

(2008) 11 AHC CK 0035

In the Allahabad High Court

Case No : C.M.W.P. No's. 24154 and 45095 of 2008

Vindhya Service Station and Another

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 20-11-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Constitution of India, 1950 — Article 14, 226

Citation : (2008) 6 AWC 6251

Hon'ble Judges : V.K. Verma, J;Sushil Harkauli, J

Bench : Division Bench

Advocate : U.N. Sharma and Vishnu Gupta, for the Appellant; Prakash Padia and Tarun Varma, Addl. S.G.I. and S.C., for the Respondent

Judgement

Sushil Harkauli, J.—Heard, Shri U. N. Sharma, senior advocate, assisted by Shri Vishnu Gupta for the Petitioners, standing counsel for Respondent No. 1 and Shri Prakash Padia for Respondents No. 2 to 4 and perused the record.

2. The Petitioner No. 1 is a petrol pump and Petitioner No. 2 is the Proprietor of the said petrol pump. This retail outlet is of the Indian Oil Corporation (called the "Corporation" for short hereinafter).

3. The Corporation has given the agency to the Petitioners under a written agreement. On 29.4.2008, the officials of M/s. S.G.S. India Pvt. Ltd. visited the retail outlet of the Petitioners for conducting "marker test".

4. It may be mentioned here that "marker" is a chemical mixed with Kerosene oil to prevent adulteration of other petroleum products by mixing them with subsidized low cost Kerosene oil. The testing of petroleum products by marker test makes the testing item turned pink if marker is present in the petroleum products.

5. In the Petitioners' case the H.S.D. (High Speed Diesel) and Xtra mile sample drawn from the Petitioners' retail outlet failed in the marker test, i.e., these

items were found adulterated with marker mixed Kerosene oil. Consequently, the Corporation stopped the supply of petroleum products to the Petitioners' retail outlet and ordered the Petitioner to maintain status quo, i.e., to stop the sale of petroleum products in the stock of the Petitioners.

6. The Petitioners challenged the order of stopping of supplies by filing Civil Misc. Writ Petition No. 24154 of 2008. Subsequently, a show cause notice dated 5.5.2008 was issued to the Petitioners by the Corporation regarding the adulteration found in the petrol pump at the Petitioners' retail outlet. According to the Petitioners, the said show cause notice was not received by the Petitioners, and the Petitioners came to know of the show cause notice through the counter-affidavit filed by the Corporation in the said Writ Petition No. 24154 of 2008. Thereupon, the Petitioner filed the second Writ Petition No. 45095 of 2008 on 28.8.2008 challenging the show cause notice. In the meantime, on 22.5.2008, a Division Bench of this Court passed an interim order in Writ Petition No. 24154 of 2008 directing the Respondent-authorities to permit the Petitioners to operate the petrol pump and to resume the supply. This order was passed on the argument (mentioned in that order) that the chemical analysis report had not been made available to the Petitioners and no show cause notice had been issued to the Petitioners. Later, the Corporation pointed out that the said interim order dated 22.5.2008 had been passed behind its back due to oversight as on that date a counter-affidavit had already been filed by the Corporation in that writ petition enclosing the show cause notice and giving all the other relevant facts. Upon this another interim order was passed on 8.8.2008 suspending the operation of the order dated 22.5.2008 and directing the Petitioners or their authorized representative to appear at the testing laboratory in Mughalsarai on 13.8.2008 at 10 a.m. The Corporation was directed by the said order dated 8.8.2008 to ensure arrangements for testing of the sample drawn from the Petitioners' outlet, being done on that very day and a copy of the testing report being supplied to the Petitioners at the petrol pump or at the residence on 18.8.2008. It was also directed by the said order dated 8.8.2008 that a copy of that report should be filed by the Corporation with a supplementary-affidavit on the next date of listing the case and the Petitioners were also given the liberty to file their objections, if any, to the testing report. The matter was fixed for 22.5.2008 for orders. Subsequently, the matter was adjourned giving further time to the parties and the suspension of the interim order dated 22.5.2008 by order dated 8.8.2008 was continued.

7. It has been alleged by the Corporation that they had made the necessary arrangement at the Mughalsarai Laboratory but the Petitioners failed to appear and the testing was done in their absence and further that the testing report confirmed the adulteration.

Petitioner No. 2 has contended that he went for the testing but was chased away by the Corporation officials. This highly improbable stand of the Petitioners raised disputed questions of pure fact which cannot be adjudicated in writ jurisdiction.

When this position of law was pointed out to the learned Counsel for the Petitioners, he confined his arguments to legal issues, which are dealt with below.

8. Before dealing with the Petitioner's arguments, we propose to deal with an objection of a preliminary nature advanced by the Respondent during the course of hearing. Sri Prakash Padia appearing for the Corporation submitted that the second/subsequent Writ Petition No. 45095 of 2008 is barred by *res judicata*. The contention is misconceived. The first/earlier Writ Petition No. 24154 of 2008 is still pending, and no final finding has been recorded therein on any issue involved therein. *Res judicata* means that findings (on issues directly and substantially involved in the earlier suit) would be binding in the subsequent suit between the same parties.

9. Coming back to the Petitioners' contentions, the first submission of the learned Counsel for the Petitioners in respect of the stoppage of supplies is that the Corporation did not have any power to stop such supplies pending final determination of the fact of adulteration through the laboratory test. There is no doubt that the agreement between the Petitioners and the Corporation regarding the retail outlet does not contain any such provision of stoppage of supply and the agreement permits only termination of the agreement on violation of any of its conditions. Adulteration is one of the grounds on which the agreement can be terminated. However, the Marketing Discipline Guidelines, issued in respect of retail outlet dealerships of Public Sector Oil Marketing Companies are effective from 1.8.2005. The Corporation is one of the Public Sector Oil Marketing Companies. Clause 6.1.1 defines "adulteration". Under Sub-clause (a) of Clause 6.1.1 of the aforesaid guidelines the individual Oil Company officers or their authorized representatives are empowered to carry out, amongst others, "marker checks" at retail outlets. Sub-clause (b) of the said clause permits sales and supplies of all products to be suspended immediately till the investigation are completed, if "marker check" indicates adulteration. There is no challenge by the Petitioners to these Marketing Discipline Guidelines and on the contrary the Petitioners are themselves relying upon these very guidelines, as is indicated later in this order. Thus, "marker check" having indicated possible adulteration, the Corporation was within its rights to stop sales and supplies of petroleum products to the Petitioners' retail outlet. Even otherwise, considering from the public interest point of view, it would be unreasonable to adopt an interpretation that despite a *prima facie* confirmation of adulteration in petroleum products at a retail outlet by the scientific "marker check", the retail outlet should still be allowed to continue with the mischief by sale of adulterated stock.

10. The second argument of the Petitioners is that under the control order, which is issued under the Essential Commodities Act, it is only the authorized officer who can carry out the taking of samples. The argument is misconceived. There is a two fold check upon adulteration: one at the level of Oil Marketing Companies and the other by the State authorities under the Essential Commodities Control Orders. In respect of the agreement between the Oil Marketing Company and

their dealers the terms are governed not by the control order but by the agreement and the Marketing Discipline Guidelines.

11. Learned Counsel for the Petitioners then argued, relying upon the Marketing Discipline Guidelines, that the Oil Company should get the "marker check" done or samples taken through their own officers and the Oil Company cannot utilize the services of other agencies like the S.G.S. India Pvt. Ltd. Reliance for this proposition has been placed upon the words "Inspecting Officer" used in Clause 6.1.1 (b) of the Marketing Discipline Guidelines. We are unable to agree because the guidelines specifically says in Clause 6.1.1 (a) that "Individual Oil Company officers or their authorized representatives should carry out...marker ...checks...at the Retail Outlets." These express words cannot be rendered redundant by interpretation of the words "Inspecting Officer" mentioned in Clause 6.1.1 (b).

12. Thus, we do not find any good ground to set aside the order stopping supplies of the Petitioners after the marker check indicated adulteration of the petroleum products at the retail outlet of the Petitioners. Civil Misc. Writ Petition No. 24154 of 2008 is, accordingly, dismissed.

13. The Petitioners have challenged the show cause notice on the ground that the sampling procedure mentioned in the Marketing Discipline Guidelines has not been followed. Reliance has been placed upon Clause 2.4.1 of the Marketing Discipline Guidelines, which provides one litre samples to be drawn from the retail outlet. According to learned Counsel for the Petitioners the samples drawn were admittedly of only 250 ml., as mentioned in Annexure-4 to Writ Petition No. 45095 of 2008.

14. We do not find this contention to be sustainable because it has not been shown that drawing of 250 ml. sample instead of one litre sample caused any kind of prejudice to the Petitioners. The Laboratory test report, which has been filed by the Respondent-Corporation, does not say that because of the quantity of sample it was incapable of being tested properly.

15. Learned Counsel for the Petitioners has placed reliance upon the case of Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, for the proposition argued by him that any violation of the guidelines vitiates the entire sampling and testing procedure. The argument is misconceived. The facts of the case of Harbanslal (supra) decided by the Supreme Court indicates that because the sample was likely to deteriorate after 10 days, the guidelines prescribed immediate testing on the spot and thereafter laboratory testing within the prescribed time. On the facts of that case spot testing had not been done and there was great delay beyond the prescribed time in the laboratory testing. Obviously, the violations, which were being considered by the Supreme Court, caused great prejudice to the dealer from whom samples were drawn for testing. The Supreme Court, in our opinion, has not laid down in the case of Harbanslal (supra) that every flimsy departure from the procedure prescribed by the

guidelines would operate to the benefit of the dealer selling adulterated products on mere technicalities which do not result in any prejudice to the dealer.

16. Learned Counsel for the Petitioners has placed reliance upon a decision of a learned single Judge of the Madras High Court dated 29.2.2008 in Writ Petition No. 29561 of 2007, M/s. D. Nagarajan and Co. v. Chief Regional Manager. However, it has been pointed out by the Corporation that the said order of the learned single Judge has been stayed by order dated 28.3.2008 of a Division Bench of the Madras High Court in appeal being W. A. No. 391 of 2008. The Respondent Corporation has relied upon a decision of a Division Bench of this Court dated 6.8.2008 in Writ Petition No. 29880 of 2008, M/s. Garg Automobiles v. Union of India and others, which has upheld the marker test. Reliance has also been placed upon a decision of the Rajasthan High Court dated 3.10.2007 in Writ Petition No. 4591 of 2007, Shyam Diesel v. Bharat Petroleum Corporation, where the deployment of the same private agency, viz., S.G.S. India Pvt. Ltd., by the Oil Companies and its authority to inspect retail outlets has been upheld.

17. Normally, the High Court under Article 226 of the Constitution of India is reluctant to interfere with mere show cause notices because it is unhealthy to allow unscrupulous litigants, who instead of filing replies to show cause notices and contesting the matter on merits, rush to the High Court under Article 226 of the Constitution of India in attempt to obtain ex parte interim orders.

18. In the present case the "marker test" was conducted by the authorized agency, which indicated adulteration. The sample drawn from the Petitioners' retail outlet has been found to be adulterated at the testing conducted at the authorized Mughalsarai Laboratory. The Petitioners' non-participation in the test conducted at the Laboratory, prima facie, is due to the Petitioners' own fault. No prejudice has been shown to have been caused to the Petitioners, in the marker test or in the sampling or testing. The Oil Companies do not readily and on flimsy ground shut down their retail outlets because of the competition in the market being faced with other competing Oil Companies. Selling adulterated petrol and diesel should be discouraged with heavy hand in the larger public interest.

19. Considering the overall facts and circumstances of this case, we decline to interfere with the show cause notice at this stage. However, because learned Counsel for the Petitioners has stated before us that the Petitioners have already submitted a reply to the show cause notice, therefore, we permit the Petitioners to file a supplementary reply in the light of the Laboratory test on the test of the sample drawn from the Petitioners' retail outlet within 15 days of this order alongwith a certified copy of this judgment. The Respondent-Corporation will take appropriate reasoned decision after considering the reply of the Petitioners within a further period of one month.

20. With the aforesaid observations, Writ Petition No. 45095 of 2008 is also disposed of.

21. Let a certified copy of this order be issued to the parties on payment of

requisite charges within 48 hours.