only penal action that can be taken in case the seals are found to be intact. If the seals were found to be intact, it goes to show that there was no tampering or malpractice committed by the petitioner.

7. I have heard the learned Counsel for the respective parties, perused the averments made in the petition, the affidavit-in-reply filed by the respondent-Corporation, and other material on record.

8. It would be relevant, first, to deal with the factual aspect, before examining the legal issues involved in the case. The Dealership Agreement dated 7-7-1978 entered into between the petitioner and respondent-Corporation incorporates the following salient clauses :

4. The said premises and the said facilities shall at all times during the continuance of this license remain the absolute property and in sole possession of the Company and no part of the said facilities shall be removed by the licensees nor shall the position of any constituent part thereof or of the said premises be changed or altered without the previous written consent of the Company.

...

7. (a) The licensees shall be responsible to see that full and proper measure is delivered from the pumps installed by the Company on the said premises and shall have no recourse against the Company for any loss, damage, cost, charge or expenses which the licensees may at any time suffer by reason of the pumps delivering wrong measure or by reason of the Motor Spirit or H.S.D. becoming contaminated in any way. If at any time the pumps shall be delivering wrong measure or shall develop any other defect, the licensees shall forthwith report such defect in writing to the Company and subject to sub-clause (b) hereunder shall not operate the defective pump or pumps further until the defect shall have been remedied.

7. (b) xxx xxx xxx

7. (c) The licensees shall in their own interest and as often as may be required by the Company checks the accuracy of the pump and shall also provide facilities for the Company's staff for doing so whenever required.

...

9. Neither the licensees nor the licensees' servants or agents shall interfere in any way with the working parts of the pumps or other equipment provided by the Company.

10. The licensees hereby covenant and agree with the Company as follows :

10. (a) to 10. (j) xxx xxx xxx

10. (k) To abide by the Petroleum Act, 1934 and the Rules framed hereunder for the time-being in force as also any other laws, rules or regulations either of the Government or of any local body as may be in force.

10. (1) to 10. (n) xxx xxx xxx

10. (o) At all times and from time to time during the currency of this license to give adequate facilities to the Company, its officers, agents and servants to inspect and test the accuracy and general working of the pumps and other equipment upon the said premises and to investigate the conduct and management by the licensees of the said facilities, and afford to the Company, its officers, agents and servants all proper and necessary assistance and facilities for conducting such inspection and investigation and for maintenance of the buildings and equipment.

...

12. This license may be terminated without assigning any reason whatsoever by either party giving to the other not less than ninety days' notice in writing to expire at any time of its intention to terminate it and upon the expiration of any such notice this license shall stand cancelled and revoked. The requisite period of notice may be reduced or waived by mutual consent.

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 :-

(i) to (vi) xxx xxx xxx

(vii) If the licensees shall be guilty of a breach of any of the covenants and stipulations on their part contained in this agreement;

(viii) If the licensees shall commit or suffer to be committed any act which in the opinion of the Marketing Manager 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 licensees.

...

9. From the above, it is clear that as per Clause 12, the license can be terminated without assigning any reason by any party by giving to the other party, notice of 90 days in writing, which period can be waived or reduced by mutual consent. This Clause gives the right to either of the parties to revoke the agreement, if such party so intends. However, in the present case, Clause 12 has evidently not been invoked by the respondent-Corporation while terminating the dealership agreement. Rather, the agreement has been terminated under Clause 13(a) which confers upon the respondent-Corporation, the specific power to terminate the agreement at any time, upon happening of any event as specified in Clauses 13(a)(i) to 13(a)(viii). Clearly, as stated in the impugned communication, the respondents have invoked Clauses 13(a)(vii) and 13(a)(viii) while terminating the agreement.

10. As per Clause 7(a), it is the responsibility of the licensee (petitioner) to ensure that full and proper measure is delivered from the pumps installed by the Corporation. During the inspection carried out by the officials of the respondent-Corporation, it was found that the dispensing unit for H.S.D. at the retail outlet of the petitioner was delivering short by 100 ml. for every 5 liters. This would constitute a breach of the said clause which stipulates that delivery of full and proper measure is the responsibility of the licensee. Clause 9 provides that neither the licensee nor its servants or agents shall interfere, in any way, with the working parts of the pumps or other equipments provided by the Company. The dispensing unit is an equipment provided by the Corporation or Oil Company concerned (in this case, by the respondents). Upon finding the short delivery, the Electronic display assembly was removed from the dispensing unit and sent for investigation and examination to its manufacturer, M.I.D.CO. Limited. The report of the manufacturer, dated 19-5-2009, reads thus :

...As per your requirement, we are responding to the letter in three Sections :

1. We have studied the joint observations/behavior report from site, submitted by you with reference to the said unit. It is clearly indicated that the said unit has been modified to give 100 ml. short delivery for every 5 liters delivered. Since, after switching off the power to the unit and then turning it on resulted in a change in the behavior of the unit, it can be inferred that the unit is modified/tampered electronically to work in the default mode at power on, where it dispenses without any discrepancies. There seems to be some method for activating the other mode where in the short deliveries can be given, the means of activation of this mode are not indicated.

2. We inspected the said unit in your presence for any extra fittings or hardware such as an additional unauthorized card or circuit, but observed that no such abnormalities with the unit.

3. The unit was further tested by us for functional compliance, the results of which have been attached here for your reference. The report indicates abnormal behavior at one stage during flash mode and also when displaying indications for sensor failure and low battery.

Since, the functional test of the unit has failed, we conclude that the software installed in the E.R.A. unit is not the original supplied by M.I.D.CO.

...

Testing procedure :

We carried out various test cases for testing the received.

Seal sticker from M.I.D.CO. or B.P.C.L. and program version sticker from M.I.D.CO. found missing. We found the unit functioning abnormally in certain conditions as compared to our standard norms. Detailed report is attached for your reference.

Conclusion :

After detailed study of the E.R.A., from D.U. model 981 Sr. No. 9B0078 received from B.P.C.L., we conclude that the microcontroller chip hardware is not the original component as supplied by M.I.D.CO.

11. The finding in the said report, that the unit has been modified to give 100 ml. short delivery for every 5 liters and that the software installed in the Electronic Register Assembly is not the original supplied by M.I.D.CO. and that the microcontroller chip hardware is also not the original component as supplied by the manufacturer, would clearly constitute a breach of Clause 9 of the agreement. As the short delivery, which is stated to be on account of tampering/ interfering with the equipment provided by the Corporation, constituted breach of the covenants and stipulations in the agreements on the part of the petitioner, and the same being prejudicial to the interest and good name, of the Company (respondents), the dealership agreement has been terminated by specifically invoking Clauses 13(a), 13(a)(vii) and 13(a)(viii) of the agreement. This is evident from a reading of the show-cause notice dated 28-5-2010 as well as the impugned communication dated 17-2-2011, whereby, the Dealership Agreement has been terminated. The contention of the learned Advocate for the petitioner that it is not specifically mentioned which Clause of the agreement has been breached is, therefore, untenable. The petitioner is holding the dealership with effect from 17-7-1978 and is sufficiently experienced and aware of all relevant aspects regarding the Dealership Agreement, and consequences, of breach thereof. The show-cause notice and communication terminating the Dealership Agreement are detailed and sufficiently clear, therefore, this contention advanced by the learned Advocate for the petitioner cannot be accepted.

12. The main foundation upon which the case of the petitioner rests, as stated in the petition and submitted by the learned Advocate for the petitioner, is that the

respondents have flouted the provisions of the Act, Rules and Marketing Discipline Guidelines by breaking open the seals applied on the dispensing unit for H.S.D. by the Inspector, Weights and Measures, while removing the Electronic Register Assembly from the said dispensing unit. According to the petitioner, this action is in contravention of the provisions of the Weights and Measures Act, Rules and Marketing Discipline Guidelines. This aspect has been repeatedly argued by the learned Advocate for the petitioner during the course of hearing. There is an averment to this effect in Paragraph 2.13 of the petition, as also in Grounds (b) and (c). In contradiction thereto, it is stated in Paragraph 2.15 that when the seals applied by the Weights and Measures Department were found to be intact, it was obligatory on the part of the respondent-Corporation to call the Inspector, Weights and Measures, and arrange for recalibration, and till such time as that is done, the only recourse would have been to suspend supplies. In ground (a), it is specifically stated that the seal applied by the Inspector, Weights and Measures, was found to be intact. In the reply to the show-cause notice dated 7-6-2010 given by the petitioner, there is not even a whisper regarding the breaking of seals by the respondent-Corporation or of breach of any provisions of the Act, Rules or Guidelines. On the contrary, in the said reply, there is a specific assertion by the petitioner that the seals applied by the Corporation and the authorities of the Weights and Measures department were not tampered with and were intact. It is the case of the petitioner itself, that on finding short delivery, the Electronic Display Assembly was removed from the dispensing unit and supplies were suspended to the retail outlet, which remained closed for 15 days. After the respondent-Corporation installed another dispensing unit for H.S.D. at the retail outlet, the petitioner was permitted to restart the supply of H.S.D. and M.S. The outlet continued to function until the show-cause notice was issued by the respondent-Corporation, after receipt of the report of the testing of the Electronic Register Assembly of the dispensing unit dated 19-5-2009. In the said report, it is clearly noted that the unit is modified and tampered with electronically to give 100 ml. short delivery for every 5 liters delivered. The report makes it evident that upon testing, the manufacturer of the Electronic Register Assembly Unit not only found that the Unit has been electronically modified and tampered with, so as to give 100 ml. short delivery for every 5 liters, but also that the software and hardware in the said unit were not the original as supplied by M.I.D.CO. The learned Advocate for the petitioner has attempted to show from the test report that the results showed that the delivery was "as expected" and was "O.K.". However, such selective reading of certain parts of the test report which requires technical expertise to understand, cannot be accepted, especially when the report of testing of the Electronic Register Assembly dated 19-5-2009 has summed up the entire result of testing and states in clear terms that the unit has been modified and tampered with electronically to give short delivery. It is specifically stated in the said report that since the functional test of the said unit has failed, it is concluded that the software installed in the Electronic Register Assembly and the microcontroller chip hardware is not the original component, as supplied by M.I.D.CO.

13. The manufacture of the Electronic Register Assembly, M.I.D.CO. Limited, is an independent entity. It is not the case of the petitioner that it is not technically qualified to investigate and test the equipment manufactured by it. There is no reason, therefore, not to lend credence to the report of the investigation conducted by the manufacturer. The contention of the learned Advocate for the petitioner that the report is based upon surmises and conjectures lacks force in the face of the detailed investigation carried out by the manufacturer and the conclusion arrived at in the report. There is no reason to disbelieve the finding that the software installed in the Electronic Register Assembly and the microcontroller chip hardware are not the original supplied by M.I.D.CO., as the manufacturer of the unit would be in a better position to know whether the equipment has been manufactured by it, or not. Extensive tests have been carried out before the report has been made. This Court, therefore, is unable to agree with the arguments of the learned Advocate for the petitioner that the report is based upon inferences, surmises or conjectures.

14. Insofar as the seals applied on the dispensing unit are concerned, it is the specific case of the respondent-Corporation that the Electronic Display Assembly can be removed from the dispensing unit without breaking the seals. In the present case, it is stated in the affidavit-in-reply filed by the respondent-Corporation that the Electronic Register Assembly was not sealed and was removed without affecting the seals applied by the authorities. In fact, this is also the defense of the petitioner in its reply to the show-cause notice. As stated in the said reply, the seals were not tampered with and were intact. This being the position, initially, supplies were suspended to the retail outlet of the petitioner, which remained closed for 15 days. It is not disputed that thereafter the dispensing unit for H.S.D. was replaced and the retail outlet was permitted to function after restart of supplies.

15. The learned Advocate for the petitioner has stressed upon Clause 4.3 of Chapter 4 of the Marketing Discipline Guidelines, 2005, which is reproduced herein below :

4.3. Rectification of Defects in Dispensing Units/Pipeline/Tanks

(a) Dispensing units

(b) Calibration

If the pump is delivering short/excess, the Company's Maintenance Representative/Dealer should immediately arrange for recalibration with the help of the Weights & Measures Inspector in the presence of any officer of the Oil Company. In case the Weights & Measures seal is found to be broken, the Company's Maintenance Representative shall inform the concerned Company Official for further action and incorporate the same in the pump maintenance report which should be duly signed by the dealer as well....

16. It has further been argued that penal action could be taken only in

consonance with Appendix 1 to the Marketing Discipline Guidelines which stipulate that in cases of short delivery, sales and supplies should be suspended until recalibration is carried out by the Weights and Measures Department in presence of the officer of the Oil Company. Clause 4.3 deals with rectification of defects in dispensing units/Pipeline/Tanks. The present case is not one where any defect has been found in the dispensing unit. In the communication dated 17-2-2011, it is specifically stated that the petitioner has never intimated the Corporation regarding any defects in the dispensing unit resulting in short delivery.

Further, the second part of Clause 4.3 is applicable only when the seal applied by the Weights and Measures Department is found to be broken. In the present case, from the assertion of the respondent-Corporation as well as that of the petitioner in the reply to the show-cause notice and in certain Paragraphs of the petition, it appears that the seal applied on the dispensing unit by the concerned authority was intact. This being so, there would be no requirement of calling the Inspector, Weights and Measures, as per Clause 4.3 of the Guidelines. As per procedure envisaged in the Marketing Discipline Guidelines, the supplies to the retail outlet were suspended until the dispensing unit was replaced after which supplies were restarted. It is only after the report of the investigation of the Electronic Register Assembly was received that the show-cause notice dated 28-5-2010 was issued to the petitioner. After considering the reply of the petitioner dated 7-6-2010, the agreement was terminated by the impugned communication dated 17-2-2011. From the sequence of events, it is clear that the action of termination of the Dealership Agreement was not taken in the first instance, or in haste. The procedure, as envisaged in the Marketing Discipline Guidelines and Appendix thereto, was followed and supplies were suspended till the dispensing unit was replaced. The petitioner was permitted to operate the retail outlet for almost two years after the inspection took place.

17. The learned Advocate for the petitioner has strenuously argued that the seal was broken and the Electronic Display Assembly was removed by breaking the seal, which could not have been done in the absence of the Inspector, Weights and Measures. This line of argument is not supported by the record, especially the reply to the show-cause notice given by the petitioner itself. Moreover, as pointed out hereinabove, it is averred in the petition itself, that the seals were intact, though contrary assertions have been made in Paragraph 2.13. From perusal of the entire material on record, the argument of the learned Advocate for the petitioner that the seals were broken in the absence of the concerned authority, appears to be an afterthought, designed to bring in the aspect of contravention of the provisions of the Act and Rules. This attempt is not at all convincing. On the contrary, the petitioner cannot be permitted to approbate and reprobate in the same breath, as it suits its purpose. Consequently, this line of argument can hardly be appreciated by the Court. There can be no dispute regarding the provisions of the Act, Rules and Marketing Discipline Guidelines. However, in the present case, as no seals appear to have been broken and as the

petitioner itself has asserted in the reply to the show-cause, notice that the seals were intact, the provisions of the Act or Rules would not be applicable.

18. The present case pertains to contractual obligations of the parties under the dealership agreement executed between them. The terms and conditions of the contract would be binding upon the parties and breach thereof would attract the consequences as specified in the agreement. The assertion of the learned Advocate for the petitioner that the provisions of the Marketing Discipline Rules, 2005, would override the terms of contract, as the said guidelines are binding upon the parties, cannot, therefore, be accepted. The guidelines apply to all registered outlets of Oil Marketing Companies, whereas the dealership agreement is a specific contract entered into between the petitioner and the respondent-Corporation. The two do not stand on the same footing or cover the same field. The Marketing Discipline Guidelines for Petrol and Diesel retail outlet for R.O./S.K.O. dealerships of Public Sector Oil Marketing Companies have been made to facilitate the marketing of petroleum products by the dealers of the Public Sector Oil Marketing Companies on the principles of highest business ethics and excellent customer service. The said guidelines delineate the duties and responsibilities of the Oil Companies, provide for appropriate disciplinary action and also provide for taking punitive action against dealers found indulging in irregularities/ malpractices. The Dealership Agreement entered into between the petitioner and the respondent-Corporation is a contract whereby the parties have voluntarily agreed to abide by the terms and conditions stipulated therein, including the condition regarding termination of the Dealership Agreement upon happening of certain events. The rights and obligations under the two would also be different. The guidelines are general in nature and the contract is a binding covenant between the parties who have voluntarily entered into it. The Dealership Agreement has been terminated for breaches of the clauses of the agreement committed by the petitioner and the Marketing Discipline guidelines do not, in any manner, prevent the respondent-Corporation in doing so, as no bar to this effect is contained in the said guidelines.

19. A submission has also been made that the Controller of Legal Metrology, in his letter dated 9-2-1999 to all Oil Companies in response to the representation of the Federation of All Maharashtra Petrol Dealers' Association (F.A.M.P.E.D.A.), has advised that Officers of Oil Companies could not carry out checking of the accuracy of quantity delivered by the dispensing pumps suo motu, as the test of such delivery cannot be said to be authentic or accurate and penalties cannot be levied as a result of such checking; which advice has been ignored by the respondent-Corporation. This communication, however, has to be seen in the context in which the representation was made by F.A.M.P.E.D.A. The said representation is annexed at Annexure-C to the petition, and perusal thereof reveals that the subject-matter pertained to internal rivalry amongst Oil Companies due to which, Officials of one Company would raid petrol pumps of dealers of other Companies, to check the accuracy of the fuel quantity dispensed. The letter dated 9-2-1999, therefore, is in response to the above representation

of petrol dealers of Maharashtra and can be read only in the context of the said representation. It is not the case of the petitioner that a situation, such as that contemplated in the representation, namely that different Oil Companies are raiding the premises of the petitioner, has arisen. Therefore, the letter dated 9-2-1999 cannot be read as an embargo upon the respondent-Corporation to check the delivery of fuel in the retail outlet of its own dealer. Further, Clause-10(o) of the dealership agreement gives the right to the respondent-Corporation and its officers and agents to inspect and test the accuracy and general working of the pumps and other equipment upon the premises. This would mean that the officials of the respondent-Corporation can carry out inspection of the quantity of fuel dispensed from the dispensing unit installed at the retail outlet.

20. The learned Advocate for the petitioner has also pressed into service, an undated letter, annexed at running page 44 of the paper book, addressed by one "Santosh Nautiyal, Additional Secretary", to the Controller of Legal Metrology, All States and Union Territories. It has been submitted that in the said letter, it is stated that the measuring unit and totalize of the fuel dispensing units shall be verified and sealed only by the Weights and Measures Authorities in the States. This document has been strongly objected to by the learned Advocate for the respondent-Corporation on the ground that a copy thereof has not been supplied to him. It is noticed that this letter is undated and does not disclose the proper designation of its author or by which Department/Ministry it has been issued, and in what context. The learned Advocate for the petitioner has submitted that the same has been downloaded from a Website on the Internet. Though, much reliance has been placed upon the said communication, it does not appear to have any relevance or bearing in the facts of the present case.

21. As regards the submission advanced by the learned Advocate for the petitioner that the dispensing units were installed in the year 1978, the same has been refuted in the affidavit-in-reply. Upon instructions from the official of the respondent-Corporation, the learned Advocate for the respondent-Corporation has submitted that in the year 1978, there were no electronic dispensing units, as the earlier ones were mechanically operated. The dispensing unit in the retail outlet of the petitioner has been installed in the year 1999 and the petitioner has not complained of any defect in its functioning, to the respondent-Corporation. Had there been any defect in the dispensing unit, as per the terms of the agreement, the petitioner was bound to report the same to the respondent-Corporation immediately, which could then have taken steps to rectify the same.

22. At this stage, it would be appropriate to deal with the legal issues involved in the present case. The Dealership Agreement dated 7-7-1978 entered into between the petitioner and the respondent-Corporation does not contain an arbitration clause. It has been submitted by the learned Advocate for the respondents that as the adjudication of the case would involve disputed questions of fact, this Court may not entertain the petition. The learned Advocate for the petitioner has placed reliance upon *Harbanslal Sahnia v. Indian Oil Corpn.*

Ltd. (supra), wherein the Supreme Court has held as below :

7. 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, 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.

In the present case, the petition has been filed for enforcement of the fundamental rights of the petitioner, especially the right to livelihood. It is only after entertaining the petitioner can the Court come to the conclusion whether any fundamental rights of the petitioner have been infringed, or not.

23. In *Sanjana M. Wig (Ms.) v. Hindustan Petroleum Corpn. Ltd.* (supra), relied upon by the learned Advocate for the respondents, the Supreme Court has held in Paragraph 18 as below :

It may be true that in a given case when an action of the party is de hors the terms and conditions contained in an agreement as also beyond the scope and ambit of domestic forum created therefore, the writ petition may be held to be maintainable; but indisputably therefore such a case has to be made out. It may also be true, as has been held by this Court in *Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others*, and *E. Venkatakrishna Vs. Indian Oil Corporation and Another*, that the arbitrator may not have, the requisite jurisdiction to direct restoration of distributorship having regard to the provisions contained in Sec. 14 of the Specific Relief Act, 1963; but while 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.

(Emphasis supplied)

24. In *Noble Resources Ltd. Vs. State of Orissa and Another*, the Supreme Court has held that :

14. Respondent No. 2 is a "State" within the meaning of Art. 12 of the Constitution of India. Its conduct in all fields including a contract is expected to be fair and reasonable. It was not supposed to act arbitrarily, capriciously or whimsically.

15. It is trite that if an action on the part of the State is violative the Equality clause contained in Art. 14 of the Constitution of India, a writ petition would be maintainable even in the contractual field. A distinction indisputably must be made between a matter which is at the threshold of a contract and a breach of contract; whereas in the former the Court's scrutiny would be more intrusive, in the latter, the Court may not ordinarily exercise its discretionary jurisdiction of judicial review, unless it is found to be violative of Art. 14 of the Constitution. While exercising contractual powers also, the Government bodies may be subjected to judicial review in order to prevent arbitrariness or favoritism on its part. Indisputably, inherent limitations exist, but it would not be correct to opine that under no circumstances a writ will lie only because it involves a contractual matter.

16. This dicta of law was laid down by this Court as far back in 1977, wherein this Court in Radhakrishna Agarwal and Others Vs. State of Bihar and Others, accepted the division of types of cases made by the Patna High Court in which breaches of alleged obligation by the State or its agents could be set up. It reads as under :

(i) Where a petitioner makes a grievance of breach of promise on the part of the State in cases 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 Art. 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 hereunder 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.

25. Further, in ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, , the Supreme Court has held that :

A writ petition involving serious disputed questions of facts which requires consideration of evidence which is not on record, will not normally be entertained by a Court in the exercise of its jurisdiction under Art. 226 of the Constitution, but there is no absolute rule that in all cases involving disputed questions of fact the parties should be relegated to a civil suit. It has even been held in Smt. Gunwant Kaur and Others Vs. Municipal Committee, Bhatinda and Others, that in a writ petition, if the facts require, oral evidence can be taken. This clearly shows

that in an appropriate case, the writ Court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.

(Paras 16, 19, 27 and 51)

26. In light of the above principles of law, in the factual matrix of the present case, there do not appear to be any seriously disputed questions of fact. The only area sought to be disputed by the learned Advocate for the petitioner is regarding breaking of seals. This, too, cannot actually be said to be a disputed question of fact, as the material on record clearly indicates that the petitioner has itself maintained in the reply to the show-cause notice that the seals applied by the Weights and Measures Department on the dispensing unit were not tampered with and were intact. Certain assertions to the contrary have been made by the learned Advocate for the petitioner, based upon averments made in some Paragraphs of the petition. As already noted hereinabove, there are averments in the petition itself, wherein, it is clearly stated that the seals were found to be intact. The dispute, if it can be called one, appears to have been raised as an afterthought, at the time of filing the petition and advancing arguments before this Court.

27. As laid down by the Supreme Court in *Sanjana M. Wig (Ms.) v. Hindustan Petroleum Corpn. Ltd.* (supra), a writ petition can be entertained when it involves a public character or a question arising out of public law functions on the part of the respondent. The dispensation of petroleum products is a function that necessitates dealings with the general public. Maintaining accuracy of measure of the petroleum products dispensed through the retail outlets of the respondent-Corporation would involve questions of general public interest, as it is the common man who will be availing of the facilities offered and purchasing fuel and other petroleum products from such outlets.

28. This Court is of the view that as there are no seriously disputed questions of fact that require appreciation of evidence, and as issues affecting the public good are involved, there can be no bar to entertaining the petition, keeping in mind the permissible parameters of judicial review.

29. The learned Advocate for the petitioner has placed reliance on *Hindustan Petroleum Corporation Ltd. v. Super Highway Services* (supra), by submitting that, as termination of a dealership has serious consequences, there is a need to strictly adhere to the Marketing Discipline Guidelines. Reliance has been placed upon Paragraph 31 of the said judgment wherein the Supreme Court has held that cancellation of the dealership agreement of a party is a serious business and in order to justify such action the authority concerned has to act fairly and in complete adherence to the Rule/Guidelines framed for the said purpose. In that case, it was found by the Supreme Court, that non-service of notice to the aggrieved person before termination of his dealership agreement offended the

well-established principle that no person should be condemned unheard. The Apex Court concluded that the termination of the dealership agreement of the respondent was arbitrary, illegal and in violation of the principles of natural justice, as there was no admissible evidence to prove service of notice upon the respondent, or refusal thereof.

Though, the principles of law enunciated in the above judgment cannot be disputed on the facts obtaining in that particular case, however, they will not apply to the case in hand, where the petitioner has been issued a show-cause notice to which it has given a reply. Only after consideration of the reply has the dealership agreement been terminated. As noted earlier, Clause 13(a) of the agreement empowers the respondent-Corporation to terminate the sealer ship agreement upon happening of any of the events stipulated therein. The action of terminating the Dealership Agreement has been taken by invoking Clause 13(a), upon happening of the events envisaged in Clauses 13(a)(vii) and 13(a)(viii). While doing so, the reply of the petitioner has been dealt with, point-by-point, in the impugned communication dated 17-2-2011. From the material on record, it is clear that adequate opportunity of hearing has been afforded to the petitioner.

30. The learned Advocate for the respondents has relied upon *Tata Cellular v. Union of India* (supra), wherein, the Supreme Court has laid down certain principles for exercise of the power of judicial review, as under :

94. The principles deducible from the above are :-

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made.
- (3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
- (5) The Government must have freedom of contract. In other words, a fair-play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of *Wednesbury* principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
- (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure....

31. Referring to Jagdish Mandal v. State of Orissa (supra), especially Paragraph 22 thereof, the Supreme Court has held as below :

22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, Courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a Civil Court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade Courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succor to thousands and millions and may increase the project cost manifold. Therefore, a Court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the Court can say : "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Art. 226. Cases involving black-listing or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/ shops, grant of licenses, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

32. Keeping in view the above principles of law enunciated by the Supreme Court in the context of the facts of the present case, this Court is of the view that the action of termination of the dealership agreement is not vitiated by mala fides or favoritism. Nor does the decision suffer from arbitrariness, irrationality or unreasonableness of a nature that no responsible authority acting reasonably

and in accordance with relevant law could have arrived at. Further, the decision has been taken not only upon breach of contractual obligations but also involves questions of public interest.

33. The impugned communication terminating the dealership contains detailed and cogent reasons, and has been taken after examining the explanation given by the petitioner vide his reply to the show-cause notice.

34. In *Hindustan Petroleum Corpn. Ltd. v. M/s. Pinkcity Midway Petroleum* (supra), the Supreme Court was dealing with a case where the dealer had indulged in short supply and there was tampering of seals. The dealership agreement empowered the Company to stop supplies in case of breach of any clause of the agreement. Dealing with Clause 30 of the dealership agreement, which provided for stoppage or suspension of supplies, the Supreme Court held as below :

22. A perusal of this Clause shows that if the dealer commits a default in complying with the obligations enumerated in Clause 20 of the agreement, the appellant is entitled to stop or suspend supply of its petroleum products to such a dealer without prejudice to other remedies available under the agreement. This right of the appellant to take action against an erring dealer under the terms of the agreement is de hors the proceedings that may be available to be initiated against an erring dealer under the provisions of various other enactments referred to in Clause 20 of the said agreement including under the provisions of the 1985 Act. This right of the Corporation to suspend the supply of petroleum products to an erring dealer is a right exercised under the terms of the contract and is independent of the statutory provisions of the various Acts enumerated in Clause 20 of the agreement. The Courts below, in our opinion, have committed an error by misreading the terms of the contract when they came to the conclusion that the only remedy available as against a misconduct committed by an erring dealer in regard to short-supply and tampering with the seals lies under the provisions of the 1985 Act. The Courts below have failed to notice that when a dealer short-supplies or tampers with the seal, apart from the statutory violation, he also commits a misconduct under Clause 20 of the agreement in regard to which the appellant is entitled to invoke Clause 30 of the agreement to stop supply of petroleum products to such dealer. The power conferred under the agreement does not in any manner conflict with the statutory power under the 1985 Act nor does the prescribed procedure under the 1985 Act in regard to search and seizure and prosecution apply to the power of the appellant to suspend the supply of its petroleum products to an erring dealer. The power exercised by the appellant in such a situation is a Contractual power under the agreement and not a statutory one under the 1985 Act. The existence of dual procedure; one under the criminal law and the other under the contractual law is a well-accepted legal phenomenon in the Indian jurisprudence.

(Emphasis supplied)

Though, the Supreme Court was dealing with the case of short supply where seals were broken, the observations made hereinabove are pertinent and squarely apply to the facts of the present case. As stated by the Apex Court, the power conferred by the Dealership Agreement does not conflict with any statutory provisions under the Act. It is a contractual power and can be exercised when any event takes place that justifies its invocation, as in the present case.

35. Summing up the factual and legal position as discussed hereinabove, the following aspects emerge clearly :

- On the date of the inspection, it was found that there was a short delivery of 100 ml. of H.S.D. from the dispensing unit at the retail outlet of the petitioner for every 5 liters.
- The petitioner had not made any complaint regarding any defect in the dispensing unit for H.S.D. at the retail outlet.
- In the reply to the show-cause notice given by the petitioner on 7-6-2010, it is stated that the seals applied by the Corporation and the Weights and Measures Department were not tampered with and were intact. This is also stated in certain Paragraphs of the petition.
- The report dated 19-5-2009 of the manufacturer of the Electronic Register Assembly Unit indicates that the said unit was modified to give 100 ml. short delivery for every 5 liters delivered. As per the said report, after switching off the power to the unit and then turning it on, there was a change in behavior of the unit. It was, therefore, concluded by the manufacturer that the unit is modified and tampered with electronically. As per the said report, the software installed in the Electronic Register Assembly Unit is not the original supplied by M.I.D.CO. After carrying out various tests, it was further concluded that the microcontroller chip hardware is not the original, as supplied by M.I.D.CO. No evidence to the contrary has been placed on record by the petitioner. It has not been denied that it is not a case of short delivery, even in the reply to the show-cause notice.
- As per the terms of the agreement, the petitioner is bound to abide by the Petroleum Act, 1934, and the Rules framed hereunder. The act of short delivery beyond permissible limits, as in the case of the petitioner, is a malpractice as defined under the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2005. The manipulation/alteration of the microcontroller chip attached to the Electronic Register Assembly of the aforesaid dispensing unit, in all probability, could only have been done by interfering with the working parts of the pumps and other equipments provided by the Corporation, constituting a violation of Clause 9 of the Agreement. As such, the said act being prejudicial to the interest and good name of the Company and its product [Clause 13(a)(viii)], and constituting a breach of the covenants and stipulations contained in the agreement [Clause 13(a)(vii)], the respondent-Corporation is empowered to invoke Clause 13(a) of the said agreement whereby, it is at liberty to terminate the agreement upon happening

of any of the events stipulated therein.

- It cannot be overlooked that it is only the petitioner who could have stood to gain by the short delivery. The losers would be the public at large who would utilize the services offered at the retail outlet of the petitioner, unaware of the short delivery of H.S.D. from the dispensing unit.

36. Examining the case from every possible angle, in light of the factual and legal parameters discussed hereinabove, in the considered view of this Court, the impugned decision dated 17-2-2011 of the respondent-Corporation in terminating the Dealership Agreement of the petitioner cannot be said to be tainted by the vice of arbitrariness, illegality or irrationality, so as to violate any legal or fundamental rights of the petitioner.

37. For the foretasted reasons, the petition fails, and is rejected. Rule is discharged. There shall be no orders as to costs.