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(2008) 11 MAD CK 0163

In the Madras High Court

Case No : Writ Appeal No. 391 of 2008, Writ Petition (MD) No. 6167 of 2008, M.P. No. 1 of 2008 in W.A. No. 391 of 2008 and M.P. (MD) No''s. 2 and 3 of 2008 in Writ Petition (MD) No. 6167 of 2008

The Chief Regional Manager and duly Constituted Attorney, Hindustan Petroleum Corporation Ltd. and S.K. Shenbagamoorthy and Brothers — APPELLANT

Vs

D. Nagarajan and Co. and Others — RESPONDENT

Date of Decision : 21-11-2008

Acts Referred:

Citation : (2008) 11 MAD CK 0163

Hon'ble Judges : V. Dhanapalan, J;S.J. Mukhopadhaya, J

Bench : Division Bench

Advocate : V.T. Gopalan for King and Patridge in W.A. No. 391 of 2008 and M. Venkatachalapathy for M. Sriram in in W.P MD No. 6167 of 2008, for the Appellant; AR.L. Sundaresan for A.L. Gandhimathi in W.A. No. 391 of 2008, P. Krishnasamy, Central Govt. Standing Counsel for Respondent No. 1 in W.P (MD) No. 6167 of 2008 and V.T. Gopalan for M. Sridhar Respondents 2 and 3 in W.P. (MD) 6167 of 2008, for the Respondent

Judgement

S.J. Mukhopadhaya, J.—In both the Writ Appeal and the Writ Petition, as common question has been raised, and the Petroleum Company is common, they were heard together and disposed of by this common judgment.

2. In Writ Appeal No. 391 of 2008, the Hindustan Petroleum Corporation Limited (for short, ''the Hindustan Petroleum'') has challenged the order dated 29.2.2008 passed in Writ Petition No. 29561 of 2008, whereby, the learned single Judge interfered with the show cause notice dated 1.9.2007 issued by appellant-Hindustan Petroleum, giving a finding in favour of the respondent - M/s. D. Nagarajan & Co., a petroleum dealer.

In Writ Petition No. 6167 of 2008, the petitioner, namely M/s. S.K. Shenbagamoorthy & Brothers, which is also a petroleum dealer, has challenged similar show cause notice dated 30.6.2008 passed by the second respondent-

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Hindustan Petroleum, for the same grounds, on which the learned single Judge, by order dated 29.2.2008, allowed the other Writ Petition No. 29561 of 2007 (which is under challenge in the present Writ Appeal No. 391 of 2008).

3. The impugned show cause notice dated 1.9.2007 issued by the Hindustan Petroleum, had been interfered with by the learned single Judge in W.P. No. 29561 of 2007, on the main ground that there was pre-determination by the Hindustan Petroleum at the time of issuance of the show cause notice.

4. The stand of the Hindustan Petroleum is that there was no pre-determination at the time of issuance of the impugned show cause notice(s), but the facts which came to the notice of the Hindustan Petroleum, were brought to the notice of the petroleum dealers, in the absence of which, the petroleum dealers could not have submitted an effective show cause reply.

It was further submitted by the learned Senior Counsel appearing for the Hindustan Petroleum that the Writ Court should not have interfered with in the matter at the stage of show cause notice, but ought to have asked the petroleum dealers to submit their reply so as to enable the competent authority of the Hindustan Petroleum to come to a definite conclusion in one or other way, on the basis of the available records and reply, as could have been submitted by the petroleum dealers.

5. Learned Senior Counsel appearing on behalf of the petroleum dealers, not only raised the question of pre-determination by the authorities before the issuance of show cause notice, but also the question relating to the report submitted by an outside agency, on the basis of which, the impugned show cause notice(s) had been issued.

6. According to the learned Senior Counsel appearing for the petroleum dealers, as per the relevant Rule/Guideline, all the relevant ''Tests'' should have been conducted by the competent authority of the Hindustan Petroleum, based on which show cause notice(s) could have been issued, but such power could not have been abdicated in favour of an outside agency for issuance of the impugned show cause notice(s) to the petroleum dealer(s).

It was also submitted by the learned Senior Counsel appearing for the petroleum dealers that introduction of ''marker test'' is violative of natural justice, as the ''marker kit'' is not available to the dealers and the dealers did not have any idea of dealing with the ''marker'' at the time of unloading the petroleum. Only the ''density test'' could have been made at the time of unloading the petroleum, which is distinct from the ''marker test''. Learned Senior Counsel appearing for the petroleum dealers further submitted that as per the ''Marketing Discipline Guidelines'', three tier sample system is required to be done including the one for laboratory for testing, which was not properly done in the present case.

7. We have heard the learned Counsel appearing for the parties and noticed the rival contentions.

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8. For determination of the first question as to whether there was pre-determination by the Hindustan Petroleum to take penal action against the petroleum dealers in question, it will be desirable to quote relevant portion from one of the show cause notice(s), dated 1.9.2007, the other being ''in pari-materia'' almost similar, as under:

Sub: Show Cause Notice-Dealership Licence Agreement

Dated 01.06.1981.

This refers to the subject Agreement dated 01.06.1981 (hereinafter called "Dealership Licence Agreement" for the sake of brevity) entered into by and between you and Corporation to carry on the business of sale of Petroleum Products and the terms and conditions contained therein.

We refer to the OMC RO Audit conducted at your Retail Outlet on 14.08.2007 by M/s. SGS India Private Limited, wherein it was observed that Retail outlet Nozzle sample of both MS & HSD have failed in the Marker Test as they were found to be ''Pink''. Copy of the Audit Report Document Ref.No.FT102-09-06 dated 14.8.2007 was handed over to your representative at the Retail Outlet on 14.8.07. Subsequent to the failure of the nozzle samples of MS/HSD in Marker Test, the Tank Truck Retention samples and the Nozzle samples were collected from your Retail Outlet jointly by SGS and the Area Sales Manager, HPC, Pondy on the same day and were sent for Joint Test.

We draw your attention to the Joint Marker Test conducted on 17.8.2007, which was witnessed by your representative Shri N Simla Raja, S/o Mr.Nageswaran, along with Shri K.P. Thiruvengadam, Partner, M/s. Thiruvengadam & Co., Shri G. Yuvaraj of C. Gopal Transporter, Shri B. Sampath, representative of SGS and officials of HPCL. It was observed that both the Products MS & HSD drawn from the outlet through the nozzle failed in the Marker Test conducted on 17.08.2007 in the presence of your representative, whereas the Tank Truck Retention samples passed in Marker Test, Copies of the Joint Test dated 17.8.2007 for MS & HSD were handed over to your representative on 17.8.07, which was acknowledged by him.

Please note that failure of Nozzle Samples of MS/HSD in the Marker Test tantamount to Adulteration of MS/HSD, which is violative of Clause Nos. 26, 42 and liable for action under Clause Nos. 55(l) & 55(k) of the subject Agreement dated 01.06.1981. The said Clauses are reproduced hereunder:

Clause No. 26: x x x x

Clause No. 42: x x x x

Clause No. 55: x x x x

In view of the facts and circumstances stated above, you are hereby called upon to show cause as to why action, as deemed fit including termination of the Dealership Agreement cannot be taken against you, in accordance with Clauses

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55(1) and 55(k) for violations of Clauses 26 and 42 of the subject Agreement.

Your reply should reach the undersigned within 7 days from the date of receipt of this notice, failing which it will be construed that you have no cause to show, and in which case, further action, as deemed fit including termination of Dealership Agreement dated 1.6.1981 will be taken as per law and Clause Nos. 26, 42, 55(1) and 55(k) of the dealership agreement dated 1.6.1981 without any further notice to you.

Learned Senior Counsel appearing for the petroleum dealers referred to one of the paragraphs of the above quoted show cause notice dated 1.9.2007, wherein, while giving reference to the report that both the products of MS and HSD drawn from the outlet to the nozzle, which failed in the Marker Test conducted on 17.8.2007, the authority has further stated that failure of Nozzle Samples of MS/HSD in the Marker Test tantamount to Adulteration of MS/HSD; it was submitted that the aforesaid language used in the show cause notice, shows that there has been pre-determination by the authorities of the Hindustan Petroleum to pass the penal order against the petroleum dealer(s).

Learned Senior Counsel appearing for the petroleum dealers also placed reliance on the decision of the Supreme Court in the case of Siemens Ltd. v. State of Maharashtra and Ors. reported in 2007 1 L.W. 608, wherein, the Supreme Court, while noticing the show cause notice issued therein, observed that, when the statutory authority has already applied its mind and has formed an opinion as regards the liability or otherwise of the appellant therein, if in passing the order, the respondent therein, has already determined the liability of the appellant therein and the only question which remains for its consideration is the quantification thereof and the same does not remain the realm of a show cause notice and the Apex Court held that the Writ Petition was maintainable.

Reliance was also placed on the decision of the Supreme Court in the case of Dr (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and Others, , wherein, the Supreme Court held that Writ Petition challenging a null and void order, maintainable, notwithstanding existence of an alternative remedy under statute.

There are other case laws relied on the same questions, which are not required to be reiterated.

9. Learned Senior Counsel appearing for the Hindustan Petroleum has submitted that only relevant facts have been informed to the petroleum dealers for filing of an effective show cause reply.

10. We are in agreement with such submission of the learned Senior Counsel appearing for the Hindustan Petroleum, as it would be evident from the impugned show cause notice(s) that what had been discussed, is the fact relating to the report submitted after the ''Marker Test'' and the petroleum dealers have been informed of the consequences, in view of the relevant Clauses of

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agreement, which have been quoted in the impugned show cause notice dated 1.9.2007.

11. While relevant facts are to be narrated for submitting a reply, but in the show cause notice, as distinct from explanation, not only the relevant facts are to be stated, but the consequential order as may be passed, is to be informed to the charge-person (dealers herein) so as to understand the gravity of the show cause, enabling him to file an effective reply.

12. In the aforsaid background, we hold that the language used in the impugned show cause notice(s) issued to the petroleum dealers, only suggests the relevant facts and the action that may be taken if the reply is not satisfactory, which does not amount to pre-determination of the penal action. In appropriate cases, if proper show cause reply is filed, the competent authority may even drop the proceedings, but may not pass any penal order or may only pass lesser penal order than the maximum.

The Learned single Judge, having erred in holding that the show cause dated 1.9.20007 notice has been passed on the basis of pre-determined view of the authority, being an error on record, we cannot uphold the impugned order dated 29.2.2008 passed by the learned single Judge in Writ Petition No. 29561 of 2007.

13. One of the grounds taken is that the ''nozzle samples'' for the Marker Test, were drawn by an outside agency, namely M/s. S.G.S. India Private Limited (fourth respondent in Writ Petition (MD) No. 6167 of 2008), which is not permissible, as under the Marketing Discipline Guidelines, the relevant test should be conducted by the competent authority of the Hindustan Petroleum.

14. It is not in dispute that previously, the sample test used to be conducted manually by the competent officer of the Hindustan Petroleum. The Marketing Discipline Guidelines are still in vogue. But subsequently, vide order dated 12.1.2007, Clause(s) was inserted in the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2005, introducing the system of "marker", a chemical substance, approved by the Central Government for blending in kerosene and other petroleum products with the objective of preventing their diversion or adulteration of motor spirit or high speed diesel. A further Clause was inserted, namely "test kit", which means, a set of equipment used to determine the presence of marker in kerosene, motor spirit, high speed diesel and other petroleum products. The other necessary amendments were made for testing the sample products by the marker system by the marker test.

15. Learned Counsel appearing for the parties have not disputed that the ''test'' can be made by the ''marker system'', but the only ground taken is that the said test is to be conducted by the competent officer of the Hindustan Petroleum and the power vested under the relevant Act/Guidelines/Rule/Order, cannot be delegated to any other party, which according to the writ petitioner-petroleum dealer, has been delegated to an outside agency, such as M/s. S.G.S. India

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Private Limited (fourth respondent in W.P(MD). No. 6167 of 2008).

16. We have perused the records enclosed with the paper book submitted in Writ Appeal No. 391 of 2008. There are copies of few formats enclosed in the paper book showing the name of S.G.S., and in the said format(s), the name of the petroleum dealer, the code, postal address, the name of the auditor of S.G.S., representative of the dealer present at the time of the test, the name of the Officer of the Petroleum Company, etc., have been shown. The said format(s) was signed by the S.G.S. Auditor, OMC Field Officer and the dealer/ representative.

In the "Marker Project Witnessing of Joint Test", report of which has been submitted, it is in the format of the Hindustan Petroleum Company, wherein the sample test has been reflected and it not only bears the signature(s) of the dealer, transporter, but also the officer(s) of the Hindustan Petroleum.

17. Learned Senior Counsel appearing for the Hindustan Petroleum submitted that as per the new/amended guidelines/order/Rules, introduction of blending of marker in the potential of adulteration, outside agency should be engaged only for supply of ''test kit'', and it is from the said test kit, the samples are drawn and to find out that the test kit is proper or not, report is submitted by the fourth respondent-SGS India Private Limited, which has supplied the ''test kit'' in the present case.

So far as the ''test'' is concerned, the test has been conducted separately by the officer of the Hindustan Petroleum and for that purpose, "marker project witnessing of joint test report" has been submitted in the format of the Hindustan Petroleum, the result of the test of the nozzle and the samples, have been shown including the nozzle as found after the test, which have not been reflected in the standard operational format submitted by the SGS.

On a perusal of the formats, we find that the SGS, which supplied the ''test kit'' for market, while giving the details in their format as to the connection to which the test kit has been used, the SGS has not given any finding in regard to the colour of the petroleum product as found after one or other test(s), which has been done and submitted by the officials of the Hindustan Petroleum and submitted with the other report, namely marker product witness joint test report.

18. In the facts of the cases, the second submission relating to engagement of outside agency, cannot be accepted, apart from the fact that the said issue was not raised by the petroleum dealer(s) before the Writ Court.

19. As we hold that the learned single Judge has wrongly come to the conclusion that the show cause notice was issued after pre-determination by the Hindustan Petroleum Company, the other submission as was made by the learned Senior Counsel appearing for the petroleum dealers relating to the engagement of outside agency, is rejected.

20. We set aside the impugned order dated 29.2.2008 passed by the learned

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single Judge in Writ Petition No. 29561 of 2007, thereby, allow Writ Appeal No. 391 of 2008 filed by the Hindustan Petroleum Company and dismiss Writ Petition (MD). No. 6167 of 2008 filed by the petroleum dealer.

This judgment will not stand in the way of the competent authority of the Hindustan Petroleum Company to give the findings on the merits on the reply/ objection, if any, submitted by one or other petroleum dealer(s), including the writ petitioners (petroleum dealers) in the present cases, to their respective show cause notice(s) issued by the Hindustan Petroleum.

In the facts and circumstances of the cases, there shall be no order as to costs.

The Miscellaneous Petitions are closed.

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