(2016) 06 CAL CK 0006

In the Calcutta High Court

Case No : Writ Petition No. 24202(W) of 2014 with C.A.N. No. 9886 of 2015 with C.A.N. No. 9912 of 2014

Shankar Auto Service — APPELLANT

Vs

Indian Oil Corporation Ltd. — RESPONDENT

Date of Decision : 24-06-2016

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2016) 4 CalLT 512 : (2017) 2 WBLR 254

Hon'ble Judges : Aniruddha Bose, J.

Bench : Single Bench

Advocate : Mr. Ratnanko Banerjee, Mr. Avik Banerjee, Mr. Nilay Sengupta and Mr. Anindya Ghosh, Advocates, for the Petitioners; Mr. S.N. Mukherjee, Mr. M.S. Yadav and Ms. Saswati Chatterjee, Advocates, for the IOC

Final Decision : Allowed

Judgement

Aniruddha Bose, J. - This proceeding arises out of a decision of termination of dealership of the petitioner no. 1 for operating a retail outlet from which motor spirit and high speed diesel are sold. The petitioner no. 2 is one of the partners of the petitioner no. 1, the latter being a firm engaged in the aforesaid business. The agreement of dealership for operating the outlet from Diamond Harbour Road, Kolkata was executed on 31st July 2009, between the petitioner no.1 and the Indian Oil Corporation Ltd. (the oil company). The petitioners, however, claim to have been engaged in similar business since the year 1957. The decision to terminate the dealership of the petitioners was communicated to the petitioner no.1 by a letter dated 8th November 2013 issued by the Chief Divisional Retail Sales Manager, Kolkata Divisional Office of the oil company. A copy of this letter has been made Annexure ''P-13'' to the writ petition. The substance of allegations against the petitioners is tampering with a totalizer unit, from which high speed diesel (HSD) is ordinarily dispensed.

2. The petitioners claim to have five dispensing units for their retail outlet two of

them being computerized ''non-reversal'' ''Digital Dispensing Totalizer Duo Units'' of APLAB make and three dispensing totalizer units carrying the brand MIDCO. On 28th February 2013, an anti-adulteration cell of the oil company carried out inspection at the outlet of the petitioner no. 1 and found that in respect of the APLAB HSD totalizer/dispensing unit bearing model no. 22425, the embossment on one of the six seals was missing. That particular dispensing unit was thereafter sealed. I have been apprised by the learned counsel for the petitioners that this particular dispensing unit ought to remain sealed with a series of six seals and cross-sealing by the official of the Weights and Measures Department, State Government in terms of Eighth Schedule of the Standards of Weights and Measures (General) Rules, 1987. So far as this particular dispensing unit is concerned, petitioners'' case is that this was sealed by the Inspector of the Weights and Measures department of the State Government on 26th November 2012. After inspection, a notice to show-cause was issued upon the first petitioner by the Deputy Manager, Retail Sales, Kolkata ? 1 of the oil company on 25th March 2013. This notice contains two allegations, on which the first petitioner''s explanation was sought for. First, it was stated that the Totalizer unit of ''Aplab'' make HSD Dispensing Unit Model : 22425 SR. No. sw-c-07-1470 A/B was found not sealed by the anti-adulteration cell of the oil company. It has been specified in that notice that the same led to tampering of the Totalizer Unit. The second allegation was of negative stock variation beyond permissible limit for "Xtra premium (XP)" to the extent of 427 litres, while the permissible limit for the same has been specified to be 55 litres in the negative. A copy of this notice has been made Annexure ''P5'' to the writ petition.

3. The first petitioner gave its response to this notice denying the allegations. Explanation of the petitioners in relation to the missing embossment was an inadvertent error on the part of the official of the legal metrology department. The Officer of the oil company, this time being the Chief Divisional Retail Sales Manager, found that explanation of the first petitioner was not satisfactory and a second notice was issued on 26th April 2013. This notice was captioned "Show Cause Notice for Termination." It was observed in this notice that the concerned Inspector of Legal Metrology had confirmed that no error/mistake was committed by him while carrying out re-calibration/stamping of all the dispensing units at the retail outlet of the petitioners on 26th November 2012. In the same communication of 26th April 2013 it was pointed out that no explanation had been given by the first petitioner as regards stock variation of "xtra premium". These two irregularities, as per the stand of the oil company reflected in the notice, constituted "critical" and "Major", which rendered the dealership liable for termination. The first petitioner was called upon to explain as to why its retail outlet dealership ought not to be terminated under the Marketing Discipline Guidelines 2012 in conjunction with the dealership agreement. This letter of 26th April 2013 has been made Annexure ''P7'' to the writ petition. In its response to the notice of 25th March 2013 the petitioners indicated that no seal or any of its added components under the statute was found to be broken or tampered with.

Only one seal was found not embossed with stamping. The first petitioner gave a further reply on 27th May 2013 broadly reiterating the same stand. In this reply the petitioner no. 1 elaborated on possible reason for stock variation, attributing it to excessive evaporation on account of prolonged retention of low stock. The possibility of pipeline leakage was also pointed out.

4. Relationship of a retail dealer of motor spirit and high-speed diesel with the oil company is guided by three instruments. First is the standards Weights and Measures Act and Standards of Weights and Measures (General) Rules. These statutory instruments lay down the adulteration prevention measures to be taken while running outlet of running outlet of this nature. On the aspects of sealing and stamping of stamping of a dispensing unit, it has been stipulated in the aforesaid Rule:-

Part-I

"6A. Sealing and Stamping:

(a) After adjustment for correct delivery lead-and wire seals shall be applied in such a manner that no further adjustment can be made without mutilating the seal or seals. Plain wire shall not be used or lead and wire or seals. The stamp and seal of the verification authority shall be affixed on the lead and wire seal or seals by means of a plier or any other suitable device."

Part-II

"5. Sealing:

The Volumetric container filling machines shall be provided by the manufacturer with a plug/plugs or stud/studs of such soft metal to receive the stamp or seal of the verifying authority. Such plug/plugs or stud/studs shall be provided in the conspicuous part of the machine and shall be made in such a manner as to prevent its removal without obliterating the seal/seals. The adjusting device also shall be properly sealed so as to avoid any tampering of the capacity."

Apart from these statutory provisions, there is a common Marketing Discipline Guidelines (MDG) of the public sector oil companies, laying down a detailed procedure for supervision of retail outlets, and the methodology for dealing with errant retailers. Such measures include imposition of penal action in the form of, inter alia, suspension and termination of dealership. The third instrument is the agreement between a retail unit and the oil company, which primarily specify the commercial terms. In this case, such agreement was executed on 31st July, 2009. This agreement contemplates resolution of disputes between a dealer and dealer and the oil company in connection with the agreement through the process of arbitration.

5. So far as the present proceeding is concerned, clauses 5.1.2 and 8.2 of the MDG are relevant. These two clauses specify:-

"5.1.2 Short Delivery of Products

a) With Weights & Measures Department Seals intact Sales through the concerned dispensing unit to be suspended forthwith and recalibration and restamping to be done before recommencement of sales.

b) With Weights & Measures department Seals tampered W&M department seals are put on Metering unit and Totaliser unit with the help of a sealing wire and a lead seal which is embossed by W&M inspector.

The seal would be deemed tampered in the following cases also:

1. Seal itself is missing

2. Different seal has been put other than embossed by W&M inspector

3. Sealing wire is broken and not in one piece.

In addition other situations which can lead to manipulation of delivery/quantity/ totaliser may also be treated as tampering.

Penal action to be taken even if the delivery is found to be correct or excess.

In case of this irregularity sales from the concerned dispensing unit to be suspended, DU sealed. 8 Samples to be drawn of all the products and sent to lab for testing.

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

i. Adulteration of MS/HSD (5.1.1)

ii. Seals of the metering unit found tampered in the dispensing pumps. {5.1.2 (b)}

iii. Totalizer seal of dispensing unit tampered or deliberately making the totalizer non functional or not reporting to the company if totalizer is not working (5.1.3 read with 5.1.2)

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

v. Unauthorized storage facilities (5.1.5)

vi. Unauthorized purchase/sales of products. (5.1.6)

vii. Tank lorry carrying unauthorized product found under decantation at the RO (5.1.7)

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

6. Personal hearing was given to the petitioners after the first petitioner sent its reply to the second notice. The petitioners had appeared before the hearing officer being the Deputy General Manager (Retail Sales), West Bengal Sales

Office of the oil company on 8th August 2013. A written notes on submissions was also filed on that date. The decision was communicated to the first petitioner by a letter dated 8th November 2013 issued by the Chief Divisional Retail Sales Manager, Kolkata Divisional Office of the oil company. On the question of negative stock reporting, the explanation given by the petitioner no. 1 was found to be satisfactory. So far as allegation of tampering is concerned, however, it was recorded in this communication:-

"However, the other breach communicated to you was that the ''Aplab'' make DU of HSD, bearing model: 22425, Sr. No.SW-C-07-1470 A/B was found to be having totalizer unit''s seal without embossment of weights & measure department which is considered as ''totaliser seal tampered'' in accordance with the provisions of clause 5.1.2 (b) of Marketing Discipline Guidelines (MDG) 2012. The said breach, as per clause 8.2(iii) of MDG, 2012 is a ''critical irregularity'', which calls for termination at the first instance.

Your contentions in the written explanation and during personal hearing that you are not aware about the missing of embossing on the seal by W&M Department and that the same could be a human error attributable to the sealing officer W&M Department are not sustained due to the reason that the sealing of W&M Department was done at your behest and the certification given by sealing officer of W&M Department about the orderly affixing of all the seals, has been signed and acknowledge by you. Beside that inspection report of the Field Officer dated 05.12.2012 also does not mention any defect or short coming in the W&M seals in the DUs. Your explanation therefore is not at all satisfactory. This clearly shows that there has been a tampering of totalizer unit''s seal of the ''Aplab'' make dispensing unit of HSD, bearing model no. 22425, Sr.No.SW-C-07-1470 A/B which is a "critical irregularity" as per MDG-2012 and violation of conditions of the dealership agreement executed dated 21/07/2009.

The above irregularities committed by you/your servants or agents are in violation of Clause Nos. 7 & 34 of the terms & conditions of the dealership agreement aforesaid as these also violate Clause Nos. 5.1.2 (b) of the Marketing Discipline Guidelines 2012, action for which is termination of the dealership agreement dated 31.07.2009 executed between yourself & the Corporation. However, in terms of the right available to you under Clause 8.9 of MDG 2012, in case you desire to appeal within the period of 30 days from the date of receipt of this letter, you may approach the Appellate Authority whose name & address is given below:

Sh. B. Ashok, Executive Director, Retail Sales,

Indian Oil Corporation Limited

Indian Oil Bhavan,

G-9 Ali Javar Jung Marg,

Bandra (East), Mumbai-4000051

Copy of appeal should also be sent to Kolkata Divisional Office, 34 A, Nirmal Chandra Street, Kolkata-700013 to enable them to continue supplies.

In the event you fail to exercise the said right to appeal within the prescribed time-limit of 30 days, the order being communicated above regarding the irregularities committed, shall become final & the Dealership Agreement referred to above, shall stand terminated upon the expiry of 30 days period prescribed for filing the appeal & you shall cease to be our Retail Outlet dealer at 57/1, Diamond Harbour Road, Kolkata- 700 023, West Bengal. In case, an appeal is preferred by you in exercise of your right under Clause of MDG 2012 within the prescribed time-limit, further decision regarding termination of your dealership shall stand dererred till the decision of the Appellate Authority on your appeal. It may also be noted that in the event, your appeal filed before the Appellate Authority is rejected, the dealership agreement executed between yourself & our Corporation referred to above shall stand terminated forthwith upon such rejection. Upon the termination becoming final as the case may be, your license to enter upon the above said Retail Outlet premises shall also extinguish whist the Corporation remaining in possession of the Retail Outlet."

7. The petitioner had preferred an appeal against the initial order of termination under Clause 8.9(1) of the MDG and the Appellate Authority in this case was the Executive Director, Retail Sales of the oil company. One of the grounds on which appeal was preferred by the first petitioner was that the hearing officer in the case of the petitioners was the Deputy General Manager (Retail Sales), West Bengal Sales Office and it was to him the written submissions was made over, but the decision on termination was issued by another officer, Chief Divisional Retail Sales Manager. The Appellate Authority, however, sustained the decision of the authority of first instance, and confirmed termination of the first petitioner''s dealership. In this writ petition, the petitioners have challenged the legality of termination order issued by the authority of the first instance as also the order of the Appellate Authority. The legality of the two notices which preceded the termination order has also been challenged. The first point on which argument has been advanced before me by the petitioner is that there was no critical irregularity in this case on the seal on the unit itself was not tampered, but only the embossment on the seal was missing. Submission of the petitioners is that the missing embossment on only one seal could be an inadvertent error. It was highlighted on behalf of the petitioners that the said unit was non-reversable in nature and could not be manipulated or tampered with at will by the dealer. Further submission of the petitioners was that detailed checking of the outlet did not reveal any malpractice or irregularity on the part of the dispensing unit, and all the seals were intact. It was further urged on behalf of the petitioners that the officers of the oil company in this case acted with closed mind and issued the termination order even though no mala fide on the part of the first petitioner could be established. No error or discrepancy was found on verification of stock. Mere missing of the embossment ought not to result the termination of dealership.

8. The other ground on which the initial order of termination is assailed is that the officer who heard the petitioners of 8th August 2013 did not pass the order. The termination order, which formed the main cause of action of the writ petition, was the communication captioned "Termination of retail outlet dealership" bearing reference no. KDO/R/Shankar Auto Service/13" dated 8th November 2013 issued by Chief Divisional Retail Sales Manager, Kolkata Divisional office of the oil company. This is the communication the legality of which has been questioned in the writ petition. A copy of this order has been made Annexure ''P13'' to the writ petition. In the affidavit-in-opposition of the oil company affirmed by one Monoj Gupta, the Chief Divisional Retail Sales Manager on 27th October 2014, a copy of the order captioned "Personal Hearing Order" dated 3rd September 2013, issued by one Sivasis Dey, DGM (Retail Sales) of the West Bengal State Office has been annexed. It is not in dispute that this order of 3rd September 2013 running into six pages was never served upon the petitioners. On behalf of the respondents, however, it has been argued that the proceeding against the first petitioner was administrative in nature and it was a case of institutional hearing. The decision had to pass through various authorities within the administrative set up of the oil company and it was sufficient if the ultimate decision was communicated to the first petitioner or its partners.

9. This writ petition has been resisted by the respondents on merit as also on the ground of maintainability. It is argument of the respondents that the petitioners have alternative efficacious remedy in the form of arbitration, and the petitioners ought not to be permitted to raise their grievance before the Constitutional Court. Admitted position is that the dealership agreement provides for arbitration as a settlement mechanism. It has been specified in Clause 61(a) of the dealership agreement:-

"61(a) Any dispute or difference of any nature whatsoever, any claim, cross-claim, counter-claim or set-off or regarding any right, liability, act, omission or account of any of the parties hereto arising out of or in relation to this agreement shall be referred to the sole arbitration of the Director (Marketing) of the Corporation who may either himself act as the Arbitrator or nominate some other officer of the Corporation to act as the Arbitrator. The Dealer will not be entitled to raise any objection to any such Arbitrator on the ground that the Arbitrator is an officer of the Corporation."

10. The arbitration clause is wide enough to cover the dispute which this writ petition is concerned with and hence the matter ought to have been referred to arbitration. On this point the judgments relied upon by the respondents are the cases of Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums [(2003)6 SCC 503] and Empire Jute Company Ltd. v. Jute Corporation of India Ltd. [(2007)14 SCC 680] and [(2008)8 SCC 172]. In the case of Gridco Ltd. & Ors. v. Sadananda Gogoli (AIR 2012 SC 729), the limits of the writ jurisdiction has been outlined and it has been held that the Writ Court cannot substitute its own decision with that of the administrative authority in a situation where an

administrative body is the decision making authority in regular course. None of these authorities, however, lay down in absolute term that the writ jurisdiction of the High Court is altogether excluded in the event there is an arbitration clause. In the case of Hindustan Petroleum Corpn. Ltd. (supra), controversy arose over competing jurisdictions of the Civil Court and the arbitrator. In that case, the dealer, against whom penal measures were imposed by the oil company, had approached the Civil Court. The oil company had applied to the Civil Court under the provisions of Section 8 of the Arbitration and Conciliation Act, 1996 read with Section 5 thereof for referring the dispute to arbitration. The plaintiff in that proceeding sought to make out a case that the dispute involved was not covered by arbitration. It was in that context the Hon''ble Supreme Court held that if there was any objection as to the applicability of the arbitration clause, the same will have to be raised before the arbitral tribunal concerned. In the case of Empire Jute Company Ltd. (supra) also, restraint on the Writ Court has been prescribed in resolving disputes covered by an arbitration clause, but total hands off approach by the Constitutional Court has not been mandated in this case also. On behalf of the writ petitioner the decision of the Supreme Court in the case of Bihar State Mineral Dev. Coprn. v. Encon Builders (I) P. Ltd. [(2003)7 SCC 418]. That is a proceeding involving the Arbitration Act, 1940. In this case, bias on the part of the arbitrator and there was finding by the Trial Court that the relevant clause did not give rise to an arbitration agreement. The ratio of this decision is not applicable in the facts of this case.

11. In the case of Ram and Shyam Co. v. State of Haryana & Ors. (AIR 1985 SC 1147), the exceptions to the exclusion of the Writ Court''s jurisdiction on the ground of there being alternative remedy has been highlighted. It has been held in this case:-

"Ordinarily it is true that the court has imposed a restraint in its own wisdom on its exercise of jurisdiction under Article 226 where the party invoking the jurisdiction has an effective, adequate alternative remedy. More often, it has been expressly stated that the rule which requires the exhaustion of alternative remedies is a rule of convenience and discretion rather than rule of law. At any rate it does not oust the jurisdiction of the Court. In fact in the very decision relied upon by the High Court in The State of Uttar Pradesh v. Mohammad Nooh it is observed that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It should be made specifically clear that where the order complained against is alleged to be illegal or invalid as being contrary to law, a petition at the instance of person adversely affected by it, would lie to the High Court under Article 226 and such a petition cannot be rejected on the ground that an appeal lies to the higher officer or the State Government."

12. The same principle has been reiterated in the case of Star Paper Mills Ltd. v. State of U.P. & Ors. [(JT 2006 (12) SC 92]. So far as the present proceeding is concerned, it has been pointed out on behalf of the respondents, referring to the

decision of Empire Jute Co. Ltd. (supra), a strict approach is necessary in view of near mandatory legal character incorporated in Section 5 of the 1996 Act for ousting the jurisdiction of regular judicial forum in respect of a dispute covered by the arbitration clause. But Judicial Review under Article 226 of the Constitution being part of basic structure of the Constitution, as laid down in L. Chandra Kumar v. Union of India and Others [(1997) 3 SCC 261], the provisions of Section 5 and 8 of the 1996 Act cannot be construed to oust the Constitutional writ jurisdiction of the High Court altogether, provided of course the writ petition otherwise can be maintained in respect of the dispute involved in a particular case. In any event, no application under Section 8 of the 1996 Act has been filed in this case. No doubt there are factual disputes involved in this case as well. But I do not propose to enter into such factual disputes, and I shall confine my scrutiny of the decisions or actions impugned within the parameters permissible for intervention by the Writ Court while testing legality of decisions involved in this proceeding. Similar jurisdictional issues were considered by a learned Single Judge of the Allahabad High Court in the case of Navin Filling Station v. Indian Oil Corporation Limited and Ors. [(2008)4 AWC 3234] in a case of termination of a dealership agreement in which objection on maintaining the action under Article 226 of the Constitution was taken, referring to the arbitration clause and the 1996 Act. In this judgment, three decisions of the Supreme Court, being (i) Sanjana M. Wig (Ms) v. Hindustan Petroleum Corporation: (AIR 2005 SC 3454), (ii) Harbans Lal Sahni v. Indian Oil Corporation (AIR 1999 SC 22), (iii) Whirlpool Corporation v. Registrar of Trade Marks (AIR 1999 SC 22) were considered and the Hon''ble Judge in exercise of the Constitutional writ jurisdiction chose to decide the complaint of the petitioner. I am in respectful agreement with this authority and choose to follow the same course on the point of maintainability of this petition, following the ratio of the aforesaid three authorities.

13. Now that I have held that jurisdiction of this Court under Article 226 of the Constitution of India has not been ousted by the Arbitration Clause contained in the dealership agreement in the given facts of this case, I shall test the legality of the decision of the appellate body and the authority of the first instance on the basis of limited grounds available for judicial review. Before I proceed to do so, I must point out that I did not find any illegality in the two notices which were sent to the first petitioner. These notices required the first petitioner to explain certain irregularities, and these notices by themselves cannot be held to be illegal or contrary to any provision of law. The manner in which complaints of critical irregularities shall be dealt with has been stipulated in the Marketing Guidelines and in this regard the following Clauses are relevant.

"8.5.6 In respect of all cases of irregularities, a show cause notice, within 30 days from the date of inspection will be issued to the dealer indicating all the irregularities. However, in case samples of MS/HSD were drawn during inspection then the show cause notice will be issued within 30 days of test results. The show cause notice should be issued along with all reports and other documents, etc. which forms the basis of the notice.

8.5.7 The dealer would have a period of 15 days to reply from the date of receipt of show cause notice.

8.5.8 Upon receipt of the reply to the show cause notice, the authorised officer of the OMC will review the charges levelled and the reply received and pass a speaking order preferably within a period of 45 days from the receipt of the reply. The speaking order shall indicate complete details of the irregularities committed the reply of the dealer and detailed reasons as to why the reply is acceptable/not acceptable to the official.

8.6 In case of Critical irregularities leading to termination, the Head of the State office/Regional office/Zonal office of the concerned OMC or their nominee before recommending/approving the termination of dealership will provide a personal hearing to the signatories to the dealership or their nominee(s). However, if signatories to the dealership or their nominee(s) fail to attend the hearing on an appointed date, one more chance will be given and after that the case may be processed ex party based on available facts.

8.8 Authority to take action:

i) The action of termination and all other critical irregularities will be approved by Regional head/State head/Zonal head of the concerned oil company (General Manager and above). However, in respect of SC/ST category dealerships termination will be approved by the Director (Marketing) HQ.

ii) In respect of major irregularities, the approving authority would be an authorised officer not below the rank of Dy. General Manager at State/Region/ Zonal level.

iii) In respect of minor irregularities the approving authority would be the head of Territory/Regional/Divisional office."

14. I find from the materials forming part of records of this case that after the reply was received from the petitioners, a note was prepared on 31st May 2013, by the Manager (Retail Sales) in which the explanation given by the petitioners in their reply of 27th May 2013, on the aspect of tampering of the totalizer seal of dispensing unit was not found acceptable and before termination of dealership, opportunity of personal hearing was recommended. This was ultimately approved by the Executive Director, West Bengal Sales Office and hearing by the Dy. General Manager (Retail Sales) on his behalf was prescribed. It was thereafter, personal hearing was given. The oil company''s stand is that this is as per the MGD. I must point out here that the MDG has been made effective from 8th January, 2013 and the allegations of irregularities related to a period prior to these Guidelines becoming operational. On this point, however, not much dispute has been raised and the contesting parties seem to have accepted applicability of these Guidelines I shall accordingly proceed on the basis that the action taken against the first petitioner was in terms of these Guidelines, which are applicable in this case.

15. One of the main complaints of the petitioners in the writ petition is that the officer who heard them did not pass the order. In this case, the respondent no.3, i.e the Dy. General Manager (Retail Sales) West Bengal Sales Office, was the officer before whom the writ petitioners had appeared for personal hearing. Prior to that, both the notices were issued calling upon the writ petitioner to show cause. To the show cause notice of 26th April 2013, petitioners have given a detailed reply on 27th May 2013. Thereafter, a further notice was issued on 11th July 2013, giving the petitioners opportunity of personal hearing. Actual hearing took place on 8th August 2013. The termination notice dated 8th November, 2013 was issued by the Chief Divisional Retail Sales Manager. In the affidavit in opposition, the respondents, however, have disclosed a "Personal Hearing Order" dated 3rd September, 2013, issued by the officer, who it appears, had heard the petitioner on 8th August, 2013. There is another note annexed to the affidavit-in-opposition of the oil company, issued by one P.K. Basu, whose designation has been written in short, as "CM(RS),WBSO". This note appears to have been prepared on 19th September, 2013, and I find from this note that a conscious decision was taken by the oil company not to serve the "Personal Hearing Order" to the first petitioner. It is recorded in this note:-

"4. Giving the effect of the Personal Hearing Order was discussed with GM (Law) on 19/09/2013. It was opined that as personal hearing is a process before taking final decision by the competent authority, hence this order is not required to be served to the dealer at this stage.

5. In view of the foregoing, the proposal of the Kolkata Divisional Office dated 31/05/2013 and the Personal Hearing order dated 03/09/2013 may be accepted. Accordingly approval may be accorded to terminate the dealership of the Retail Outlet for the proven case of "critical irregularity" of tampering of totaliser unit''s seal of the "Aplab" make dispensing unit of HSD, bearing model no.22425, Sr. No.SW-C- 07-1470 A/B at the Retail Outlet, as per point 2 of clause 5.1.2(b) of MDG 2012 and ref. Cl. no.8.2 (iii) of MDG 2012, calling for termination at the first instance under MDG 2012, which is also a violation of various terms and conditions as stipulated in the dealership agreement executed on 31/07/2009 between the Corporation and the Retail Outlet Dealer. If approved, the Divisional office to take adequate measures for safe custody of RO premises including equipments & superstructures."

16. On behalf of the petitioners, three authorities have been relied upon,

(i) Gullapalli Nageswara Rao v. Andhra Pradesh State Transport (AIR 1959 SC 308), (ii) State of WB v. Kohinoor Tea Co. Ltd. & ors (AIR 1976 Cal 432) and (iii) Union of India v. Gyan Chandra Chattar {(2010)7 SCC 781} to contend that the officer who hears a case must pass the order as well. This point was taken by the petitioners in their appeal before the Executive Director, Retail Sales of the respondent no. 1 as is evident from paragraph 41 of the petition of appeal and ground II thereof. The appellate authority, however, has not given a decision on this point and decided the appeal of the first petitioner on merit. The respondents'' case on this point is that a proceeding of this nature is administrative in character, and requirements of principles of natural justice has to be complied with by the institution as a whole, and not by any individual officer. The authorities on which the respondents relied upon to sustain their stand on institutional hearing are Pradyut Kumar v. C.J. of Calcutta (AIR 1956 SC 285), Jaswant Sugar Mills v. Lakshmi Chand (AIR 1963 SC 677), Ossein and Gelatine Manufacturers'' Assn. of India v. Modi Alkalies and Chemicals Ltd. [(1989) 4 SCC 264] and Kalinga Mining Corporation v. Union of India & Ors. [(2013) 5 SCC 252]. These authorities have been cited to distinguish between administrative and judicial proceedings. Citing these authorities, it has been argued on behalf of the oil company that in administrative proceedings, a decision rendered by an officer would not be vitiated if another officer had heard the matter. In the context of this case, after filing of affidavit-in-opposition, however, it has surfaced that an order was actually passed on 3rd September, 2013 after personal hearing was given, but that order was never served. In any event, as the oil company is contending that there is no necessity on the part of hearing officer to pass an order, and such order can be passed by another officer as part of institutional hearing, I propose to deal with the cases cited on behalf of the oil company.

17. The controversy involved in the case of Pradyut Kumar (supra) was in relation to power of the Chief Justice to delegate the power of inquiry into allegations of misconduct of an officer of a High Court to another Judge. The Hon''ble Supreme Court found such delegation to be valid, referring to a decision of the House of Lords [Board of Education v. Rice (1911) AC 179]. In that decision, it was held that an administrative authority could obtain the material on which he is to act in such manner as may be feasible and convenient, provided the affected party has a fair opportunity to correct or contradict any relevant and prejudicial material. In Jaswant Sugar Mills (supra), the distinguishing elements of judicial and administrative acts were outlined. In the cases of Ossein and Gelatine Manufacturers'' Assn. of India (supra), and Kalinga Mining Corporation (supra), orders passed by officers other than the ones who had heard the matters were found to be valid, broadly on the ground that such matters were required to be heard by institutions and not particular officers. In Ossein and Gelatine Manufacturers'' Assn. of India (supra), under challenge was an order passed by the Central Government under Section 55 of the Monopolies and Restrictive Trade Practices Act, 1969. In this case, the proceedings were found not in the nature of judicial proceedings, and the interaction between the affected party and the authorities were in the nature of meetings, minutes of which were recorded in detail. In the case of Kalinga Mining Corporation (supra), the controversy related to grant of mining lease. The Central Government was to hear out the matter. A Joint Secretary heard the matter for two days, but the order was passed by another officer. The officer who had heard the matter had prepared a long note, which was approved by the Secretary of the department and subsequently by the Minister. The order which was passed was a verbatim

copy of the report/note prepared by the Joint Secretary. It was in that context the decision was found to be valid, not suffering from any procedural infirmity.

18. In administrative matters, often decisions are required to be taken through a multi-layered process of consents and approvals, unlike in a judicial proceeding guided by an insulated and hierarchical structure. In the former case, in which the decision has to incorporate in itself opinions and comments of several authorities, and may involve discussions and negotiations at various stages, the ultimate decision does not retain a single-source characteristic, and in such a situation it becomes immaterial through whose pen the decision ultimately surfaces. It becomes an institutional decision.

19. The petitioners'' case, however, is not a case in which a matter has been heard by one officer and another officer has decided the matter. As I have observed in the previous paragraph, such a course is permissible in certain administrative proceedings in which law provides for institutional hearing, consisting of a comprehensive decision making process. No doubt the provisions in the Marketing Discipline Guidelines stipulated for termination of a dealership agreement is not a judicial proceeding, and strict adjudicatory principles are not required to be adhered to by the administrative set-up of the oil company. But this is a proceeding which is administrative in character, in which basic tenets of natural justice is to be complied with. Secondly, the procedure specified in the said Guidelines would have to be followed. In this case the "Personal Hearing Order" has not been served upon the petitioners. The respondents, however, contend that it is immaterial which order is communicated, as the decision for termination of dealership on the ground of critical irregularities requires to be examined at various levels. According to the respondents, if the end-result of the proceeding with its basic reasoning is communicated to the dealer that would be sufficient. So far as the decision-making process is concerned, respondents'' case is that the provisions of the MDG have been followed by them, and this has been narrated in their affidavit-in-opposition.

20. In cases of allegations of irregularities of this nature, the MDG contemplates an initial show-cause seeking explanation, then review of the explanation of the dealer, which is to be followed by a speaking order giving details of irregularities and the reason as to why the reply of the dealer is acceptable or not acceptable. In case of critical irregularities leading to termination, the head of the State Office/Regional Office/Zonal Office or their nominee is to give personal hearing to the dealer concerned before recommending or approving the termination of dealership. It is only after personal hearing action for termination is to be taken, on approval of the specified senior official of the oil company. From Clause 8.8(i), I find that the action of termination and all other critical irregularities are required to be approved by the Regional Head/State Head/Zonal Head of the oil company. It is also provided in Clause 8.9 of the MDG that in case of orders in critical irregularities, the dealer has right of appeal before a higher official of the oil company. In relation to allegations of critical irregularities, I find that the

decision making process commences on the basis of a speaking order passed after the receipt of reply to the show-cause notice. The authorised officer of the oil company is to pass such an order. The speaking order is to contain reason in detail as to why the reply is acceptable or not acceptable to the official. In the event there is finding of there being critical irregularities, as per Clause 8.2 of MDG, termination is to be effected at the first instance. Before the action for termination is to be taken, a personal hearing is required to be given by the specified head of the office or his nominee before approving the termination of dealership. It is implicit in these provisions that such personal hearing ought to result in a formal order, which has been the case in this proceeding as well, resulting in issue of the order dated 3rd September, 2013. This is the second stage of the decision making process. The actual action of termination is again required to be approved by the Regional Head/State Head/Zonal Head of the oil company. From the scheme envisaged under the MDG, it is apparent that the initial order to be passed after the reply to the show-cause notice is received, would be a tentative order which will assume final shape after personal hearing is given. The order on the basis of personal hearing to be passed by the head of the respective office or its nominee would require approval from the designated officer of the oil company before effecting termination.

21. Now, which one would be the order against which appeal is to be preferred? I find from the materials disclosed in the pleading that the initial expression of intention to terminate the dealership of the first petitioner was communicated to it by the letter dated 26th April, 2016, captioned "Show Cause Notice for Termination". The first petitioner had replied to it and thereafter, on 31st May, 2013 a note was prepared recommending termination of dealership of the petitioner. In this note an opportunity to give personal hearing to the dealer was contemplated, which was approved by the Executive Director of the oil company which reached him following different officers of different ranks within the administrative set-up of the oil company. It was thereafter, on 11th July, 2013 the first petitioner was informed that personal hearing and such hearing was subsequently held on 8th August, 2013. On the basis of the said hearing the order dated 3rd September, 2013 was issued. The oil company, however, chose not to serve that order to the dealer on the reasoning that personal hearing is a process before taking final decision. Thereafter a proposal was mooted for termination of dealership of the petitioner on the basis of "Personal Hearing Order" which was approved by the Executive Director of the oil company, as it appears from Annexure ''R-3'' to the affidavit-in-opposition. The proposal note is dated 19th September, 2013 and the approval by the Executive Director, West Bengal Sales Office (WBSO) was given on 27th September, 2013. This proposal note was again not sent to the first petitioner and a fresh memorandum dated 8th November, 2013 to which I have already referred to, was communicated to the first petitioner informing it of the decision to terminate the dealership, with a rider that the petitioner no.1 was entitled to prefer an appeal under Clause 8.9 of the MDG.

22. In my opinion, it was the order passed after personal hearing was given by the Deputy General Manager (Retail Sales), West Bengal Sales Office dated 3rd September 2013 which constituted the substantive order, against which appeal was to be preferred. The various departmental notes dealt with the question as to whether approval to this order ought to be given or not, and these notes were in relation to the approval process. Once approved, the order of 3rd September 2013 became operative, and the petitioners became entitled to prefer an appeal against this order. The letter dated 8th November 2013 merely communicated the order. The letter, being Annexure "P13" to the writ petition summarizes the "Personal Hearing Order" upon being approved by the Executive Director. But according approval does not constitute passing a fresh order. Though the order was passed in a proceeding administrative in nature, mere communication of the decision does not fulfil the requirement of serving the order on the dealer, which requirement is implicit in the MDG. Moreover, the order being an appealable one, it becomes necessary that a dealer receives the actual order or a copy of it. If he gets mere summary of the order, then it would not be possible for him to formulate the grounds of appeal. For that purpose, he would need to know the manner in which factual position and evidence have been dealt with by the authority of the first instance, and how the relevant provisions of the MDG have been applied in the facts of the case. The aggrieved dealer also does not get the opportunity to look at the reasoning of the authority of first instance if the actual decision is not served on him. In the case of Kalinga Mining Corporation (supra), the order which was sent was a verbatim copy of the note prepared by the Joint Secretary. That is not the case here, as the "Personal Hearing Order" runs into six pages, containing various observations and reasoning of the hearing officer. Non-service of this order effectively deprives the first petitioner the right of preferring appeal. The appeal was preferred against the notice dated 8th November, 2013, whereas the effective order was the one dated 3rd September 2013, the latter having not been served upon the petitioners.

23. The respondents relied upon the decision of the Supreme Court in the case of Gojer Brothers v. Ratan Lal (AIR 1974 SC 1380) to contend that the order of the authority of the first instance had merged with the order passed in appeal, and any flaw in the original order could not be looked into at this stage. I do not accept this argument because in my opinion, the petitioners were deprived of the effective opportunity to prefer an appeal. In this case, the petitioners were compelled to prefer an appeal against a communication projected as an order, whereas the actual order was never served on them and there is no material to suggest that the petitioners were otherwise notified of this order. in such circumstances, one cannot treat the appellate order to have been passed in a valid proceeding. On behalf of the respondents it was also contended that since the petitioners were given opportunity to file written notes on submissions, and in such circumstances it was immaterial if it was the same officer who passed the order, or it was another officer. But his argument does not aid the oil company in this proceeding, where the order was made by the officer who had heard the

petitioners, but the actual order was not communicated to the petitioners.

24. On behalf of the petitioners, argument was also advanced on improper delegation of authorities who had taken various steps or passed orders at different stages. I could not find any major flaw in that regard. Fault was sought to be attributed to the appeal proceeding itself, as the petitioners were apprehensive that the appellate authority being superior officer of the same company and his possibility of being involved in the decision making process earlier. In an administrative proceeding, however, such association becomes inevitable. To succeed on this ground, the petitioners would have to clearly demonstrate bias on the part of the appellate authority, or show his direct involvement in the decision making process earlier. It was also extensively argued on behalf of the petitioners that detection of missing embossment could not give rise to critical irregularities as per the MDG. I am not determining that question in this judgment, and I shall explain in that subsequent paragraph why I have chosen not to do so.

25. In my opinion, it was incumbent upon the oil company to effect service of copy of the "Personal Hearing Order", and this failure on the part of the respondents render the entire appellate proceeding invalid. Since it was on account of fault on the part of the oil company the petitioners could not prefer a proper appeal, a further opportunity to file an appeal should be given to the petitioners.

26. I accordingly set aside the order of the Appellate Authority and give liberty to the petitioners to file an appeal afresh against the order passed on 3rd September 2013 within 30 days. Since the "Personal Hearing Order" has been annexed to the affidavit-in-opposition of the oil company, I do not direct fresh service of this order. The petitioners shall be entitled to file the appeal on the basis of the copy of the order annexed to the affidavit-in-opposition. Once such appeal is filed, decision shall be taken thereon upon giving opportunity of hearing to the petitioners, who shall be entitled to be represented by their advocate in the appeal proceeding. Decision in the appeal shall be taken within a period of 8 weeks from the date of filing of the appeal and the allotment of the subject dealership shall not be made to any person for a period of 30 days. If the petitioners prefer an appeal within the time-frame prescribed, status quo as regards the subject dealership shall be maintained till lapse of 14 days from the date the decision of the Appellate Authority is communicated to the writ petitioners. I have observed earlier in this proceeding that I am not deciding the question as to whether as case of missing embossment from a seal can constitute "critical irregularities" or not. The petitioners have also argued that some element of mala fide or mens rea has to be established to hold a dealer guilty of critical irregularities. In my view, these questions ought to be raised before the appellate forum. The scope of arguing these issues before the appellate forum is wider than in a writ proceeding.

27. The writ petition stands allowed in the above terms. There is an application,

registered as CAN 9886 of 2015 taken out by the oil company seeking leave of this Court to appoint an ad hoc dealer in respect of the same retail outlet. Having regard to what I have held and directed, no specific order is warranted in respect of this application and the same shall stands disposed of in terms of my findings and directions given in the main writ petition. There is also an application, registered as CAN 9912 of 2014, taken out by the petitioners seeking direction on the oil for restoration of supply. That application is treated on day''s list. This application shall also stand disposed of in the above terms. The interim order passed in this matter shall stand dissolved.

28. There shall be no order as to costs.

29. Urgent Photostat certified copy of this order be given to the parties expeditiously, if applied for.

