(2021) 12 KL CK 0026

In the High Court Of Kerala

Case No : Writ Appeal No. 1785 Of 2019

Vembanad Gas Agencies APPELLANT

Vs

Union Of India RESPONDENT

Date of Decision : 03-12-2021

Acts Referred:

Constitution of India, 1950 — Article 226
Arbitration and Conciliation Act, 1996 — Section 11

Citation : (2021) 12 KL CK 0026

Hon'ble Judges : K.Vinod Chandran, J;C.Jayachandran, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

K Vinod Chandran,J.

1. A distributor of domestic Liquid Petroleum Gas (LPG) is before this Court, asserting his right to retain the consumers, who have subscribed with him. The learned Single Judge found that the transfer of consumers from the appellant to the newly appointed distributor does not affect the appellant's business, since he would continue to have average refill sales corresponding to the ceiling limits of the market. The agreement produced as Ext.P1 was also gone into, in which there was an arbitration clause. Looking at that specific clause, it was found that though the appointment stipulated is of an officer of the Corporation, consequent to the amendment of the Arbitration and Conciliation Act, 1996, necessarily an independent Arbitrator has to be appointed. The learned Single Judge found that this would not affect the arbitration clause as such, since the appellant could approach the Company for appointment of an independent Arbitrator, which if not conceded to, the appellant would also have the remedy under Section 11 of the Act of 1996. The decision in Harbanslal Sahnia V. Indian Oil Corporation Ltd. (2003(2)SCC 107) was distinguished. There, the issue was with respect to termination of a dealership, which was held to be based on an irrelevant and non existent cause. Whereas in the present case, the issue is only with respect to the

interpretation of the clause and whether the action of the respondent would lead to a breach of the agreement or not. It was held, relying on All India LPG Distributors Federation V. Union of India (2003(2) KLJ 451) that appointment of additional distributors in an area, where there is a distributor appointed; resulting in reduction of consumers of the existing dealer, cannot give rise to a valid challenge on the ground of arbitrariness or illegality. The writ petition was dismissed, leaving open the liberty of the appellant to seek remedy in accordance with the alternate disputes resolution mechanism.

2. The learned counsel appearing for the appellant, Sri Anchal C Vijayan, relies on Harbanslal Sahnia (supra) to urge this Court to exercise discretion and consider the issue raised, on merits. It is also pointed out that, a Division Bench of the High Court of Bombay in WP(C)No.8753 of 2018 Shailaja R. Khanvilkar vs. Union of India dated 30.09.2019, has elaborately considered the issue to set aside a circular dated 04.01.2018 issued by Bharat Petroleum Corporation Ltd (BPCL). The contention of the distributor that the power to reduce the area or territory does not include a right to reduce existing consumers was upheld. It was also held that the impugned circular visits the earlier distributors with discrimination, in so far as conferring benefits to the newly appointed distributors and there is no intelligible differentia validating such categorization. It is pointed out that, the attempt of the respondent to transfer the existing consumers of the appellant, to the newly appointed distributor, violates Ext.P2 Inter-Company Portability Scheme, which permits such portability only on a request made by the consumer. Various provisions of Ext.P1 agreement are read over to impress upon us that the agreement between the distributor and the oil company is an agreement between a principal and principal and there is no agency in conferring such distributorship. The business efficacy of the appellant should also weigh with the Corporation when a decision is taken, since otherwise the loans taken by the appellants would not be serviced and the appellant would be reduced to penury. The consumer is enrolled and serviced by the distributor and the oil company has no proprietary rights over the consumers.

3. Sri Adarsh Kumar, learned counsel appearing for the 5th respondent, which is a Federation of the existing LPG distributors, supports the appellant and emphasizes that the distributors are not agents of the Corporation and they purchase the LPG cylinders from the Corporation and sell it to the consumer; who is enrolled with the distributor. It is argued that, though there is power on the Oil Company to appoint additional distributors and reduce or increase the area of operation, there is no power to take away the consumers of an existing distributor, since the consumers have been subscribed through the efforts of the distributor. The decision of the High Court of Bombay is pointed out to emphasize this point, where specifically their Lordships held that the LPG distributorship of an Oil Company is not an agency. It is submitted that contractually, there is no power on the Oil Company to expropriate the consumers of an existing distributor and statutorily too, there is no such power conferred on the respondent Corporation. The Unified Selection Guidelines produced as Ext.R5(A)

is referred, to argue that the power to select and appoint is confined to only virgin markets, where there are no consumers serviced by an existing dealership. The learned counsel would assertively reiterate that there is no power conferred on the respondent Corporation to expropriate the consumers of an existing dealer.

4. Sri Poulose C. Abraham, appearing for the Corporation, would at the outset, caution us from dealing with the 2016 regulations; prior to which the subject matter of the writ petition arose. It is pointed out that the reliefs sought for in the writ petition are confined to the appellant's right to retain its existing consumers and there cannot be any expansion of the issues involved in the case by reason of the respondents who have impleaded themselves. It is urged that the scope of the writ petition should not be widened at the behest of the associations of long-existing and newly-appointed distributors; who are not even necessary parties in the lis. It is pointed out that, the right of the company to transfer the consumers from one distributorship to another has already been upheld in All India LPG Distributors Federation (supra); by a Division Bench of this Court based on the terms of the agreement. Learned Counsel for the Oil Company submits that they still stand by Ext.P2, Portability Scheme, but it is for the consumer to request for a transfer; in which case the Corporation would be bound to consider the same. If any of the transferred consumers of the appellant requests that they be transferred back to the appellant, definitely the company would be obliged to do it.

5. Sri Nirmal.S, learned counsel appearing for the 4th respondent Association of newly appointed distributors, support the oil company. It is pointed out from a counter affidavit filed by the BPCL in another writ petition that, the BPCL has not issued the impugned Circular and they have filed a review against the said decision. Annexure R4(g) subscription voucher is pointed out to assert that the subscription of a consumer is with the Oil Company and even the consumer cannot raise a complaint against his/her transfer to another distributor, effectuated for administrative reasons. The policy of the Government of India is very clear from Annexure R4(b), which requires the Oil Companies to close down all extension counters and appoint and transfer the existing consumers to nearby distributors through intra-company or inter-company transfers. The extension counters of existing distributors were necessitated only because of the expanding market and the difficulties in effective supply, for reason of the increasing area and multiplying numbers to be serviced by an individual distributor. Appointment of new distributors was the only method and otherwise the distributorship would have been monopolized by the existing distributors; not a healthy trend, especially when the reigning consideration of any commercial venture is the interest of the consumer, especially in a public utility system where the consumer's interest prevails.

6. We first consider the issue, whether the remedy under Article 226 of the Constitution of India could be invoked. We notice that the learned Single Judge has considered the issue on merits, but also reserved the right of the appellant

to invoke the alternate dispute resolution mechanism. It was also made clear that the observations on merits would not govern the consideration in an arbitration initiated by the appellant. It is trite that if the learned Single Judge has declined discretion, then in appeal, we would not interfere with that, unless the impugned action is so unreasonable and arbitrary. Harbanslal Sahnia is also to that effect; but invoked the power when the dealership was terminated for an irrelevant and non existent cause. In the present case, since the learned counsel for the appellant has filed an appeal and all the parties have urged this Court to give an authoritative pronouncement, especially in the context of the subject being the interpretation of a dealership agreement, already spoken of by a Division Bench of this Court; a binding precedent, we proceed to deal with the matter on merits.

7. We have called for the Judge's Papers of WP(C) 1524 of 2020, the counter affidavit in which, was relied on by the learned counsel appearing for the 4th respondent, produced as Ext.R4(g). Ext.P2 in the said writ petition is the circular extracted in Shailaja R. Khanvilkar (supra). The specific contention of the BPCL in the counter affidavit, is that Ext.P2 document is not one issued by it and there is no Chief General Manager (CGM-LPG, Sales) by the name of Sathish Kumar Thatipelli working in the BPCL. Ext.P3 judgment produced in that case is the one which is produced before us across the Bar. In paragraph 16 of the counter affidavit, it is also pointed out that BPCL has filed a review petition, against the judgment of the Division Bench of High Court of Bombay. In any event, with due respect, we are unable to accede to the dictum that the reduction of the area or territory, would not include consumers and hence there could be no reduction of existing consumers of an existing distributorship.

8. Reduction of area or territory, though geographical, would necessarily involve the transfer of consumers, since no territory can be assigned without reference to the consumers therein and there can be no consumer in isolation, without reference to the territory or area. A consumer's subscription is based on and presupposes the location, where the product is to be delivered and he cannot have an existence, divorced from the area or territory within which he uses the LPG cylinder. An existing distributor may cater to a number of consumers in an area and with the increasing subscription, it may not be possible for that distributor alone to cater to the needs of all the consumers in the area. The profit element or business efficacy is not the sole consideration in a public utility service and the consumer's interest has primacy. It is in this context, there are appointments made of new distributors to cater to the increasing number of subscribers; which is a natural consequence of the area or territory of a distributor being reduced or modified for a new appointment. The consumers, new or old, who have their location in the area or territory, which stands severed from the existing distributor, would necessarily have to be transferred to the new distributor, on which the existing distributor can have no grievance.

9. We cannot accede to the argument of Sri. Vijayan that, since the contract

entered into between the distributor and the Oil Company is a commercial contract, the business efficacy of the distributor has to be given primacy. We cannot, but, observe that the argument raised as to whether the consumer belongs to the Company or the distributor, completely ignores and compromises the interest of the consumer, that too, the consumer of a public utility service, which is brought under the Essential Commodities Act. We reject the contention raised by the existing distributors of business efficacy of the distributor being the reigning factor. They expect an increase in turn over, over the years, based on which expectation, they have taken loans for vehicles, infrastructure and so on, as pleaded in the writ petition. If prudence dictates to them that the business is not viable, it is always open to them to stop it. Service, prompt and effective; in this case the regular supply of LPG cylinders, is what the State and its instrumentality strive to achieve, when dealing with public utility services. If the Corporation feels that the service will not be effective for reason of increasing subscribers, as per the norms laid down by them, they are entitled to appoint new distributors to cater to the multiplying subscribers in a given area by bifurcating the already allotted area between the existing and the newly appointed distributor. We cannot accede to the plea of the distributors that, it is their business efficacy, which should rule the roost than the interests of the consumers. Such high handed attitude of distributors, ignoring the interest of consumers, especially in a public utility service, cannot be accepted and as rightly pointed out, it results in monopoly and the consumer would be left to the vagaries of individual distributors.

10. The Liquified Petroleum Gas (Regulation of Supply and Distribution) Order 2000 was specifically referred to by Sri Nirmal.S. The distributor as defined under LPG Order, is a person, firm, etc who has been appointed by a Government Oil Company and engaged in the business of purchase, sale or storage for sale of LPG in cylinders to consumers on the basis of an agreement with a Government Oil Company. Hence, the agreement entered into between the distributor and the Company has a statutory backing. The clauses of the agreement also support the case of the respondent Company. Clause 1(b)(ii) reserves the right of the Corporation to appoint one or more additional distributors in the same territory, referred to in clause 1(a); which is the territory assigned to the distributor in that agreement. The distributor cannot object to such an appointment and sub-clause (iii) further entitles the Corporation at its discretion to reduce, restrict, modify or alter the area of the distributorship territory; which decision is binding and final on the distributor. While sub-clause (iv) prohibits the distributor from selling outside the territory, sub-clause (v) exhorts the distributor to enroll as many consumers and canvass business for developing and increasing the sale of LPGs. As far as the appellant is concerned, the agreement is one entered into in 1989 and continued over the years. The appellant would have canvassed consumers, which definitely would not have been possible without the brand name of the Company. The mere canvassing of subscriptions does not entitle the distributor to retain the consumers, because, the subscription made is to the Company and

not to the distributor. In this context, the subscription voucher as pointed out by Sri Nirmal.S, assumes relevance. The subscription voucher is that of the respondent Corporation and not of the distributor.

11. The LPG Manual issued by the consortium of Oil Marketing Companies (OMC) at Chapter II deals with marketing. Clause 4.7 deals with the relationship between consumer, distributor and OMCs, which is as under:-

"Distributor is appointed by OMCs on "Principal to Principal basis". Distributor is responsible for all business and dealings with the OMCs consumer. The consumer is enrolled by the Distributor on behalf of OMC. The Subscription Voucher is signed by the consumer and is also required to be signed by the distributor on behalf of Corporation. The terms and conditions of the contract are printed on the Subscription Voucher. OMCs are at liberty to service its consumer through any Distributor. The cylinder and regulator are provided against deposit and hence they are given on loan to consumer(Other than FTL equipment) by the Oil Company through the distributor".

We also extract one sentence from 5.1.1 dealing with subscription of vouchers, which is as under:-

"The consumer is considered to be a "subscriber" to these services and the contract which he/she signs is called the Subscription Voucher(SC)".

Hence the contract of the subscriber/consumer is with the Oil Company and the distributor signs the subscription voucher on behalf of the Company, which makes it an agent, in so far as the public utility service of supply of LPG cylinders is concerned.

12. We now come to the argument of the contract being between principal and principal, which arises from clause 17 of Ext.P1 agreement, which is extracted hereunder:-

" In all contracts or engagements entered into by the Distributor with the consumers for sale of LPG and/or the sale and/or installation and/or repairs of appliances and/or connections thereof with LPG Cylinders equipment the Distributor shall act and shall always be deemed to have acted as a Princial and not as an agent or on account of the Corporation, and the Corporation shall not in any way be liable in any manner in respect of such contracts and/or engagements and/or in respect of any act or omission on the part of the Distributor, his servants, agents and workmen in regard to such installation, sale, distribution, connections, repairs or otherwise. The Distributor shall be bound to inform the consumers in writing of this provision, through correspondence or at the time of enrollment, of the consumer".

The business of distributorship is carried out by the distributor as a principal without any vicarious liability cast on the company, with respect to the sale, installation, repairs of appliances or pressure regulators, refills and other equipments which the distributor purchases from the Company and sells to the consumer. The company distances itself from the actual supply effected by the distributors, which is again through the infrastructure and employees of the distributor. It cannot distance itself from the essential responsibility to supply LPG cylinders to the consumers, following the norms and guidelines which regulate the public utility services. A breach committed by the distributor would be the responsibility of the distributor, but the company definitely would have a supervisory role and such breach would also entail penalties and sanctions from the Company. There cannot be any proprietary rights of the consumers on the company, especially in a public utility system and it is the option of the consumer to chose the company or the distributor; subject only to those existing in the area in which such consumer is located. The primacy of the consumer cannot be given a go-by and there cannot be a proprietary right on the Company and least of all, on the distributor of the consumers canvassed by them and serviced. The consumer has the freedom to migrate from one distributor to another or from one oil cmpany to another, so far as there is a supply carried out in the location of the consumer.

13. The Division Bench of this Court in All India LPG Distributors Federation (supra) held so in paragraph 16.

"16. We are unable to accept the contention. Admittedly, the Corporation has reserved the right to reduce the area of operation. It has also reserved the right to appoint additional distributors for the area initially allotted to them. The reduction in the area of operation would automatically result in the number of consumers registered with the dealer. Equally, the appointment of new dealers for the area carved out of the operational limits of an existing dealer would automatically result in the reduction of the number of consumers. Thus, it cannot be said that the action of the Corporation or the Government of India violates the terms of the agreement".

We bow to the above proposition and are unable to follow the dictum of the decision in Shailaja R.Khanvilkar (supra) for reason of the binding precedent of this Court and also on our independent consideration; we find ourselves unable to accede to that position.

14. Having considered the issue on merits on consent of parties and having interpreted the clauses in the agreement, which has a statutory backing, as has already been interpreted by another Division Bench of this Court, we find no cause to reserve the remedy of the appellant in the arbitration proceedings. We do not find any reason to entertain the appeal. We hence reject the appeal, leaving the parties to suffer their respective costs.

