

(2008) 11 CAL CK 0030

In the Calcutta High Court

Case No : Writ Petition No. 27514 (W) of 2007

Tarun Kumar Halder and Another

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 06-11-2008

Acts Referred:

Constitution of India, 1950 — Article 19(1)(g), 21
Essential Commodities Act, 1955 — Section 3
Petroleum Act, 1934 — Section 14, 23, 4

Citation : (2008) 11 CAL CK 0030

Hon'ble Judges : Dipankar Datta, J

Bench : Single Bench

Advocate : Saptangshu Basu, Sagar Bandopadhyay, Tirthankar Ghosh, Phiroze Edulji, for the Appellant; Sabyasachi Chowdhury, Debashish Dutta, Maya Bhadra for the Respondents 1 to 3 Sourya Sadhan Bose, Cedric Fernandez for the Respondent 4, for the Respondent

Final Decision : Dismissed

Judgement

Dipankar Datta, J.

The Judgment of the Court was as follows:

1. The two petitioners and the added respondent, who are brothers, constituted a partnership firm under the name and style M/s. Sankar Filling Centre. In pursuance of a Memorandum of Agreement (hereafter the MOA) executed on 2.11.98 between Bharat Petroleum Corporation Limited (hereafter BPCL) and the three brothers, they were appointed as dealers and license was granted by it in their favour for a period of 15 years from 26.6.98 to run the retail outlet at 73D, Narkeldanga Main Road, Kolkata 700 054 and to use motor spirit and/or HSD pumps, storage tanks, pipes and fittings and all other facilities erected and provided by BPCL upon the said premises and also other facilities that may be provided by BPCL on the said premises during continuance of the licence. It is the specific case of the petitioners that they have been running the retail outlet

without any blemish and at no point of time any complaint was lodged by any customer regarding quality and quantity of petroleum products sold by them from the retail outlet. From time to time, officials of BPCL conducted a number of inspections and on each of such inspection, no irregularity was detected. However, on 20.10.07 employees of SGS India Private Limited, the respondent No. 4, being a private agency having no authority to enter upon the retail outlet made an unauthorized collection and testing of samples which was objected to by the petitioners. Since however no action was taken by BPCL on the basis of such unauthorised testing, the matter was not proceeded with.

2. It is their further case that on 3.12.07 employees of the respondent No. 4 again visited the retail outlet of the petitioners and sought to conduct marker test of high-speed diesel and motor spirit. Despite objection raised by the employees of the petitioners, samples were collected from the retail outlet. The employees of the respondent No. 4 having carried out the marker test of petrol and diesel products expressed that while all products had passed the tests, testing of diesel on analysis has shown "P" (Pink) on the marker and, therefore, has failed the test. Copy of the report was given to the petitioners by the employees of the respondent No. 4 and the same is annexure P-3 to the petition.

3. In the afternoon of 3.12.07 itself, the petitioners received a communication from the Deputy Manager (Sales) of BPCL. On the basis of the test conducted by the respondent No. 4, a report had been submitted to BPCL mentioning that HSD (Diesel) sample, tested vide IAS Column No. 04162442 had turned "Pink" and, accordingly, in terms of the extant guidelines the petitioners were advised to suspend the sale of all products with immediate effect till further intimation. It was further conveyed that all tanks and dispensing units were being sealed.

4. Close on the heels of the order suspending sales of products followed a letter dated 7.12.07 from the Territory Manager (Retail), Kolkata, of BPCL. The contents of the first paragraph of the letter reiterated the visit of the officials of the respondent No. 4 to the retail outlet on 3.12.07 and the result of such inspection. In the second paragraph of the letter it was mentioned that in terms of the prevailing policy retesting of the samples of the retail outlet, the tank lorry and the supply location were conducted at the Budge Budge laboratory of BPCL on 6.12.07 in presence of the petitioners, the transporters' representative, representative of the respondent No. 4 and the Deputy Manager (Sales) and on testing, the HSD sample taken from the retail outlet tested "P" (Pink) while HSD sample drawn from the tank lorry indicated the result "N" (Not pink). While enclosing copy of the test report, the petitioners and the added respondent were required to explain in writing within 7 days from date of receipt of the same, the reasons for failure of HSD sample collected from the retail outlet to pass the marker test failing which it would be construed that they have no explanation to offer and action as deemed fit would be initiated.

5. By a representation dated 12.12.07, the petitioners challenged the authority of respondent No. 4 to conduct marker test and also to collect samples from the

retail outlet and the jurisdiction of BPCL to proceed against the petitioners on the basis of the report of the respondent No. 4. According to the petitioners, in terms of the Petroleum Act, 1934 (hereafter the 1934 Act) and the Rules made there under read with the provisions of the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2005 (hereafter the 2005 Order) and the Marketing Discipline Guidelines, 2005 (hereafter the Guidelines), only those officers authorized by the competent authority may enter into the retail outlet, collect sample and conduct test and, therefore, BPCL not being authorized to engage the respondent No. 4 lacks the competence to proceed against the petitioners on the basis of report submitted by it. A request was made to revoke the order of suspension and to allow the petitioners to carry out normal business from the retail outlet.

6. Immediately thereafter, on 14.12.07, the present petition appears to have been affirmed and filed before this Court on 19.12.07. Challenge in this writ petition is to the engagement of the respondent No. 4 by BPCL to conduct tests in the retail outlet of the petitioners, the order suspending sales on the basis of report prepared by it, the show cause notice issued by BPCL on 7.12.07 and its refusal to revoke the order of suspension.

7. Mr. Basu, learned Counsel appearing for the petitioners invited the attention of the Court to provisions contained in Clause 10(k) of the MOA whereby the parties agreed to abide by the 1934 Act and the rules framed there under as also any other laws, rules and regulations, either of the Government or of any local body as may be in force. He also invited the attention of the Court to the provisions contained in Section 14 of the 1934 Act read with Rule 2(xxii) and Rule 186 of the Petroleum Rules, 2002 (hereafter the 2002 Rules), in support of his submission that for inspection and sampling of petroleum products it is the Central Government which may, by notification in the Official Gazette, authorize any officer by name or by virtue of office to enter any place where petroleum, inter alia, is being stored for the purpose of inspection and taking samples for testing. By referring to Rule 2(22) of the 2002 Rules he sought to contend that a "Sampling Officer" would mean an officer authorized by the Central Government under sub-section (1) of Section 14 of the 1934 Act and that in terms of Rule 186 thereof it is only the Sampling Officer who can draw samples in the manner prescribed therein. He also referred to Clause 7 of the 2005 Order to contend that any gazetted officer of the Central Government or the State Government or any police officer not below the rank of Deputy Superintendent of Police, duly authorized by general or special order of the Central Government or a State Government, as the case may be, or any officer of the Oil Company not below the rank of Sales Officer can enter and search any place or premises of a dealer and take samples of the product. In view of such statutory provisions which bind the BPCL, Mr. Basu submitted that engagement of a private agency like the respondent No. 4 by the BPCL to enter upon the retail outlet and to draw samples for testing is absolutely unauthorized and any action taken on the basis of a report prepared by the respondent No. 4, which is honest in the eye of law,

would be grossly vitiated. He also referred to the Guidelines for retail outlet dealership of Public Sector Oil Marketing Companies, effective from 1.8.05 and referred to the provisions which provide for the procedure for drawing samples, testing thereof and disciplinary action in case of failure of the product to meet the required test. Suspension of sales having been ordered by BPCL on the basis of a report which is absolutely unauthorized, according to him, it ought to have been revoked on receipt of representation from the petitioners and by neglecting to revoke the order of suspension and on the contrary by continuing it, BPCL has violated the rights guaranteed to the petitioners under Article 19(1)(g) of the Constitution and thereby deprived the petitioners of their livelihood which is protected by Article 21 thereof.

8. In support of his submission, Mr. Basu relied on an unreported decision of the High Court of Madras dated 29.2.08 in W.P. No. 2956 of 2007 (M/s. D. Nagarajan & Co. vs. Chief Regional Manager, HPCL). He contended that in that petition, the issue raised before the Court was the same as the present one. The very same respondent No. 4 herein had collected samples and tested it whereupon a show cause notice was issued by Hindustan Petroleum Corporation Ltd. (hereafter HPCL). Upon considering various decisions of the Apex Court as well as relevant provisions of law, the High Court of Madras held that the impugned show cause notice issued on the basis of marker test conducted by the respondent No. 4, who is not authorized under the said 2005 Order, cannot be sustained in law.

9. He urged the Court to follow the said decision and thereby to set aside the show cause notice and direct BPCL to resume supply so that the petitioners are in a position to resume their business.

10. The petition was opposed by Mr. Choudhury, learned Counsel appearing for BPCL, Mr. Bose, learned Counsel appearing for the respondent No. 4 and Mr. Pramanik, learned Counsel appearing for the added respondent.

11. Mr. Choudhury contended that Public Sector Oil Marketing Companies have been consistently taking steps to check and control adulteration of its petroleum products at various levels. One of such steps taken by the said companies including BPCL is the introduction of a three tier sampling system which, inter alia, includes collecting samples and testing of the same in order to establish whether any malpractice has taken place at the supply location or during transportation or at the retail outlet. Elaborate procedure and guidelines for sample collection and testing under the three tier sampling system would appear from Chapter 2 of the Guidelines. These guidelines are constantly updated to meet growing customer expectation and ensuring quality of product and service. Each and every dealer of the Public Sector Oil Marketing Companies is provided with a copy of the Guidelines and/or its amendments and updates and they are governed by the same.

12. The provisions of the Guidelines are in addition to the statutory remedies and/or options that may be available to the Oil Marketing Companies under various

statutes including the Essential Commodities Act, 1955 (hereafter the E.C. Act), the Standards of Weights and Measures Act, 1985 (hereafter the W.& M. Act), the 1934 Act, etc. The provisions of the Guidelines are followed to ensure that there is no breach of contractual obligation by a dealer operating a retail outlet, besides also ensuring compliance of diverse statutory provisions.

13. According to him, the terms of the agreement between the Public Sector Oil Marketing Companies and its dealers provide the parameters based whereon a particular dealership would be governed. The MOA executed by BPCL on the one hand and the petitioners and the added respondent on the other prohibits the dealers to adulterate petroleum products supplied by BPCL. In terms of the MOA, the petitioners have also covenanted that at all times during the subsistence thereof, the petitioners would give adequate facilities to BPCL and/or its officers, agents and servants to inspect and test the accuracy and general working of the pump and other equipments upon the said premises and to investigate the conduct and management of the said facilities by the petitioners. The MOA further provides that BPCL shall be at liberty to terminate the same forthwith, if the dealers are found guilty of breach of any of the covenants and/or stipulations mentioned therein and in the event of such breach, BPCL shall not be bound to observe and perform its obligation in terms thereof. The entitlement of BPCL and/or its officers and/or agents and/or servants to inspect and investigate the conduct and management of the retail outlet by the petitioners is independent of other statutory rights that may be available to it.

14. He urged that out of the many methods of adulteration usually adopted by some erring dealers, one of the most frequently used methods was to mix kerosene available at subsidized prices from the Public Distribution System (PDS) with that of the petroleum products in the retail outlet. It was submitted that the heavily subsidized kerosene, targeted to be supplied by the Government of India to people living below poverty line, are diverted to the petrol pumps thereby creating great loss to the Government revenue as well as environmental pollution by selling of adulterated fuel. The basic principle/motive for which the heavily subsidized kerosene was given to the people living below the poverty line was getting defeated. In order to check the same, the Ministry of Petroleum and Natural Gas, Government of India decided to adopt the "marker" test. "Marker" means a chemical substance approved by the Central Government from time to time for blending in kerosene and other petroleum products with the objective of preventing their diversion or adulteration of motor spirit or high-speed diesel.

Before issuance of Marker to prevent diversion or adulteration of kerosene and malpractices carried out by few of the errant dealers, the 2005 Order was amended by order dated 12th January, 2007 known as "the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Amendment Order, 2007. After such the amendment, the Deputy Secretary to the Government of India, Ministry of Petroleum and Natural Gas vide its letter No. P- 11013/05/2006-Dist dated 15.1.07 amended the Guidelines

regarding the introduction of marker in kerosene. He explained in details how the marker works and is used to detect adulteration.

15. In view of the specialized nature of the test involved, the Public Sector Oil Marketing Companies after discussion with the Ministry of Petroleum and Natural Gas awarded the contract for supply of marker to the respondent No. 4 herein. The respondent No. 4 was further required to carry out the audits at the terminals and retail outlets including testing and accordingly all the dealers of all the Public Sector Oil Marketing Companies were intimated about the respondent No. 4 who was authorized to carry out such test. In fact, the respondent No. 4 has been authorized by all the Public Sector Oil Marketing Companies, including BPCL to carry out test and collect samples at various points, including retail outlets. Such authorization is in terms of the Guidelines, as amended and also according to the entitlement of BPCL in terms of the MOA.

16. So far as the present case is concerned, he submitted that sample of diesel taken from the retail outlet on 3.12.07 tested "P" (Pink) and that is why BPCL had suspended sales and issued notice to the petitioners and the added respondent to show cause why action according to law shall not be taken against them. Suspension of sales and supply of petroleum products to the petitioners, being the erring dealers, is a right which the BPCL has exercised under the terms of the contract and the Guidelines which is independent of the provisions contained in various statutes. Such right of BPCL to take action against an erring dealer for breach of terms of agreement executed between him and it as well as breach of the Guidelines, is dehors the proceedings that may be available to be initiated against such erring dealer under the provisions of the E.C. Act and/or W. & M. Act and/or the 1934 Act. In this connection, reliance was placed on the decision of the Apex Court reported in Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums, . According to him, simultaneous proceedings, one under the penal laws and the other under contractual law being a well-accepted legal phenomenon, BPCL is justified in taking action against the dealers in terms of the MOA and taking punitive action in terms thereof need not be preceded by drawal of samples and testing thereof by officers authorized by the Central Government in terms of the provisions contained in the 1934 Act and the Rules framed there under or by specified officers under the 2005 Order.

17. BPCL according to him had not committed any error in proceeding against the errant dealers and he urged the Court to allow it to proceed against them by dismissing the writ petition.

18. Mr. Bose, learned Counsel representing the respondent No. 4 submitted that his client was appointed as investigating agency by Indian Oil Corporation Limited, IBP Company Limited, HPCL and BPCL on 27.9.06. The job of the respondent No. 4 is to enter upon a retail outlet on behalf of any of the Oil Companies and to draw samples from the nozzle of the dispensing unit thereat. Thereafter, the marker test is conducted and if the result is negative i.e. the sample turns Pink, the result is immediately informed by the officers of the

respondent No. 4 to the officers of the concerned Oil Company for taking necessary further action. Thereafter, test is conducted by the Oil Company at its laboratory in the presence of representatives of all concerned parties and on the basis of such retest necessary action follows. The Guidelines framed by the Central Government for testing of samples at retail outlet of the Oil Companies authorized conducting of marker test and in the present case, test was conducted in accordance therewith. The test report prepared at the retail outlet on 3.12.07 was duly signed by the representative of the petitioners. The representative of the petitioners was also present at the laboratory on 6.12.07 when retest was conducted and adulteration was detected. Since respondent No. 4 did not indulge in any irregularity, according to him, the petitioners cannot question tests conducted by it. He referred to an unreported decision of the High Court of Jharkhand dated 29.1.08 on W.P. (C) No. 5738 of 2007 (Jharkhand Petroleum Dealers Association vs. Union of India & Ors.) wherein the marker test system introduced to check adulteration was challenged but the Court had declined to interfere. There being no merit in the petition, he also prayed for dismissal of the writ petition.

Learned Counsel appearing for the added respondent submitted that the petitioners have not allowed his client to participate in the business and he supported the stand of BPCL to initiate action against the petitioners. He too prayed for dismissal of the writ petition.

The issue which falls for determination on the present petition is whether BPCL is justified in proceeding against the petitioners on the basis of inspection of the retail outlet by the respondent No. 4 and collection and testing of samples by it, without the respondent No. 4 being authorized in this behalf in terms of provisions contained in the 1934 Act and the 2005 Order.

It would be worthwhile to notice certain clauses in the MOA relevant for deciding the issue raised herein. They are:

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

(g) Not to adulterate the Petroleum Products supplied by the Company and at all times to take all reasonable precautions to ensure that the Motor Spirit or H.S.D. is kept free from water, dirt and other impurities and served from the pumps in such condition.

(i) To be responsible for all Motor Spirit or H.S.D. or other Petroleum products delivered by the Company to the Licensees from the time of the delivery thereof into the storage tanks of the pumps upon the said premises or otherwise and to pay for all supplies ordered by them prior to the delivery thereof unless otherwise agreed.

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

13(a). Notwithstanding anything to the contrary herein contained the Company shall be at liberty to terminate this agreement forthwith upon or at any time on the happening of any of the events following:

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

(d). That if Licensees commit breach of any covenant and/or stipulation in this Licence, the Company shall not be bound to observe and perform its obligations hereunder.

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20. Adulteration of motor spirit and diesel by errant dealers is rampant and has assumed menacing proportion. Introduction of the marker test system is intended to check adulteration. BPCL being one of several Government Oil Companies is duty bound to ensure supply of unadulterated quality motor spirit and diesel to the consumers, lest it is dragged to the Consumer Courts for deficiency in service. To discharge this duty it has appointed the respondent No. 4 as its agent to conduct surprise inspection at its retail outlets. In terms of clause 10(g) of the MOA, the petitioners as dealers are under an obligation not to adulterate the petroleum products supplied by BPCL and in terms of clause (o) thereof, they have unconditionally agreed to allow inspection of the retail outlet by the officers, agents and servants of BPCL to test the accuracy and general workings of the pump and other equipments at the said premises. The 1934 Act and the 2005 Order, which has been made by the Central Government in exercise of power conferred by Section 3 of the E.C. Act no doubt provide for testing of samples of petroleum/motor spirit/diesel by duly authorized officers in the manner prescribed. If petroleum is not stored in accordance with rules made u/s 4 of the 1934 Act one would commit a violation of provisions of the statute and may be punished u/s 23 thereof. Similarly, if a dealer indulges in any manner in any one or more of the malpractices defined in clause 2(f) of the 2005 Order, he would be liable to be prosecuted in terms of the E.C. Act. If appropriate and due

quantity of petrol and diesel is not supplied, a dealer may be dealt with under the W. & M. Act. Violation of any of the provisions contained therein are social crimes and a person may expose himself to be proceeded against and on proof of violation may suffer penal consequences by being sentenced to imprisonment or by imposition of fine or with both. The liability which one might incur under the 1934 Act or the W. & M. Act or the E.C. Act read with the 2005 Order is not to be confused with the liability that might be incurred by one in terms of the contract between the parties. Proceedings under the 1934 Act and the E.C. Act read with the 2005 Order on the one hand are intended to punish a wrong doer for committing statutory violation whereas proceedings drawn up in terms of an agreement between a Oil Company and its dealer, on the other hand, deal with misconduct. The two proceedings are entirely different and independent of one another and the power conferred under the agreement does not come in conflict with the statutory power available under the 1934 Act and the E.C. Act read with the 2005 Order. Proceedings initiated in terms of an agreement between the Oil Company and the dealer are meant not really to punish the guilty but to keep the administrative machinery unsullied by getting rid of bad elements. Interfering with proceedings initiated under a contract between the Oil Company and its dealer for taking action against an errant dealer would only result in serving the interest of the dishonest. As in the present case, a finding by BPCL that the petitioners have adulterated diesel would not make them liable to suffer penal consequences envisaged in the 1934 Act or the 1955 Act. However the mere fact that the respondent No. 4 is not authorized to collect and test samples in the manner laid down in the statutory provisions would not warrant a finding that BPCL under the terms of the contract is not empowered to engage respondent No. 4 and consequently the respondent No. 4 is not authorized to inspect the retail outlets of BPCL, and collect and test samples. In the interests of administration and good governance, BPCL has to ensure that on proof of charge of misdemeanor/misconduct an undesirable element is thrown out at the earliest. As has been held in *Pink City* (supra) exercise of contractual power for initiating action as distinguished from exercise of statutory power is well-accepted in Indian jurisprudence and, therefore, cannot be faulted.

21. The decision in *M/s D. Nagarajan* (supra) has been looked into. Perusal thereof reveals that the Madras High Court did not have the occasion to consider the terms of the agreement between the parties since the impugned action of the respondent HPCL was sought to be justified by its counsel on the basis of the 2005 Order. The issue raised before the Court was decided on the basis of its appreciation of the 2005 Order and not the terms of the agreement and, therefore, the decision has no application on facts and in the circumstances of the case.

22. The writ petition is devoid of merit. It stands dismissed. However, parties shall bear their own costs.

23. It shall be open to BPCL to proceed against the petitioners and the added

respondent in accordance with law.

24. Since the cause title of the petition has been amended in terms of leave granted by the Court, office is directed to take note of such amendment and correct the data fed in the computer at the time the writ petition was filed.

25. Urgent photostat certified copy of this order, if applied for, be furnished to the applicant within 4 days from date of putting in requisites there for.