

(2014) 10 GUJ CK 0021

In the Gujarat High Court

Case No : Special Civil Application No. 2829 of 2013

Paras Service Station

APPELLANT

Vs

Bharat Petroleum Corporation Limited

RESPONDENT

Date of Decision : 17-10-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Essential Commodities Act, 1955 — Section 2(t), 3

Citation : AIR 2015 Guj 12 : (2015) GLH 3 613

Hon'ble Judges : C.L. Soni, J

Bench : Single Bench

Advocate : Saurabh Soparkar, Sr. Advocate and Jal Soni Unwala, Advocate for the Appellant; Bhargav D. Karia for Minoo A. Shah, Advocate for the Respondent

Judgement

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C.L. Soni, J.—In this petition filed under Article 226 of the Constitution of India, the petitioner has sought declaration that the action of termination of the dealership agreement dated 22.7.1976 by order dated 4.1.2012 is illegal and invalid and further prayed to quash and set aside the order dated 6.3.2013 terminating the said dealership agreement and ordering the petitioner not to use or enter the premises of the petroleum outlet and not to damage the company's property.

2. The order dated 4.1.2012 terminating the dealership of the petitioner was challenged by preferring Special Civil Application No. 119 of 2012. Said order was set aside by order dated 8.11.2012 passed in the said petition and the matter was remitted to the competent authority of respondent corporation for fresh decision on merits after hearing the petitioner. Thereafter, second order dated 6.3.2013 was passed by the competent authority after hearing the petitioner.

3. The case of the petitioner is that the petitioner, under the dealership

agreement, has been carrying on the business of petrol since 1976 except with one or two interruption on account of the legal proceedings initiated against the petitioner. On 14.9.2006, the test at the Retail Outlet ("RO") of High Speed Petrol was carried out and as per the test result, the specific standards were matched. However, out of three motor spirit petrol sample of one liter each collected, one sample was handed over to the petitioner and the other one was sent for testing to Quality Control Laboratory at Kandla. The Kandla Laboratory received such sample after a period of more than one month instead of ten days as mandatorily required under the provisions of sub Sections 4, 5 and 6 of the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Mal-practices) Order, 2005 ("the Order" for short). On the basis of the test report carried out at Kandla Laboratory, the petitioner was served with the show cause notice on 22.12.2006 to which, the petitioner gave detailed reply on 7.1.2007 and 10.1.2007. After receipt of the reply, no immediate action was taken. However, after a period of more than five years, without giving any opportunity to the petitioner, order terminating the dealership agreement came to be passed against the petitioner. The petitioner has taken other legal contentions in the petition as regards non compliance of the mandatory requirements of collection of sample and laboratory test and sending of sample for laboratory test etc.

4. The petition is opposed by the respondent by filing affidavit in reply stating that the petitioner has committed breach of dealership agreement by carrying out other activities on the area of 2751 square meters and also committed breach of undertaking given by the petitioner by not stopping such other activities not relating to running of Outlet under the dealership agreement. It is also stated that the matter was remanded to the concerned authority of the respondent to give full opportunity of hearing to the petitioner and then to pass fresh order. The petitioner has been given full opportunity and after considering all the aspects of the matter, reasoned order is passed.

5. It is further stated that the necessary procedure for sampling and testing the sample under the Order and under the Guidelines of 2005 have been duly followed and even the petitioner has accepted the test result of the sample. It is stated that the adulteration found as per the test result and the continuous violation of the undertaking given by the petitioner are serious breaches of the agreement and there is no illegality in the impugned action. Other facts as regards following procedure for drawing of the samples, sending for testing and the test results not matching with the specific standards etc., are stated in the reply, to which no detailed reference needs to be made at this stage.

6. I have heard learned advocates for the parties. Learned Senior Advocate Mr. Saurabh Soparkar with learned Advocate Mr. Jal Soni Unwala appearing for the petitioner submitted that the mandatory requirement of sending the sample for testing within 10 days was not followed. Mr. Soparkar submitted that the period prescribed in the Order and the Guidelines is of 10 days for sending the sample

to the Laboratory for testing and at the best, such period could be extended by further five days as stated in Clause 2.10 of Guidelines. Mr. Soparkar submitted that there is also requirement of completion of testing of the sample within the prescribed time limit of 20 days by the Laboratory after receipt of sample. Mr. Soparkar submitted that such time limit is provided with an object to see that the testing is done of the same quality of petrol collected as the delay in testing causes great prejudice to the dealer. Mr. Soparkar submitted that indisputably the samples from the RO of the petitioner were collected by Mobile Van of the respondent corporation on 14.9.2006, out of which one sample was received by the laboratory on 13.10.2006 and the test was performed on 25.11.2006. Mr. Soparkar submitted that since there was clear breach of the mandatory requirement as regards sending and testing of the sample within prescribed time limit, the test result could not have been relied for terminating the dealership agreement.

7. Mr. Soparkar submitted that the termination of dealership agreement is very harsh action and, therefore, the provisions of the Order and of the Guidelines were required to be followed scrupulously which in the present case were not followed. Mr. Soparkar submitted that there was no breach of the undertaking as it was for the respondent to make use of the portion of plot where the activity of nursery was alleged to be carried on. Mr. Soparkar submitted that so far as the running of small hotel (dhaba) is concerned, the same was never under the control of the petitioner and it was not alleged that the petitioner had used the portion of the plot for running such small dhaba and, therefore, it could not be said that there was breach of the undertaking given by the petitioner. Mr. Soparkar submitted that as per the test result, Research Octane Number (RON) was found not matching with minimum standard of 88. Mr. Soparkar submitted that RON has tendency to decrease. The test result of the sample of petroleum product collected from refinery was 89.6, then at the tank lorry, it was 88.7 and then further decreased to 86.5 in respect of the sample collected from the RO. Mr. Soparkar submitted that for such tendency to decrease in RON, it cannot be said that the petitioner had indulged into adulteration of speed petrol. Mr. Soparkar submitted that it is not the allegation that the petitioner used only foreign substance to adulterate the product. Mr. Soparkar submitted that the Division Bench of this Court in group of appeals being Letters Patent Appeal No. 473 of 2010 and allied matters has held that the decrease in RON cannot be said to be adulteration of petroleum product. Mr. Soparkar submitted that in so far as the test result of Residue On Evaporation ("ROE") is concerned, it could be on account of not testing the sample collected from RO immediately within ten days as required by the Order and the Guidelines. Mr. Soparkar submitted that when the sample was sent for testing after about a month and thereafter the test was carried out after a period of more than one month, the sample of the product would not have retained the same quality. Mr. Soparkar submitted that such was the serious lapse on the part of the respondent and therefore, test result could not be utilized against the petitioner for terminating the dealership agreement on

the ground that the petitioner has indulged into adulteration of petroleum product. Mr. Soparkar thus urged to allow the petition. Mr. Soparkar has relied on the following decisions:

[1] In the case of Allied Motors Ltd. Vs. Bharat Petroleum Corporation Ltd., ;

[2] In the case of Bharat Petroleum Corporation Ltd. Vs. Jagannath and Company and Others, ;

8. As against the above arguments, learned advocate Mr. Bhargav D. Karia appearing with learned Advocate Ms. Minoo Shah for the respondents submitted that the requirement to send the sample collected within ten days for testing to the lab is not mandatory. Mr. Karia submitted that the quality of the product of which the sample was collected would remain unchanged for a period of one year and therefore, late sending of sample for testing would not affect the result of testing. Mr. Karia submitted that if the provision for sending the sample within 10 days for testing is read as mandatory, then, the very purpose of collection of samples to find out whether the dealer has adulterated the petroleum product or not would be frustrated as sometimes for the circumstances beyond the control, the sample may not be sent for testing immediately within 10 days. Mr. Karia submitted that the respondent has framed guidelines for its own purpose to find out and to check whether the dealers supply good quality of petroleum product or not and for such avowed object behind framing of the guidelines, the provision for sending the sample for testing within 10 days cannot be read as mandatory. Mr. Karia submitted that so far as the petitioner is concerned, the petitioner has accepted and not disputed the test result, and if the test result has established that the RON and ROE did not match with the specification, the adulteration against the petitioner was proved. The respondent Corporation was, therefore, justified in terminating the dealership agreement as per the terms of the agreement itself. Mr. Karia submitted that since such action is permissible, it cannot be said that the respondents have committed any illegality in terminating the dealership of the petitioner. Mr. Karia submitted that the petitioner consciously gave undertaking that it shall not use the land of the respondent corporation for any other purpose except for RO of the petroleum product. However, the petitioner did not stop activity of running nursery on the land and continued the same which was contrary to the dealership agreement and in breach of undertaking given by it. Mr. Karia submitted that since the due procedure was followed as required under the Order and the Guidelines for testing the sample in the laboratory and since the action of terminating the dealership agreement was taken on the basis of test report and after hearing the petitioner, this court may not interfere with the impugned action taken by the respondent. Mr. Karia thus urged to dismiss the petition.

9. Having heard the learned advocates for the parties, it appears that as per the test report dated 14.9.2006 at Annexure-D, three samples of motor spirit-speed of quantity one liter each were drawn by Mobile Laboratory on 14.9.2006 from RO of the petitioner. For the tests carried out by Mobile Laboratory on 14.9.2006,

no adverse result was made. Then, out of two other samples, one was handed over to the petitioner for its retention and another was sent to the Laboratory at Kandla for RON Test as found stated in the said test report. It appears from the test report at Annexure-E of Kandla Laboratory that the sample was sent on 10.10.2006 and received at the laboratory on 13.10.2006. Thereafter, test was carried out in the laboratory on 25.11.2006 and as stated in the report, RO sample failed to meet with the requirement of Speed MS. The test result of RON is stated to be 86.5 against minimum requirement of 88. The test result of ROE is shown as 90 against maximum requirement of 40. Thus, the performance test is shown to have failed.

10. The main contentions raised on behalf of the petitioner are that on account of non-observance of mandatory requirement of sending the sample within 10 days for test and of not testing the sample within prescribed time limit, the test results could not have been relied on by the respondent so as to terminate the dealership agreement and that the test result ipso facto could not be said to have established adulteration of petroleum product (Speed) in absence of proof of use of any foreign substance by the petitioner.

11. Mr. Karia, however, submitted that since the samples were properly drawn and requirement to send the sample for testing within ten days is not mandatory but directory, and since the sample of high speed petrol could retain its quality for a period of one year, test result could not be brushed aside on the ground that the requirement of sending sample within ten days for test was not followed. Mr. Karia submitted that the test result contained in test report at Annexure-E of Kandla Laboratory is not challenged by the petitioner on any other ground except that the mandatory requirement of sending the sample within prescribed time limit for test was not followed.

12. Clause 8 of Order for sampling of the product reads as under:

"8. Sampling of Product.-

(1) The authorised officer under clause 7 shall draw the sample from the tank, nozzle, vehicle or receptacle, as the case may be, in clean aluminum containers, to check whether density and other parameters of the product conform to the requirements of Bureau of Indian Standard specifications number IS 2796 and IS 1460 for motor spirit and high speed diesel respectively. Where samples are drawn from retail outlet, the relevant tank-truck sample retained by the dealer as per clause 3(b) would also be collected for laboratory analysis.

(2).....

(3).....

(4) The authorised officer shall forward the sample of the product taken within ten days to any of the laboratories mentioned in Schedule III or to any other such laboratory when it may be notified by the Government in the Official Gazette for this purpose, for analysing with a view to checking whether the

density and other parameters of the product conform to the requirements of Bureau of Indian Standard specifications number IS 2796 and IS 1460 for motor spirit and high speed diesel respectively.

(5) The laboratory mentioned in sub-clause (4) shall furnish the test report to the authorised officer within twenty days of receipt of sample at the laboratory.

(6) The authorised officer shall communicate the test result to the dealer or transporter or concerned person and the oil company, as the case may be, within five days of receipt of test results from the laboratory for appropriate action."

13. Sub clause (4) of clause 8 of the order requires the authorized officer to forward sample of product taken within ten days to any of the laboratories mentioned in Schedule III or to any other such laboratory when it may be notified by the Government in the Official Gazette for this purpose, for analyzing with a view to checking whether the density and other parameters of the product conform to the requirements of Bureau of Indian Standard Specifications No. IS 2796 and IS 1460 for motor spirit and high speed diesel respectively. Sub-clause (5) thereof provides that the laboratory mentioned in sub clause (4) shall furnish the test report to the authorized officer within twenty days of receipt of sample at the laboratory. Sub Clause (6) provides that the authorized officer shall communicate the test result to the dealer or the transporter or concerned person and the oil company, as the case may be, within five days of receipt of test results from the laboratory for appropriate action.

14. The Marketing Discipline Guidelines 2005 at page 96 have made following provisions for drawal of the samples by Mobile Laboratory and of testing the samples. Clause 2.4.4 and 2.10 reads as under:-

2.4.4. DRAWAL OF SAMPLES BY MOBILE LABORATORIES

1. Mobile laboratories will draw nozzle samples of MS and HSD from all the tanks at the retail outlets and will carry out clinical tests as applicable for mobile laboratories on these samples. If the sample passes no further action will be taken.

2. If any of the samples fails, the Mobile lab will follow samples:

MS: 6x1 litre samples for each of the concerned tanks where product has failed. (2 with dealer, 2 to concerned Oil Company for retention, 2 to concerned Oil Company for testing)

HSD: 3x1 litre samples for each of the concerned tanks where the product has failed (1 with dealer, 1 to concerned Oil Company for retention, 1 to concerned Oil Company for testing).

The mobile lab will collect the relevant tank lorry retention sample from the retail outlet and will hand over the same along with the relevant RO sample (mentioned above) to the concerned Oil company representative preferably within the next 5 days. He should also inform the concerned Supply location

immediately on telephone, so that depot sample can be retained. The Division should ensure that all samples, i.e. RO/tank lorry/depot samples reach the respective laboratories for testing preferably within 10 days of the collection of the samples.

Appropriate action will be taken by the concerned Company based on the test results.

2.10 SAMPLE TESTING AND RESULTS:

The test to be carried out for MS/HSD samples drawn from dealers premises are given in Annexure S-4.

All samples should reach the lab preferably within 10 days from the date of drawal and lab should test the samples preferably within the next 20 days. Results are to be communicated to the dealer by the concerned Oil Company preferably within the next 5 days from receipt of test reports.

While in general, above procedure should be strictly followed and the time frame as stipulated above to be adhered to, however during special drives, in view of the large number of samples, the lab may accept the samples upto 15 days after drawal and the testing should be completed preferably within 30 days of the receipt of the sample.

All test reports are to be signed by authorized officers only.

Interpretation of results-Samples are deemed to have failed if the test results of sample under scrutiny and the reference sample do not fall under the reproducibility/permissible limit of test method.

The tests to be conducted on MS/HSD (as given in Annexure S-4) will conform to the latest IS: 2796 specifications of Motor Spirit and IS: 1460 specifications of High Speed Diesel, and amendments thereupon.

(The BIS Specifications in respect of BS II and Euro III yet to be received from M/s. Bureau of Indian Standards, which will be incorporated in the MDG on receipt)

The test will be carried out as per standard test methods as given in the Bureau of Indian Standard Specification, IS: 1448:P methods of tests for petroleum products and Standards applicable at the time of inspection.

The test results on the sample taken from the Retail Outlet and Tank Lorry should be within the reproducibility limits of the test method when compared to the reference sample at dispatching location.

Reference for density would, however, be that recorded in the dispatch document upto decanting of Tank Lorry at the Retail Outlet. Thereafter, for samples collected from Retail Outlet, reference density would be density of the composite product in Storage tank, recorded after receipt of product after dispensing at least 50 liters of product through the pump.

15. In earlier round of litigation initiated by the petitioner by filing Special Civil Application No. 119 of 2012 challenging order of termination of dealership agreement dated 4.1.2012, the Court had observed that the authority had not addressed the issues as to whether the delay and breach of the provisions for sampling and test of the sample collected has vitiated the result of the test or not and whether the breach of the provisions of the Order vitiated the ultimate decision or not.

16. In the impugned order dated 6.3.2013, at Annexure-Q, it is stated that result of test carried out by Mobile Laboratory of the collected sample of speed product from RO was given to the petitioner on the very same day. It is further stated that the Mobile Laboratory sent the product sample to the scheduled laboratory at Kandla for testing additional parameter, such as RON etc., and upon such testing carried out on 25.11.2006 by Kandla Laboratory, RO sample failed to meet the requirement of speed MS (BS-II). It is further stated that the quality of the product did not deteriorate over the period of time as alleged by the petitioner because upon testing of SL (Station Lorry) and T/S (Tank Lorry sample), they passed the test carried out, whereas RO sample failed the test in RON, ROE and Performance Test. Thus, though the factum of delay in sending RO sample to Kandla Laboratory for test beyond the prescribed period is not disputed, however, the test results of Kandla Laboratory are stated to be not affected on the ground that delay would not affect the quality of the product.

17. Sub-Clause (4) of Clause 8 of the Order mandates for sending the sample of the product for testing within 10 days to any scheduled laboratory for analyzing with a view to check whether parameters of the product conform to the requirement of specified standards. Sub Clause (5) further provides for furnishing of the test report by such laboratory to the authorized officer within 20 days of the receipt of the sample at laboratory. Thus, not only the sample is required to be sent to the laboratory within 10 days but even the laboratory is required to perform test and furnish testing report to the authorized officer within 20 days thereafter.

18. Clause 2.4.4 of the Guidelines also requires the mobile laboratory to send collected sample for testing to the laboratory preferably within 10 days of such collection. Clause 2.10 requires that the samples should reach to the laboratory preferably within 10 days from the date of drawal and laboratory should test sample preferably within next 20 days. It is further stated that while in general, the above procedure should be strictly followed and the time frame as stipulated above should be adhered to, however, during special drives, in view of large number of samples, the laboratories may accept samples upto 15 days after drawal and the testing should be completed preferably within 30 days of the receipt of the sample. Thus, relaxation provided by the guidelines is only of 5 days more in sending the sample for testing to the laboratory and of 10 days more to the laboratory to complete the testing of the samples received by it. However, such relaxation is only during special drives as stated above.

19. In this very Guidelines, it is stated in Clause 1.5 (v) that the provisions contained in the order and the instructions issued by the Oil Company/State Government authorities, etc., from time to time shall be strictly adhered to. Therefore, it is not possible to agree with the submissions of Mr. Karia that the provisions made for sending of samples and testing thereof by the laboratory are just directory and not mandatory. In fact, the order in clear terms makes it mandatory for the concerned authorities to send the samples for testing within 10 days and for the laboratory to complete the testing within 20 days. However, even if relaxation is read with the order, the same should be to the limited extent as stated above. It is no ground to say that since the product can maintain its quality for a period longer than the time provided in the Guidelines for sending of the samples for testing or for completing the testing by the laboratory, the provision for sending the sample for testing and completion of testing by the laboratory should be read as directory. In the impugned order, it is stated that since the testing of S/L and T/L samples passed the test and RO sample failed the test, it could be said that the product had maintained its quality. However, such could never be accepted as a ground to deviate from strict adherence to the provision of order and Guidelines is not required. When there is a specific provision made in the order as also in the guidelines to do a particular thing in a particular manner and when such doing of thing has direct effect on rights of the parties, the same has to be done in the manner prescribed.

20. In the case of Allied Motors Limited (*supra*), the Hon''ble Supreme Court has held and observed in para 25 to 29 and 59 as under:-

25. According to the appellant, the respondent has clearly acted in violation/contravention of, or at the very least in departure from, the Motor Spirits High Speed Diesel Order and the Marketing Discipline Guidelines and has also acted contrary to the principles of natural justice and fair play both in respect of taking samples which formed the basis of termination, as also in respect of the termination of dealership.

26. The appellant referred to the decision in *Bharat Filling Station and Another Vs. Indian Oil Corporation Ltd.*, wherein the Delhi High Court specifically referred the Market Discipline Guidelines. Relevant part of the judgment is reproduced as under:-

"9. As noted above, IOC, whenever enters into dealership agreement, executes memorandum of agreement which lays down standard terms and conditions. These conditions, inter alia, include provisions for termination of the dealership as well. It is provided that the agreement can be terminated by giving required notice. It may however be mentioned that at the same time in order to ensure that such agreements with the dealers are worked out in a systematic manner and the respondent IOC does not invoke the termination clause arbitrarily, Government of India has issued Marketing Discipline Guidelines.

27. The appellant also referred to the decision of this Court in *Ramana Dayaram*

Shetty v. International Airport Authority of India wherein this Court held that:

"10. it is well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them."

It is submitted that the respondent was bound to act in accordance with the Marketing Discipline Guidelines.

28. It is further submitted that in the case of Ramana Dayaram Shetty, this Court held that:

"12. the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including awards of jobs, contracts, quotas, licenses etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

29. The appellant further submitted that in the present case the respondent has departed from the standard norms laid down in the Marketing Discipline Guidelines and the standard norms of natural justice and fairplay and that such departure was clearly arbitrary, irrational, unreasonable and discriminatory. The appellant urged that the respondent Corporation terminated the dealership without even issuing show-cause notice and/or providing any opportunity of hearing. The termination is clearly in violation of the principles of natural justice.

59. In the instant case, the haste in which 30 years old dealership was terminated even without giving show-cause notice and/or giving an opportunity of hearing clearly indicates that the entire exercise was carried out by the respondent Corporation non-existent, irrelevant and on extraneous considerations. There has been a total violation of the provisions of law and the principles of natural justice. Samples were collected in complete violation of the procedural laws and in non-adherence of the guidelines of the respondent Corporation.

21. In the case of Jagannath and Company (supra), the Hon"ble Apex Court has held and observed in para 12 to 16 as under:-

12. In view of the above, it is important to consider the relevant provisions of the Guidelines. As per clause (c) of para 2.4.5 of the Guidelines, the samples so collected would be sealed and labeled and the labels so pasted over the containers must have the product name, name of the retail outlet, package type,

sample source, quantity of sample, sampling date, batch number etc., and should be jointly signed by the dealer or his representative(s) and the Inspecting Officer. As per clause (a) of para 2.4.5, the Inspecting Officer has to draw three samples from one tank-one for the dealer, second for the Company and the third will be sent to the Laboratory for testing. In order to ensure that all the three containers are containing samples from the same tank, all the three containers must have the same batch numbers duly signed by the dealer and the Inspecting Officer, otherwise it would be difficult to know as to whether the container left with the dealer was containing sample from the same tank as has been sent for testing to the laboratory. It is the complaint of the contesting respondents that the said officer, however, allotted three different numbers to the containers containing samples from the same tank. Moreover, the BPCL has filed photocopies of the labels pasted over 7 sealed containers duly signed by the dealer, each containing aluminium container Nos. 008997, 008950, 008923, 008976, 008949, 008916 and 008952 along with wooden container Nos. 008960, 008957, 008923, 008976, 008949, 008916 and 008952 in which aluminium containers have been placed. It is further pointed out by the contesting respondents that these numbers do not co-relate with the container numbers purported to have been sent by the Inspecting Officer to the Laboratory because all the three containers containing sample from the same tanker had been differently numbered.

13. It is also demonstrated by the contesting respondents that out of 8 samples so collected, only 5 samples were tested by the Company Laboratory. Also, no explanation was given about the other three samples. It is the claim of the contesting respondents that the BPCL has filed report in respect of only 5 samples and report of 3 samples has either been suppressed or has not been sent to the Laboratory and only a forwarding letter has been filed. It is also highlighted that the Laboratory has also not indicated the numbers of the containers so tested in its report. In such circumstances, as rightly pointed out, it is impossible to know which sample has been tested by the Laboratory. It has also not been mentioned in the report that the Laboratory has received the samples in sealed covers and the seals were opened by them as is the practice in every report received from forensic laboratory. It is further highlighted that the absence of container numbers in the report raises a doubt as to whether the laboratory has tested the same samples as had been sealed and counter signed by the dealer or some other contaminated samples. These important questions were raised before the writ Court alleging that the samples tested were not of those collected from the respondent-Firm.

14. In order to ensure fairness in testing the samples, it has been provided in clause (D) of para 2.5 of the Guidelines that in case of sample failure, in the event of request for testing by the dealer, the same shall be tested at Company's Laboratory in the presence of representative(s) of the dealer. The relevant extract of clause (D) of para 2.5 reads as under:

"In case of sample failure, in the event of request for testing by the dealer, the same to be considered on merits by the State Office/Regional/Zonal General Manager of the concerned Oil Company. If approved by GM, the sample of retail outlet retained by the dealer alongwith the counter sample retained with the Field Officer/Oil Company are to be tested as per the guidelines, preferably in presence of the Field Officer, RO dealer/representative and representative of QC department of the Oil Company after due verification of samples."

15. It is rightly pointed out that the samples were not tested in any government laboratory and these tests were conducted in the company's laboratory itself. Therefore, in order to satisfy the conscience of the dealer about the authenticity of the tests so conducted, it has been contemplated in the Guidelines that on the request of the dealer, the test(s) could be conducted in his presence.

16. In Hindustan Petroleum Corporation Ltd. & Ors., vs. M/s. Super Highway Services, this Court held that :

"33. the Guidelines being followed by the Corporation require that the dealer should be given prior notice regarding the test so that he or his representative also can be present when the test is conducted. The said requirement is in accordance with the principles of natural justice and the need for fairness in the matter of terminating the dealership agreement and it cannot be made an empty formality. Notice should be served on the dealer sufficiently early so as to give him adequate time and opportunity to arrange for his presence during the test and there should be admissible evidence for such service of notice on the dealer. Strict adherence to the above requirement is essential, in view of the possibility of manipulation in the conduct of the test, if it is conducted behind the back of the dealer."

It was further held that the cancellation of dealership agreement of a party is a serious business and cannot be taken lightly. As pointed out in the said decision, in order to justify the action taken to terminate such an agreement, the authority concerned has to act fairly and in complete adherence to the rules/guidelines framed for the said purpose.

Thus, as taken note of by the Hon'ble Supreme Court in the above-said decisions, the guidelines were required to be followed without any laxity, especially when the action initiated against the petitioner was to result in taking punitive action and it was not open to the respondent to follow the guidelines as per its convenience, otherwise the very purpose of framing the guidelines will be frustrated.

22. In the present case, indisputably, RO sample was received by the laboratory at Kandla for testing nearly at the end of a month. Not only this but, even after receipt of such sample on 13.10.2006 at the laboratory, the same was tested by the laboratory only on 25.11.2006. Thus, even after receipt of the sample on 13.10.2006 by the laboratory, testing of RO sample was carried out by the laboratory after a period of more than one month and 12 days which was

otherwise required to be tested within one month even after relaxation in time. In the facts of the case, relaxation was not available as it is not the case of the respondent that the circumstances in the special drives were prevailing at the relevant time. Thus, on account of the clear breach of the mandatory requirement of sending RO sample for testing within 10 days and completing the test of such sample within the required time limit of 20 days, the test result could not have been relied against the petitioner to say that the product was found not meeting with the specific requirement of speed MS. If such test result could not have been relied to allege failure of performance test against the petitioner, no action for termination of the dealership agreement could have been taken on such ground against the petitioner.

23. So far as the RON test is concerned, minimum requirement as per the standard specification of IS 2796.2000 is 88. As found stated in the test report of Kandla Laboratory, when the sample was tested at refinery level, it was 89.6; then, when it was tested at tank lorry, it was 88.7 and when the sample of RO was tested, it was found at 86.5. Thus, the test result of RO sample has revealed that RON was below minimum standard. However, the argument on behalf of the petitioner is that it is on account of decrease tendency in the value of RON, decrease in RON from refinery level till it reached to the RO of the petitioner was natural and it was not on account of any act of adulteration by the petitioner. It was also argued that the reduction in required specification of RON cannot be termed as adulteration as held by the Division Bench of this Court in group of appeals being LPA No. 473/2010 vide order dated 31.2.2014.

24. The Division Bench of this Court considered the definition of adulteration given in the Order and observed in para 10.1, 10.2, 11 and 12 as under:

"10.1 In this regard we would also like to reproduce the definitions of Adulteration and Malpractice which have been alleged to have been done by the original petitioner. The Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2005 is a statutory enactment passed by virtue of the powers conferred under section 3 of the Essential Commodities Act, 1955 by the Central Government. In the said Order, Clause 2(a) defines "adulteration" as follows:

(a) "adulteration" means the introduction of any foreign substance into motor spirit or high speed diesel illegally or unauthorisedly with the result that the product does not conform to the requirements of the Bureau of Indian Standards specifications number IS 2796 and IS 1460 for motor spirit and high speed diesel respectively or any other requirement notified by the Central Government from time to time.

2(f) "malpractices" shall include the following acts of omission and commission in respect of Motor Spirit and High Speed Diesel:

(i) Adulteration,

- (ii) Pilferage,
- (iii) stock variation,
- (iv) unauthorised exchange,
- (v) unauthorised purchase,
- (vi) unauthorised sale,
- (vii) unauthorised possession,
- (viii) over-charging,
- (ix) sale of off-specification product, and
- (x) short delivery & quot;.

2(t) "sale of off specification product" means sale of motor spirit or high speed diesel by dealer of quality not conforming to Bureau of Indian Standards specifications number IS 2796 and IS 1460 for motor spirit and high speed diesel respectively.

10.2 There is no clause within the remit of the guidelines or the Order warranting an inference that whenever the requirements/specifications fail to conform to the standards of petroleum products, that product is adulterated. On a perusal of the aforesaid definition of adulteration, a petroleum product can be said to be adulterated only when there is introduction of any foreign substance into petroleum product, which results in the product not conforming to the requirements and specifications as per the Order. The definition has to be interpreted strictly and it is not possible to expand the purport or scope of the definition. It is not the case of the petroleum company that the petitioner by introducing foreign substance offered petrol for sale, which does not conform to the requirements and specifications. It is only inferentially based on the value of RON (when the specification is 88, RON was found to be varying in three different tests of the same samples and the nearest one was 87.6 which was ideally required to be rounded off to 88) that the Territory Manager came to the conclusion that MS is adulterated.

11. Even if it is assumed that the RON did not conform to the requirement of 88, it cannot be said to be adulterated in absence of any finding with regard to introduction of foreign substance in the same. At the most, the case of the original petitioner could have fallen under section 2(t) which relates to sale of off specification product which falls under sub clause (ix) of Malpractice. Sale of off specification product means sale of motor spirit or high speed diesel by dealer of quality not conforming to Bureau of Indian Standards specifications number IS 2796 and IS 1460 for motor spirit and high speed diesel respectively. Therefore, even if the Corporation came to the conclusion that the original petitioner had indulged in malpractice by trying to sell off-specification product, the penalty of termination of retail outlet is grossly on higher side. Appendix I to the Marketing

Discipline Guidelines 2005 lays down the penal actions for malpractices and irregularities at retail outlets MS/HSD. Sr. No. 15 of the said appendix lays down the punishment for non-observance of Govt., regulations as under :

12. From the above discussion, the points which have weighed with us are enumerated as under:

I. The Corporation did not follow the time limit as prescribed under the guidelines so far as the date of sampling, sending to the laboratory and preparing test report is concerned thereby clearly violating the mandatory provisions of sub section (4), (5) & (6) of Section 8 of the Order.

II. RON at supply level as per three different reports of the same sample show variations. There is no plausible explanation coming forth with regard to the variation found in the laboratory test report of the same sample showing different RON content.

III. On the contrary, the third sample showed presence of 87.6 RON which when rounded off to 88 (as per the principles of rounding in view of Indian Standard Method for the test of petroleum and its products) which is at par with the requisite specification.

IV. There is no evidence coming on record so as to conclude that the level of RON did not match with the specified standards because of any adulteration or malpractice as defined under the Order. In fact there is no mention of the nature and extent of adulteration in the show cause notices by the Corporation.

V. For the sake of assumption, even if the case of the original petitioner is considered as sale of off-specification product the penalty of termination is grossly on higher side.

VI. In all the sampling reports as well as the inspection reports for the period from 2006 to 2009 the respondent authorities have not found any breach or any malpractice other than the one for which the impugned action has been taken.

VII. There is a delay of around three years in issuing the dealership termination order.

25. In the present case, over and above the test of RON not meeting with the required specification, test of ROE is also stated to have failed so far as the RO Sample was concerned. Mr. Karia heavily relied on the test result of ROE and submitted that even if the test result of RON is not considered to be adulteration, test result of ROE since not meeting with the required specification, it could be said that adulteration against the petitioner was proved.

26. Following are the irregularities in which the impugned action of termination of the dealership is taken against the petitioner:-

"IRREGULARITIES

i. During routine inspection of the Retail Outlet, on 14.09.2006, by our PFS

Mobile Lab., in the presence of your available representative, Shri Kamlesh H. Merai sample of Speed was drawn which upon testing has failed to meet the specification in terms of RON and Performance Test of Branded Fuels.

ii. Although the entire premises ad measuring approx. 5810 sqm (62500 sq. ft) is required to be used for the purpose of stocking and selling the Company's products, we have been noticing that a large portion of the said premises ad measuring approx. 2751 sqm in the rear side of the plot is being used for running the Nursery. Moreover, about 4000 sq. ft. land in the southern part of our subject plot is being used by one M/s. Durga Hotel for running the "Dhaba" Further more, you have also failed to honour the communication/undertaking/affidavit given by you dated 22.5.01 and 09.07.01 in this regard.

27. As stated above, the first irregularity about the test result of RON and performance test not meeting the specified standards could not be relied against the petitioner on account of not following the mandatory requirements. As stated above, as per the judgment of the Division Bench, test result of RON of not meeting the specified standard without there being any proof of use of foreign substance by the petitioner would not establish adulteration. In fact, the same principle would also apply for the test result of ROE as there is no allegation of use of any foreign substance in the product by the petitioner. Therefore, if the petitioner could not be said to have indulged into an act of adulteration of the petroleum product, the test result of not meeting the specified standards for RON and ROE would not warrant termination of the agreement.

28. So far as second irregularity about using RO premises for other purposes, i.e., nursery division and dhaba (restaurant) and not complying with the undertaking given by the petitioner is concerned, it appears that there is no dispute about the fact that the dhaba has not been run by the petitioner. May be that such dhabha on RO premises has been unauthorizedly run by someone but for such unauthorized act of somebody, the petitioner could not be said to have committed any breach of the agreement or the undertaking. As regards nursery division is concerned, as per the undertaking given by the petitioner, a copy whereof is place at page 290, the petitioner agreed to use the company premises and facilities provided thereon exclusively for sale of company's product. It is stated therein that the petitioner had stopped all business and other activities from the remaining area of 2751 Sq. Mtrs., and the company was free to use or deal with the said area in the manner the company deemed it fit. Therefore, as per the undertaking in respect of the said area of 2751 Sq. Mtrs., the petitioner had already stated that the company could use the same as the company deemed it fit. It is not the case of the respondent company that the petitioners claimed any right over such land. However, if the land remained as it is with the nursery, at the best, the company could have taken action to take possession of such land as agreed by the petitioner in the undertaking. The petitioner through its counsel before the Court has in clear terms stated that the petitioner has no interest in such land or activity of nursery and it is desirous to make the RO

premises to match with the present day requirements as a well developed RO.

29. In above such view of the matter, when the petitioner could not be said to have indulged into adulteration of petroleum product which was the main ground for terminating the dealership agreement of the petitioner, interest of justice would be sub-served if following order is passed:-

[1] Impugned order dated 6.3.2013 at Annexure-Q shall stand quashed and set aside.

[2] The petitioner shall be entitled to carry on its business at its RO as per the agreement.

[3] The petitioner shall immediately clear the area of 2751 Sq. Mtrs., stated to be used for nursery and inform the respondent Company and allow the respondent Company to make use of such area.

[4] If the respondent Company does not want to make use of such area, the petitioner shall use such area only for the purpose of running RO in a well developed manner as per the present day requirements.

30. With the aforesaid directions, the petition stands allowed. Rule is made absolute accordingly.

31. At this stage, learned advocate for the respondent company requested to stay and suspend the present order for a period of four weeks or to continue the order of status-quo which remained in operation till disposal of the present petition. Learned advocate for the petitioner, however, opposed to grant such request.

32. In the facts of the case, the request for staying the present order is refused. However, since the order of status-quo continued till final disposal of the petition, the same shall continue for a further period of four weeks.