
(2001) 03 MAD CK 0013

In the Madras High Court

Case No : C.R.P. No. 578 of 2001 and C.M.P. No. 3175 of 2001

The General Manager. I.B.P. Co. Ltd. 10, Mayor V.R. Ramanathan Road, Cheput Chennai - 600031, The Divisional Manager I.B.P. Co. Ltd. 10, Mayor V.R. Ramanathan Road. Cheput. Chennai - 600031 APPELLANT

Vs

Smt. Jayanthi Seharajan Proprietrix Kavitha Agencies, Dealer I.B.P. Co. Ltd. 40, Salem Main Road, Athur- 636102 RESPONDENT

Date of Decision : 13-03-2001

Acts Referred:

Citation : (2001) 03 MAD CK 0013

Hon'ble Judges : Prabha Sridevan, J

Bench : Single Bench

Advocate : Vijay Narayanan, for the Appellant; R. Muthukumarasami, for the Respondent

Judgement

Prabha Sridevan, J.—The petitioner is aggrieved by the order of staying the termination order dated 23.02.2000. The respondent filed O.S.

No. 5086 of 2000 for declaration that the termination order dated 23-02-2000 is null and void and for a mandatory injunction to restore the

supply of petroleum. Pending suit two petitions were filed, I.A. No. 13036 and 13037 of 2000. The former was for stay of the termination order

and the latter was for ad-interim mandatory injunction to restore supply. The learned VII Assistant City Civil Judge allowed both the petitions.

Against I.A. No. 13037 of 2000 which is for a mandatory injunction, C.M.A. No. 193 of 2000 was filed and against I.A. No. 13036 of 2000

which is for stay C.M.A. No. 194 of 2000 was filed. The learned IV "Additional City Civil Judge disposed of both the appeals by a common

judgment. He came to the conclusion that I.A. No. 13036 of 2000 which was for

stay deserved to be allowed and as regards I.A. No. 13037 of

2000. the learned Judge came to the conclusion that the respondent herein was not entitled to a mandatory injunction and therefore, set aside the

order of the trial Court. The petitioner before this Court is the party aggrieved by the order of stay. The respondent has not challenged the order

dismissing the application for mandatory injunction. Mr. Vijay Narayanan, learned counsel for the petitioner submitted that the Court below erred

in granting the stay. The history of the case set in proof is as follows:

The petitioner is a Government of India Enterprise, which supplies petroleum products to its dealers who are appointed under and are bound by

the dealership agreement between the parties. The dealership agreement lays down the period of the agreement, the rights and liabilities of the

party and in particular, the various covenants which if breached, will entitle the petitioner to terminate the dealership agreement or to suspend

supplies. The agreement between the petitioner and the respondent is dated 30.10.1985 and intended to come into effect from 11-03-1986 and to

remain in force for 15 years thereafter i.e.11-03-2001. In view of the widespread complaints regarding petroleum and petroleum products, the

petitioner and other public sector oil marketing companies undertook widespread surprise inspections of the various retail outlets. The respondent

was one such dealer operating the retail outlet at Salem Main Road. The officers of the petitioners visited the respondent's outlet on 03-12-1999

and drew samples of both motor spirit (MS) and high speed diesel (HSD). The sample of MS failed to meet the specification limit as stipulated in

Motor Spirit and High Speed Diesel Control (Regulation of Supply and Distribution and Prevention of Malpractices) Order 1998, (Control Order

in short). Therefore, Ex-P3, a show cause notice was issued as to why action cannot be taken against the respondent for violation of the covenants

of the agreement as well as the Control Order because the Research Octane Number (RON Test in short) of MS showed that the product was

off-specification. By Ex-P4, an explanation was given. This is dated 07-02-2000. Thereafter another inspection was conducted on 26-01-2000

when according to the petitioner, the respondent failed both in the Density test and RON Test and Ex-P5 show cause notice was issued and

supplies were also suspended on the same day, namely 26.1.2000. An

explanation was given by Ex-P6 dated 08.02.2000. The petitioner did not find the explanations given satisfactory and the dealership agreement was terminated on 23.02.2000 by Ex.P-7. Thereafter the respondents

appears to have approached this Court by a Writ, W.P. No. 3750 of 2000. This Court granted stay of the order of termination on 03-04-2000.

Against that, Writ Appeal No. 605 of 2000 (See 2000-3-M.L.J. 534) was filed by the petitioner. The Division Bench of this Court came to the

conclusion that the questions which are in issue are essentially questions of fact requiring investigation and therefore, the order of stay was set aside

and it was held that these questions should be appropriately decided only in a Civil Court. It is only thereafter that the suit has been filed.

2. The learned counsel for the petitioner submitted that the tests showed clearly that there was adulteration since the readings did not conform with

the requirements relating to quality of MS laid down in Schedule 1 of the Control Order. While the Schedule 1 lays down the requirements

regarding Research Octane Number, as regards the Density it is admitted by both the parties that in the Density registered in the Registry and the

Density ought to be observed, the variations 0.003 was acceptable. Mr. Vijay Narayanan, learned counsel submitted that the respondent failed in

both the tests. He was aggrieved by the orders of the Court below wherein the learned Judge held that the petitioner could not fix the liability for

adulteration on the respondent According to the learned counsel, the Appellate Court erred in holding that the test sample was taken from the lorry

and not from the respondent's tank and, therefore, the respondent could not be blamed and also that it was clear that the sample was taken only

from the outlet and the reference to the Lorry was the lorry number which delivered the product at the outlet which was on 20.01.2000. The

learned counsel submitted that the other ground on which the court below erred was regarding the failure to test the sample within 10 days.

According to the learned counsel, a sample has to be sent within 10 days and the test should be conducted within 10 days thereafter. In this case,

the sample test was done within 18 days from the time the sample was taken on 04-12-1999 and therefore, it falls within 20 day parameter. As

regards the finding of the Court below that when the authorities have the option to suspend supplies for 45 days for the first irregularity, there was

no justification to terminate the dealership when admittedly this irregularity was the first occasion, the learned counsel submitted that those

guidelines regarding the action to be taken for the irregularities were purely internal administration guidelines and the respondent cannot take

umbrage under the same nor should the Court rely on them. Finally, the learned counsel relied on the guidelines given by the Supreme Court with

regard to temporary injunction in the decision reported in "Colgate Pahnolive (India) Ltd. v. Hindustan Lever Ltd. (1999(7) SCC 1) and Gujarat

Bottling Co. Ltd. v. Coca Cola Co. (1995 (5) SCC 545).

3. Mr. R. Muthukumarasami, who took notice on behalf of the caveator argued that the question of balance of convenience and irreparable

hardship was heavily on the side of the respondent. The dealership had been terminated at least one year before the expiry of the lease agreement.

The loss that has been suffered by the respondent was incalculable and once the regular customers get used to obtaining their supply of MS or

HSD from other outlets, it would be difficult for the respondent to wean them away from other distributors. Therefore, the order of termination

directly affected the respondent's livelihood whereas the petitioner did not suffer such injury. The learned counsel also submitted that when the

internal guidelines itself stipulate that for the first irregularity suspension of 45 days of supply was sufficient punishment, the respondents ought to

have adopted that course first as a warning for a dealer who had perhaps committed irregularities. The action of the petitioner in singling out the

respondent was definitely mala fide. The learned counsel also submitted that when the requirements of Research Octane Number had been

deleted, there was no justification for the petitioner to terminate the dealership on the basis of a deviation in a specification which was no longer a

relevant criterion for the purpose of assessing the quality of the fuel. He referred to the same judgment reported in 1999 (7) SCC 1 which was

relied on by the learned counsel for the petitioner and said that out of the 7 considerations which must weigh with Court while hearing the

applications (sic) or aggrieved of injunction, one of the principles was that there can be no fixed rules and the facts and circumstance of each case

had to be considered and also the issue of irreparable loss and injury should be looked into bearing in mind the strength of the party's ease.

4. In the other decision relied on by the learned counsel for the petitioner reported in 1995 (5) SCC 545 (cited supra), the Supreme Court held

that the Court could exercise its discretion by obtaining an undertaking from the party in whose favour the order is issued to compensate the other

party in case the ultimate decision comes in favour of the other party. To this Mr. Muthukumarasami submitted that there was no possibility of the

petitioner adequately compensating the respondent in case injunction is not granted because there was no way to assess not only the quantum of

sales but also the possibility of expansion in the future.

5. According to the petitioner, the violation of the agreement which entitles them to terminate the agreement is in respect of the breach of Clause

12(e) which is as follows:

To take every reasonable precaution against contamination of the products supplied by the Company by later, dirt or other things injurious to their

quality and not in any way directly or indirectly alter the Company's standard quality of products as delivered. The Company shall have the right to

exercise at their discretion quality control measures for products marketed by the Company.

The respondent is also accused of violating the Control Order. A perusal of the said Order shows that the mal-practice could arise out of any of

the following facts of omission and commission.

I. Adulteration

II. Pilferage

III. Stock Variation

IV. Unauthorised exchange

V. Unauthorised purchase

VI. Unauthorised sale

VII. Unauthorised possession

VIII. Over charging

IX. Sale of Off-specification product

6. The complaint as seen from the show cause notice shows that the irregularity complained of can only fall under the category of adulteration and

consequently sale of off-specification production. Adulteration is defined as

follows:

Adulteration"" means the introduction of any foreign substance into motor spirit high speed diesel illegally or unauthorised with the result that the product does not conform to the requirement and specification of the product indicated in schedule I.

Added Schedule I changed

Since it is the case of the petitioner that it is the motor spirit sold by the respondent which has been found to fall short of the standard requirements, we may also look at the definition of Motor Spirit,

Motor Spirit"" means any Hydrocarbon Oil (excluding Crude Mineral Oil) [Q] which meets the requirements of Bureau of Indian Standards

Specification No. IS-2796 and is suitable for use as fuel in Spark Ignition Engines.

[Q] has its flash point below 25 degree Celsius. Sale of off-specification product is defined thus,

Sale of off-specification product"" means sale of motor Spirit or High Speed Diesel by dealer of quality not conforming to bureau of Indian

Standards Specifications No. IS 2796 and IS 1460 for Motor Spirit and High Speed Diesel or also not in conformity with Schedule I.

Therefore, Schedule 1 which relates to quality of MS is relevant. This Schedule as on 28-12-1998 shows the Serial No. 5 Octane requirement as

one criterion. This could be RON or Anti-Knock Index. We have already seen that the act of adulteration or sale of off-specification product can

only be decided by reference to the Bureau of Indian Standard No. IS-2796. A reference to the Foreword to Motor Gasolines Specification, Aug

95 shows that,

In this revision the requirements for antiknock rating (Octane number) has been replaced by the anti-knock index which is the average of

Research Octane Number (RON) and Motor Octane Number (MON), that is $(RON+MON)/2$, since anti-knock index is a better representation

of the Rod Octane requirements for a vehicle.

7. The Bureau intended to replace the RON number specification by anti-knock index, which is a better representation. In the amendment to the

specification which is annexed in the typed set of papers given by the respondent IS. No. 2796 of 1995 has been amended after the Petroleum

Products Committee has finalised their specification for the year 2000 AD and in the said amendment the RON number has totally been removed

and what remains is the antiknock index alone and thereafter by amendment No. 4 in September 2000, RON is again inserted after serial No. 13

to Schedule 1 as amended by amendment No. 2 March 1999 in which the RON number had been removed. Therefore, it appears from the

documents produced before the Court that though RON number was a relevant criterion by amendment No. 2 of 1999, it was deleted and

thereafter, inserted again only by the amendment in September 2000, therefore at the relevant point of time, the RON number was not one of the

criterion which should be satisfied to meet the quality test. Learned counsel for the petitioner, of course, submitted that though the Bureau of

Standard specifications had amended the Schedule 1 that would not mean that it was automatically adopted by the petitioner. Therefore, the

question whether the RON test was a relevant test when the surprise inspection was taken is itself a matter to be decided.

8. According to the learned counsel for the petitioner, the inspection conducted on 26-01-2000 brought to light the second instance of irregularity

and therefore, this dealer should not be allowed to distribute fuel which is adulterated to the public.

9. The counsel for the respondent on the other hand, submitted that since no action was taken in respect of the alleged adulteration in respect of

the first inspection dated 03-12-1999, the instant inspection on 26-01-2000 and fault alleged to "have been discovered on that date will only be

the first irregularity assuming without admitting it is so. The learned counsel for the respondent also said that it was a surprise inspection all over the

State and the respondent alone was singled out for conducting the RON test not the others. To this Mr. Vijay Narayanan, learned counsel for the

petitioner submitted that though the petitioner had passed the Density test in the inspection conducted on 03-12-1999, the petitioner alone failed in

the RON test amongst the other dealers and that is why action was taken against him. But if we see the Regulation of Supply and Prevention of

Malpractices Order,

(7) In order to check complaints of adulteration, the inspecting officials will First test the product for quality and density at the retail outlet itself in

the presence of the dealer with necessary equipments such as filter paper, hydrometer, thermometer which are available at the retail outlet and only

if density is not found in order, the samples should be drawn.

(8) When density fails, laboratory testing of the products the officers shall take three samples of 750 ml to 1 ltr. each of the product. The samples

should be sealed carefully in proper containers. One sample is to be given to the dealer transporter of concerned person under acknowledgement,

with instructions to preserve the sample in safe custody till the testing investigations are completed. The second and third samples will be deposited

with the Enforcement Branch of the department on the same day or the next day by 11.00 A.M. positively.

(9) The samples shall be taken in clean glass or aluminum containers (Plastic containers shall not be used).

(10) Each sample should be labeled properly as per Annexure-II and jointly signed by the officer who has taken the sample, representative of the

state Level Coordinator and the dealer or transporter of concerned person or a representative and the label shall contain information as regards the

product, name of the outlet, quality of the sample, date and time, name and signature of the concerned person.

(11) The Enforcement Branch will retain the second sample and send the third sample of the product within ten days to any of the laboratories

specified in the Control Order. However, the samples shall not be sent to the laboratory of the same Oil Company whose outlet has been checked.

(12) In case of adverse report received from the laboratory, action should be taken in accordance with law.

(13) In case the laboratory report indicates that the sample is not adulterated, the dealer will be informed accordingly within a period of ten days.

Therefore, only if Density test fails, the department is entitled to draw samples. In the instant case, admittedly during the inspection dated 13-12-

1999, the respondent passed the Density test. To the question why these samples were drawn from the respondent, the learned counsel for the

petitioner explained it away saying that because there was a quality-control drive they took the RON test also. But he could not answer the

grievance raised by the learned counsel for the respondent that at the first instance, the respondent alone was subjected to RON test. But,

however, if we look at the second show cause notice dated 04.02.2000 it is totally silent about the inspection dated 3.12.1999 and about the show cause notice dated 28.01.2000 so is the reply dated 07.02.2000. The notice does not refer to the earlier inspection. In the document which is the retail outlet inspection report dated 26.01.2000, the date of previous inspection is stated to be 03-12-1999. In column (o), which deals with irregularities, which was detected during the 5 years prior to the date"" of this inspection which is 26-01-2000, there is no reference to the so-called irregularities on 03.12.1999. Even the nature of irregularity mentioned, is stock variation, the relevant dates shown therein are 22-01-98 and 10.11.1998. The stock variation is defined as variation beyond the norms for permissible variation in stocks as given in Schedule II, which deals with evaporator and handling loss in fuels. Therefore, one conclusion that can be drawn from this is that the petitioner for some reason decided to ignore the inspection dated 03-12-1999 and the tests conducted on the sample drawn on that date. When it is on record that the alleged irregularities detected on 03-12-1999 have not been noted down by the inspecting officials in their subsequent report it is not necessary for us to consider the same at this stage without the advantage of oral evidence. So for the purpose of deciding this interlocutory application, the test on 26-01-2000 alone is relevant.

10. The Lower Appellate Court has pointed out to several infirmities in the test. One is that the sample test has not been done within the time limit set down in the guidelines. At the same time, there is also the difficulty regarding the RON specifications being relevant for deciding the quality of the product. It is the case of the respondent that at the relevant point of time, the RON specification has been deleted, whereas according to the petitioner though the Bureau of Indian Standard Specifications had removed it, there was nothing to show that it had been implemented by them. But, it must be remembered that the malpractices referred to in the Control Order namely adulteration and off-specification have to be decided with reference to Schedule 1 which is according to the Bureau of Standard Specification. As regards the Density test according to the petitioner, the respondents had failed the test, but according to the respondent the reading of 0.07360 entered by the pump boys was a mistake and that

should not be taken as the reference point for deciding the variation in the Density test. The explanation given by the respondent is that the Density test must be taken from the sample which shall be within +0.0030 of the recorded density of the last receipt at the retail outlet and or the density taken in the morning following the last receipt. This is as per the Control Order. According to the respondent, the tank was dry when the MS was transferred to it and throughout that week the readings had been within the permissible limits and therefore their case that the original reading of 0.7360 was erroneous must be accepted. The learned counsel for the petitioner, however, said that the respondent had been found to have sold off- specification products and therefore, did not deserve any indulgence of this Court and therefore, the interim order must be vacated. He referred to the decision referred to in 1999 (7) SCC (1) (cited supra) for the purpose of showing that the Court should grant only such orders which will not adversely affect the interest of the general public which can or cannot be compensated otherwise. He also referred to judgment reported in 1995(5) SCC 545 (cited supra), which is referred to in the above decision where the Supreme Court has held that the object of the interlocutory order is to protect the plaintiff. against injury by violation of his right for which he cannot be adequately compensated any damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has however to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated "".

11. In this case, it must be remembered that originally the respondent herein filed two petitions, one for interim stay of the termination order and the other for mandatory injunction to restore supply of MS. Both the applications were allowed by the trial Court. The Appellate Court while confirming the order of the trial Court with regard to stay of the termination order did not grant mandatory injunction. The words of the Appellate Court are as follows;

the fact that Appellate Judge had held that the petitioner was not entitled to obtain the relief of mandatory injunction and that it had not been

challenged, should not be held against the petitioner. To this Mr. Vijay Narayanan, replied that the respondent actually filed another petition to restore supply before the Court below and that had not been granted because the petitioner had filed a counter stating that the prayer in the petition to restore supply though couched in different language was essentially the same as the petition for mandatory injunction and therefore, the order of the Appellate Court refusing to grant mandatory injunction would operate as resjudicata. However, the said petition is not before me. In the instant case, one relevant factor which is a subsequent event that has to be borne in mind is that the agreement itself comes to an end on 10.03.2001. As per the agreement, the petitioner may at its option enter into a fresh agreement with the respondent for a further period of 5 years on the same terms and conditions as herein contained. The orders of termination have been passed on the so-called failure of the Density test and the RON test. The case of the petitioner is that this is the second instance of irregularity. But, I have already referred to the documents filed in the typed set of papers which prima facie show that the petitioners have ignored the inspection made on 03-12-1999 and have not taken that into account as an instance of irregularity. Therefore, the only instance of irregularity is the second inspection which is on 26-01-2000. Though it has been stated that the guidelines which referred to a punishment of suspension of supply for 45 days are only inter-departmental and cannot be taken advantage of by the petitioner, I am taking note of it only for the purpose of assessing the injury or balance of convenience as the case may be. It must be remembered that though the petition is one for stay both the counsel have argued the matter as if it is for injunction on the basis of the relative convenience on both sides and the injury they may suffer. The Marketing Discipline Guidelines 1998 which apply to dealership of Public. Sector Oil Marketing Company referred to the manner any sample shall be drawn from dispatching locations. Sample containers should be one liter Aluminum container in wooden box as per the existing norms. Sample testing should be done within 10 days on receipt of the sample and the tests will be at (a) Refinery end-Refineries will test only octane No. on MS. samples & results will be communicated to the respective Oil companies and (b) Industry laboratory-Both MS & HSD samples will be tested for clinical test as given in Annexure IV and the results will be communicated

to the respective Oil Companies. The test shall be carried out as per the method given in the Bureau of Indian Standard Specification. It also lays

down the action to be taken, after the samples are tested. If the sample passes the lab test, then sales and supplies of all the products if suspended

earlier should be resumed immediately. But if the sample was adulterated, the show cause notice should be served on the dealer and if the

explanation of the dealer is not satisfactory, the Company should take action as follows: ""fine of one lakh and suspension of sales and supplies for

45 days in the first instance (2) termination in the second instance."" Therefore, it is evident even assuming the guidelines are not mandatory the

petitioner will not be prejudiced or irreparable hardship caused, if the termination order is stayed since even according to their own guidelines, a

fine of one lakh and suspension of supply will meet the contingency satisfactorily. Even the question of public interest that was refereed to by Mr.

Vijay Narayanan would surely have been taken into account by the authorities who have framed the guidelines and that is why they have fixed a

lighter punishment for the first irregularity as a warning and termination as the punishment for what is a repetitive violation. When at this prima facie

stage, the respondent has raised several acceptable doubts regarding the genuineness of test results and the correctness of the sampling procedure

and when the punishment even as per their own guidelines is perhaps excessive, I see no reason to interfere with the order of the Court below. I

come to this conclusion because when compared to the hardship and injury that the petitioner might suffer the hardship and injuries suffered by the

respondents is irreparable. If indeed the respondent is able to show that the RON test was not relevant or that the sampling procedure has not

been followed or that the guidelines regarding punishments for the first instance is mandatory, at the time of trial of the suit then he would have

suffered the termination order and the hardship that he would have consequently suffered cannot be compensated by the petitioner. Of course, the

learned counsel for the petitioner submitted that he can always be compensated by damages. But while the respondent can give the sales figures for

a particular year, it cannot take into account the possible increase in sales etc., since it has been submitted that he is the only dealer in that area.

Therefore, the balance of convenience definitely lies in favour, of the respondent in this case. However, I do not accept the submission made by the

learned counsel for the respondent that the termination order if stayed will automatically result in resumption of supply. The clause 12(e) in the agreement is relevant and as per this clause the petitioner is given liberty, upon a breach by the dealer, of any covenant in the agreement, to stop all supplies to the dealer for such period as the petitioner may deem fit. So even if the agreement is in vogue, the petitioner can still suspend supply and they have the right to do that. The petitioner's inspecting officers found that the dealer has sold off- specification products. Even in their affidavit in support of the interlocutory application the respondent has said that the object of giving a reduced punishment for the first instance is to give an opportunity to the defendant to rectify the same. This can only mean that the petitioner has the right to suspend the supply. Therefore, I do not think that I can accept the argument of the learned counsel for the respondent that stay of the termination order will automatically result in resumption of supply. There is dichotomy in the penalties that is envisaged in the dealership agreement. It is also to be further noted that the dealership agreement comes to an end on 10.03.2001 and this Court cannot direct the petitioner to resume supply after the agreement has expired. In view of the fact that the term of the agreement has expired pending these proceedings, while I am not interfering with the order of the Court below, I direct the Lower Court to dispose of the suit within three months from the date of this order. No costs. The connected C.M.P. No. 3175 of 2001 is also closed.