

(2014) 04 CHH CK 0031
In the Chhattisgarh High Court
Case No : Writ Petition (C) No. 5395 of 2011

Sai Baba Fuels

APPELLANT

Vs

Hindustan Petroleum Corporation Ltd.

RESPONDENT

Date of Decision : 15-04-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 17
Constitution of India, 1950 — Article 226

Citation : (2014) 3 CGLJ 138

Hon'ble Judges : Manindra Mohan Shrivastava, J

Bench : Single Bench

Advocate : Prafull Bharat and Jitendra Pali, Advocate for the Appellant; Ali Asgar, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Manindra Mohan Shrivastava, J.

1. This petition under Article 226 of the Constitution of India has been preferred by the petitioner assailing correctness and validity of the order dated 18th June, 2011 (Annexure P-1), by which the Petrol/Diesel Dealership Agreement has been terminated. The factual matrix relevant for decision making of this petition is that the petitioner had entered into agreement of dealership with the respondent-Corporation on 16.12.2004. During the course of subsistence of agreement, it is alleged that on 8.2.2011, a surprise inspection was carried out by the officer of the respondent-Corporation and variation in the stock was found. A notice was issued to the petitioner calling for its explanation. It was followed by another notice in which it was stated that even the sample taken from the petitioner's stock, upon testing, failed. The petitioner submitted its reply. But, the proceedings eventually culminated in termination of dealership agreement by impugned order, giving rise to this petition.

2. Assailing correctness and validity of the action of the respondents, learned counsel for the petitioner argued that inspection dated 8.2.2011 was carried out

in the absence of the petitioner. No prior notice was given. The petitioner, in an unequal bargaining situation, was forced to sign the report. The report, on the face of it, is false and fabricated because later on, when the premises were handed-over by the petitioner to the respondent on 21.6.2011, a total quantity of 221 liters HSD alone was found. The respondent in its return has failed to explain this discrepancy. Therefore, the entire case of the respondent that there was variation in the stock beyond the permissible limit, which was one of the grounds of termination of the agreement, is liable to be rejected and consequently, the impugned order is arbitrary. The second limb of submission of learned counsel for the petitioner is that the authorities got the sample tested in laboratory without giving any advance notice and opportunity of hearing to the petitioner to remain present either personally or through his representative at the time of testing. Such test reports could not at all be made basis to take adverse action against the petitioner in view of the Supreme Court's decision in the case of Hindustan Petroleum Corpn. Ltd. and Others Vs. Super Highway Services and Another, . Learned counsel for the petitioner submits that thus, on both counts, firstly with regard to alleged variation of the stock beyond permissible limit and secondly, failure of test, the respondent has not only acted illegally, but also acted in violation of principles of natural justice. Therefore, impugned order of termination is liable to be set aside.

3. Per contra, learned counsel for the respondent-Corporation raised preliminary objection with regard to the very maintainability of the writ petition on the submission that there exists an arbitration clause in the agreement, which provides that in the event of any dispute including termination of agreement, the parties may take recourse to adjudication of their dispute by way of arbitration. He submits that on the face of existence of an arbitration clause, the writ petition is not maintainable and only on this count, the petition is liable to be dismissed. He further submits that in so far as ground relating to inspection and report of stock variation beyond permissible limit is concerned, any discrepancy in the report and panchnama is a matter which is required to be examined in arbitration proceedings and it cannot be conclusively presumed that the first inspection carried out on 8.2.2011 was necessarily incorrect and the panchnama alone was the correct to depict the correct position. He submits that during the period the stock was sealed, it remained in possession of the petitioner only. On the second aspect, learned counsel for the respondent submits that as far as the test report is concerned, in the absence of there being any challenge to the correctness of the test report as such, only on the ground that the petitioner or its representative was not present, it cannot be said that the test report should be ignored. Learned counsel for the respondent, with regard to preliminary objection relating to maintainability of the petition, relied upon the decision of the Supreme Court in the case Agri Gold Exims Ltd. Vs. Sri Lakshmi Knits and Wovens and Others, and The Rajasthan State Industrial Development and Investment Corporation and Another Vs. Diamond and Gem Development Corporation Ltd. and Another, and Division Bench judgment of this Court in the

case of Indian Oil Corporation Ltd. and Ors. Vs. M/s. Agrawal Fuels, Rajnandgaon W.A. No. 451/13 decided on 11.9.2013 and order dated 21.11.2013 passed by learned single Judge in the case of Ajay Agrawal Vs. Indian Oil Corporation Ltd. & Ors 2.

4. In reply to the specific objection with regard to maintainability of the writ petition, learned counsel for the petitioner submitted that it is not a rule of thumb that in all cases of dispute involving arbitration clause, the jurisdiction of writ Court is ousted. Relying upon the judgment in the case of Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, and subsequent judgment in the case of Union of India (UOI) and Others Vs. Tania Construction Pvt. Ltd., , it has been submitted that in appropriate cases, the writ remedy is available and interference may be called for in larger interest of justice even if there exists an arbitration clause under the agreement for resolution of dispute arising between the parties. Learned counsel submits that the test report, on the face of it, is inadmissible in view of authoritative pronouncement of the Supreme Court in the case of Hindustan Petroleum Corpn. Ltd. and Others Vs. Super Highway Services and Another, and so far as the other part i.e. variation in HSD is concerned, the discrepancy in the initial report with the panchnama itself is an extraordinary case where the matter may be examined by this Court without exhausting of exercise of alternative remedy of resolution of dispute through arbitration.

5. I have considered the rival submissions made by learned counsel for the parties and perused the records.

6. As far as preliminary objection with regard to maintainability of writ petition on the basis of availability of an arbitration clause in the agreement is concerned, there is considerable force in the submission of learned counsel for the petitioner that despite existence of an alternative remedy, in the form of an arbitration clause, the extraordinary writ jurisdiction under Article 226 of the Constitution of India is not ousted. In the case of Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, , the Supreme Court, while dealing with a case where there existed an arbitration clause, held that the rule of exclusion of writ jurisdiction on availability of an alternative remedy is a rule of discretion and not one of compulsion. It was held that in appropriate cases, 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 is challenged.

7. In another decision in the case of Union of India (UOI) and Others Vs. Tania Construction Pvt. Ltd., , relied upon by learned counsel for the petitioner, the Supreme Court while dealing with a case where there existed an arbitration agreement, held that an alternative remedy is not a absolute bar to the invocation of writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be

maintainable. It was observed that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution.

8. The principles have been laid down in the aforesaid decision, which involve cases where there existed arbitration clause in the agreement between the parties. Therefore, the submission of learned counsel for the respondent that in cases where there exists an arbitration clause, under no circumstance, writ jurisdiction can be invoked, is fallacious in law and cannot be accepted.

9. The Supreme Court in the case of Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, , has laid down at least three contingencies in which, despite existence of alternative remedy, a writ Court can entertain a writ petition. It has, therefore, to be examined in the present case whether the case of the petitioner falls in any of the contingencies as stated therein.

10. It has to be noted that in the present case that the dealership of the petitioner has been cancelled on two allegations firstly-when in the spot inspection made on 8.2.2011, stock variation was found beyond permissible limit and secondly that the sample collected from the petitioner's tank, failed laboratory test.

11. In so far as validity of laboratory test is concerned, the judgment of the Supreme Court in the case of Hindustan Petroleum Corpn. Ltd. and Others Vs. Super Highway Services and Another, has laid down that a test report which has been generated without affording an opportunity of hearing to the dealer to remain present personally or through the representative, cannot be made a basis. However, the other ground on which the dealership has been terminated is that there was found variation in the stock beyond permissible limit.

12. The allegation that there was a violation of principles of natural justice in carrying out inspection report on 8.2.2011 in the sense that the petitioner was not afforded opportunity to remain present at the time of carrying out inspection, in the peculiar facts and circumstances of the present case, itself an issue requiring enquiry into the facts. This is so because the report has been signed by the petitioner also. The submission of learned counsel for the petitioner that the petitioner was forced to sign the report, itself is an issue which requires inquiry into the facts. It would require a finding of fact to be recorded as to whether petitioner was actually present and, therefore, signed on the report or even though he was not present, he was forced to sign the report. Therefore, even if it were to be assumed that the principles of fairness required the spot inspection to be carried out in the presence of the petitioner, the peculiar circumstances as discussed above, itself is an issue requiring factual enquiry.

13. The petitioner was acting as an Agent of the Corporation and earning commission by selling petrol products as an Agent of the Corporation. The

Corporation has terminated the agreement. It is relevant to note that a panchnama was prepared on 21.6.2011 and it was on that date when the entire possession was taken over from the petitioner by the Corporation. If the stock in the tank containing petroleum products was sealed on the date of inspection i.e. 8.2.2011, when it was again checked-up after taking the possession from the petitioner, then in what circumstances, the variation has taken place and whether it was because of the Act of petitioner or by some other reason or for that reason, the initial inspection report should be disbelieved, are all matters which require a proper factual inquiry into the matter and it can be done only in the arbitration proceedings and not before this Court.

14. Therefore, in the peculiar facts and circumstances of the present case, in my considered opinion, it would be an appropriate case where the petitioner should be relegated to exhaust its remedy of revoking arbitration clause and seek resolution of dispute through arbitration as per the arbitration clause of the agreement.

15. Considering that in the present case, the petitioner is operating the petrol-pump under interim order and taking into consideration that in somewhat similar circumstance, while relegating the parties to arbitration proceedings, the supreme Court had made interim arrangement under its order dated 3rd January, 2014 passed in SLP (Civil) No. 37704/2013, it is directed that status quo shall be maintained by the parties for four weeks. However, the order of status quo shall have no bearing for consideration of the application for interim relief before the Arbitrator. In other words, if an application is made by the petitioner u/s 17 of the Arbitration & Conciliation Act, 1996 for interim relief, the Arbitrator shall consider the same appropriately in accordance with law uninfluenced by the order of the status quo which is now being passed. In the ultimate analysis, except the aforesaid observation, the petition is dismissed.

1 W.A. No. 451/13 decided on 11.9.2013

2 W.P. (C) No. 2854/10