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**(2014) 09 DEL CK 0179**

**In the Delhi High Court**

**Case No :** W.P.(C) 4883/2014 & CM Nos. 9753/2014 & 9754/2014

Rakesh Kumar Goyal

APPELLANT

Vs

Indian Oil Corporation Ltd.

RESPONDENT

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**Date of Decision :** 29-09-2014

**Acts Referred:**

**Citation :** (2014) 09 DEL CK 0179

**Hon'ble Judges :** Vibhu Bakhru, J

**Bench :** Single Bench

**Advocate :** Nidhesh Gupta, Sr. Advocate and Rachna, Advocate for the Appellant; Rajat Navet and Sanya Talwar, Advocate for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

Vibhu Bakhru, J.—The petitioner impugns an order dated 21.07.2014 passed by the Executive Director (Retail Sales) of Indian Oil Corporation (hereafter "IOC") whereby the appeal filed by the petitioner assailing an order dated 14.03.2014, terminating the dealership of the Petitioner, was rejected.

2. Briefly stated the relevant facts are as under:-

2.1. On 01.02.2005, a Memorandum of Agreement (hereinafter referred to as the "Agreement") was entered into between the Petitioner, IBP Co. Ltd. (since merged with IOC) and Smt. Queenie Sharma for carrying business under the firm namely, M/s. Madhuban Service Centre. M/s. Madhuban Service Centre is engaged in the retail sale or supply of petroleum products supplied by IOC from an outlet situated at Outer ring road, Mangolpuri Delhi (hereafter referred to as the "retail outlet").

2.2. On 08.10.2013, the retail outlet of the petitioner was inspected by officers of Anti-Adulteration Cell (in short "AAC") of IOC and no discrepancies were found. On the same day, IOC (at the instance of the Petitioner) requested the Weights and Measures department (hereafter "W/M department") for recalibration of two Dispensing Units (in short "DUs") from Xtra Premium (in short "XP") to normal

Motor Spirit (in short "MS") at the Petitioner's retail outlet. On 15.10.2013, the said DUs were converted from XP to MS, and a certificate to this effect was issued by the W/M department on 21.10.2013.

2.3. The petitioner submitted that on 12.10.2013 the delivery of all the DUs was checked by the representatives of the IOC and no discrepancies were found. Further, on 20.10.2013 an engineer of Midco - a company authorised by IOC for maintenance of the DU's at the retail outlets - changed the card of MS-2 nozzle at the retail outlet.

2.4. On 05.11.2013, the retail outlet of the Petitioner was again inspected by two officers of AAC and a Field Officer. During the said inspection, certain discrepancies/irregularities were found in the retail outlet and the same were noted in the Retail Outlet Inspection Report (in short "Inspection Report") prepared at the retail outlet on the same day i.e. 05.11.2013.

2.5. In light of the discrepancies found, product samples were drawn by the inspection officers and sales from all DUs were suspended with immediate effect.

2.6. Thereafter, the IOC issued a notice dated 06.11.2013 to the Petitioner, asking him to explain the reasons for the discrepancies found during the inspection within 7 days from the date of the notice. The petitioner replied to the notice dated 06.11.2013 on the same day, and requested the IOC to suspend the use of only DUs with short delivery and permit him to operate the retail outlet with the remaining DUs till the sample test reports are received.

2.7. The IOC sent the spurious part to Midco for testing, which by letter dated 11.11.2013 stated that:

"attachment shown to us is not an OEM part and this kind of attachment never use in any model of Midco fuel dispensers. This is additional part and not an OEM part. Further testing of this attachment is not possible for us because there is no provision is available in our lab to test this additional (Non OEM) part without complete ERA set."

2.8. Thereafter, on 12.11.2013, the petitioner gave a detailed reply to the notice dated 06.11.2013 explaining the reasons for the discrepancies found during the inspection and requesting for resuming sale or supply of petroleum products from the retail outlet.

2.9. Subsequently, the IOC issued a show cause notice dated 05.12.2013 for termination due to discrepancies noticed during the inspection carried out on 05.11.2013 at the retail outlet. On 20.12.2013, the petitioner replied to the said show cause notice reiterating the reasons for the discrepancies found during the inspection and requesting for resuming sale or supply of petroleum products from the retail outlet.

2.10. The IOC, by its order dated 14.03.2014, terminated the dealership of the petitioner, stating therein:

"it is established that external fittings were fitted by you in the dispensing units to manipulate delivery which has resulted in abnormal short delivery as detected in the inspection which is a violation of the terms of the Dealership Agreement as well as MDG. The action for such malpractices/ irregularities as per Dealership Agreement and MDG is termination."

2.11. Aggrieved by the said order dated 14.03.2014, the petitioner filed an appeal to the Executive Director (Retail Sales) of IOC on 02.04.2014 requesting for restoration of the dealership. The said appeal was dismissed by the impugned order dated 21.07.2014 and the order dated 14.03.2014 terminating the dealership of the petitioner was upheld. Aggrieved by the said order, the petitioner filed the present petition.

3. It is contended by the petitioner that the termination of its dealership by the IOC is arbitrary and unreasonable and is based on allegations that are not substantiated. The first allegation being that there is a shortfall in MS/HSD stocks beyond the permissible limits and the second allegation being that the DUs were tampered with. It is further contended that the spurious cable is a reason for short delivery, has not been established as the same was not tested by Midco. The petitioner submitted that Midco had only concluded that the cable was not an original part and therefore could not be tested and in the circumstances it was necessary for the IOC to provide the necessary equipment for testing of the said spurious cable in order to comply with paragraph 8.5.2 of the Marketing Discipline Guidelines (hereafter "MDG"). It was further contended by the petitioner that the action of suspending sales from the retail outlet on account of any additional/unauthorized fitting/gears found in a DU is contrary to the MDG. The learned counsel for the petitioner specifically referred to paragraph 5.1.11 and 8.4 of the MDG.

4. The learned counsel for the IOC referred to paragraph 8.2 of the MDG and stated that additional/unauthorized fittings/gears inside a DU are considered as critical irregularities and not minor irregularities as contended by the petitioner. He further submitted that there could be no doubt that the spurious cable found in the DU during the inspection conducted on 05.11.2013 was a reason for short delivery of products as the DUs functioned correctly after removal of the spurious part.

5. The principal controversy to be addressed is whether the action taken by the IOC is contrary to its own guidelines and whether in the facts and circumstances the IOC could have proceeded on the basis that the allegations made against the petitioner were established.

6. On an inspection made by IOC's Officers from AAC the following discrepancies/irregularities were found:

1. A negative stock variation of -1659 Ltrs in Ms. stocks which is beyond permissible limits. (Permissible limit is -894 Ltrs hence variation beyond permissible limit is -765 Ltrs)

2. A negative stock variation of -582 Ltrs in HSD stocks which is beyond permissible limits. (Permissible limit is -434 Ltrs hence variation beyond permissible limit is -148 Ltrs)

3. Short delivery in Dispensing Units as under:

4. Additional/Unauthorised cable with fittings found covered under black tape & connected to DU's pulsar cable which is connecting to Mother board & control card found in MS-1 and MS-2 DUs

7. Although the petitioner has stated that he was not present at the time of the inspection, it is not disputed that his manager was present at site and had also signed the inspection report. In the circumstances, the action of the IOC in proceeding further on the basis of the inspection report cannot be challenged.

8. The explanation given by the petitioner with regard to negative variation in the stocks of MS/HSD was not found acceptable by the IOC. The reason given by the petitioner for the short fall was removal of dead stock on conversion of the tank of XP into MS. It is stated that for that purpose stock, which was stated to be mixture of XP and water was removed by hand pump and this had resulted in the reduction in total stock. IOC considered the above explanation and held that clearance of dead stock was not required for conversion of XP tank to that of MS, since XP was only a branded petrol and further no person was deputed by the IOC for removing the dead stock.

9. The explanation for variation in the HSD stock was also rejected. The petitioner had explained that the same was on account of accumulation of water in the HSD Tank and the impact of water dip had not been considered in the closing stock on 08.09.2013. The IOC rejected this explanation by reasoning that during inspection on 08.09.2013 the water dip in HSD tank was nil and the same was also reflected in the inspection report.

10. The learned counsel for the petitioner has not been able to point out any fault in the said reasoning adopted by the IOC for rejection of the explanation furnished by the petitioner for shortfall in stocks and has focused his arguments only on the issues that further testing of the spurious cable was required to establish that that was the cause of short dispensation from the DU and further that short delivery only attracted a minor penalty as specified under paragraph 8.4 of the MDG.

11. The IOC's inference that the petitioner had tampered with the DUs to dispense short delivery cannot be stated to be unreasonable or perverse in the given facts and circumstances of the case. First of all there is no acceptable explanation provided by the petitioner for the spurious cable found fitted inside the DU. In response to the show cause notice issued by the IOC, the petitioner had stated that "we have no clue about the presence of the cables alleged to be fitted inside DUs. The DUs are open for maintenance by the concerned company representatives and company foreman when they come for maintenance or

collaboration work and any part replacement is only carried out by them." This explanation, can hardly be considered as one, since the spurious cable was found in the DUs operated by the petitioner. The suggestion of the petitioner that the IOC's representatives or representatives of the authorized agency for maintenance had placed the spurious cable which would incidentally benefit the petitioner by short delivery, is only stated to be rejected. The IOC's decision to not accept this explanation is, plainly, warranted.

12. It has been contention of the learned counsel for the petitioner that the cause for short delivery cannot be ascribed to the spurious cable since the same was not tested, is also without merit. The Inspection Report indicates that the DU's functioned properly after removal of the spurious cable. Thus, the contention that any further checks are required to be carried out by the IOC to establish that the reason for short delivery was the spurious cable is also without any merit. The cable having been found to be spurious, itself established the irregularity attracting punitive measures under the MDG.

13. The contention that the IOC has acted contrary to its guidelines (i.e. MDG) has to be examined with reference to the relevant paragraphs/clauses of the MDG. It is contended by the petitioner that paragraph 5.1.11 of the MDG was violated in as much as the IOC suspended the sales from all the DUs of the retail outlet on the day of inspection itself. The relevant extract of paragraph 5.1.11 reads as under:

"5.1.11 STOCK VARIATION OF MS/HSD (Beyond Permissible limits) FUEL

XXX XXX XXX XXX XXX In case of Negative stock variation and in the absence of any other irregularity the permissible limit be considered up to 4% as specified above and samples will be drawn and sent for testing. In case the negative stock variation is beyond permissible limits sales & supplies to the retail outlet will continue during the investigation period. Explanation of the dealer to be called. Supply to be immediately suspended in case explanation of the dealer not found satisfactory."

14. In the present case, the allegation against the petitioner was not limited to variation in stocks alone and the action of suspending sales from all DU's was taken based on the inspection which had revealed short delivery of products and a spurious part in the DU, in addition to variation in stocks.

15. Paragraph 5.1.4 of the MDG guidelines defines Additional/unauthorised fittings as under:

"5.1.4 ADDITIONAL / UNAUTHORISED FITTINGS / GEARS FOUND IN DISPENSING UNITS / TAMPERING WITH DISPENSING UNIT

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

Removal, replacement / manipulation of any part of the Dispensing Unit including

microprocessor chip / electronic parts / OEM software will be deemed as tampering of the dispensing unit.

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

16. Indisputably, the spurious cable found in the DU's would fall within the aforesaid definition. The question to be addressed is whether the short delivery on account of the spurious cable would amount to a minor irregularity or be considered as a critical irregularity. "Minor Irregularity" is defined under paragraph 8.4 of the MDG. The relevant extract of paragraph 8.4 is quoted below:

"8.4 Minor Irregularities: The following irregularities are classified as minor irregularities:

(i) Short delivery with Weights & Measures Departments" seals intact where the dealer has not informed the OMC of this defect. {5.1.2(a) }

XXX XXX XXX XXX XXX Action in case of (i) above would be as under:-

First instance: warning letter to be issued

Second instance within one year of 1st instance: Rs.10000/- per nozzle found delivering short.

Third and subsequent instances within one year 1st instance: Rs.25000/- per nozzle found delivering short."

17. Critical Irregularity is defined under paragraph 8.2 of the MDG. The relevant extract of paragraph 8.4 is quoted below:

"8.2 Critical Irregularities: The following irregularities are classified as critical irregularities:

XXX XXX XXX XXX XXX

iv. Additional/Unauthorized fittings and gears inside the dispensing units/ tampering with dispensing units. (5.1.4)

XXX XXX XXX XXX XXX

Action: Termination at the FIRST instance will be imposed for the above irregularities."

18. In the given facts and circumstances, it cannot be contended that the irregularity found is limited to minor irregularities as defined under paragraph 8.4 of the MDG. Clearly, the irregularity as contemplated under clause (i) of paragraph 8.4 of the MDG is mere short delivery simpliciter where there is no tampering or any additional/unauthorised fitting. In this case, the irregularity alleged is not limited to short delivery alone but the allegation is more sinister than that; the allegation, in no uncertain terms, is that the DU's at the retail

outlet were tampered with by adding a spurious cable to effect short delivery. This would clearly be a critical irregularity and attract the action of termination of petitioner's dealership.

19. In my view, the order passed by the IOC terminating the petitioner's dealership and the impugned order dated 21.07.2014 rejecting the petitioner's appeal therefrom do not warrant any interference by this Court in the present proceedings. Concededly, there is no infirmity in the decision making process of the IOC and the petitioner was given rightful opportunity to meet the allegations levelled against him. The explanations given by the petitioner has been duly examined and disposed of by giving reasons. None of the reasons as provided by the IOC for rejecting the petitioner's explanations can be said to be perverse or without material basis. As stated above, the action of the IOC is also in conformity with its guidelines. In these circumstances, this petition is without merit.

20. The Gujarat High Court has also in the case of Natvarlal v. Bharat: SCA 2412/2011 decided on 14 March 2011, expressed a similar view. In that case, the software installed in the electronic register assembly and the microcontroller chip hardware were not found to be the original components as supplied by Midco. The units were found to be tampered with electronically to give 100 ml. short delivery for every five litres delivered. The High Court rejected the petition challenging the termination and held that terminating the agreement could not be stated to be attended by the vice of arbitrariness or illegality or irrationality so as to violate any legal or fundamental right of the petitioner. I am in respectful agreement with that view.

21. In the given circumstances, the writ petition and the application (CM No. 9753/2014) are dismissed. The application (CM No. 9754/2014) is allowed subject to all just exceptions. The parties are left to bear their own costs.