
(2017) 03 UK CK 0002

In the Uttarakhand High Court

Case No : 71 of 2011 & First Appeal No. 71 of 2011

Vipin Kumar Agarwal

APPELLANT

Vs

Bharat Petroleum Corporation Ltd.

RESPONDENT

Date of Decision : 08-03-2017

Acts Referred:

Essential Commodities Act, 1955 — Section 3
Specific Relief Act, 1963 — Section 38, Section 41

Citation : (2017) AIR(Uttaranchal) 67 : (2017) 122 ALR 246

Hon'ble Judges : Servesesh Kumar Gupta, J.

Bench : Single Bench

Advocate : Mr. Sharad Sharma, Senior Advocate, assisted by Mr. Ramji Srivastava, Advocate, for the Plaintiff/Appellant; Mr. J.C. Belwal, Advocate, for the Defendants/Respondents

Final Decision : Disposed Off

Judgement

Servesesh Kumar Gupta, J.—By means of this appeal, the judgment and order dated 16.7.2011 rendered by the Civil Judge (Senior Division), Rudrapur, Udham Singh Nagar has been assailed whereby the Original Suit No. 91/2006, instituted by the appellant, was dismissed for the major reliefs prayed for and it was partly decreed only for the relief (A) to the effect that the defendants were restrained from taking forcible possession in illegal manner on the plot and the petrol pump nay the constructions thereon and they were also asked to remain restrained from dispossessing the plaintiff from such petroleum dispensing unit, but at the same time the learned Trial Judge dismissed the suit refusing to pass any decree of declaration that the dealership termination order dated 7.4.2006 was illegal, void and ineffective. He also refused the prayer of declaratory injunction that the order dated 13.1.2006 issued by the respondents imposing the sanction on the licences of the plaintiff to sell the other petroleum products to be illegal and void.

Before coming to discuss the issues decided against the appellant, it would be

pertinent to note down certain facts qua the controversy between the parties. The plaintiff, as claimed, was dealing in the petroleum products by way of running an outlet under the name and style of M/s Kichha Fuel Oil Distributors, where, among other things, the High Speed Diesel (HSD) dispensing unit was installed and it was providing services to the consumers for the last 50 years. All required licences were issued and the supply there under was used to be given by the respondents to the appellant for the purpose and this business was being run under the Marketing Discipline Guidelines, 2005, which were issued by the concerted decisions of the oil marketing companies in this sector. These guidelines were formulated to prevent the malpractices in the sale of petroleum products as the Preamble of the same enumerates the purpose in the following words:

"The Oil Companies consider it as their duty and responsibility to ensure dispensation of correct quality and quantity of products sold through their network. Appropriate disciplinary action as per conduct rules would be initiated against officers found erring in their duties. The conduct rules existing in the oil companies would be amended to state that in case an officer is charged under the Marketing Discipline Guidelines, expeditious decision in the matter will be taken by the Oil Companies. At the same time, the dealers of the Oil Companies who are at the cutting edge of providing services to the customers will be responsible to provide this service in the best possible manner, ensuring quality and quantity of the products. The Marketing Discipline Guidelines provide for taking punitive action against the dealers found indulging in irregularities/ malpractices."

2. The ill-fated day to the plaintiff came on 13.1.2006 when at around 6.30 PM, the team of the respondents suddenly arrived for the inspection of the petrol pump and the Deputy Manager of the respondent company measured the presence of the HSD in the underground tank by the dip rod method and found that there was a variation of 12272 litres in the book stock vis-a-vis the physical stock. As a consequence, the sale of HSD was suspended till further advice and samples were drawn. The closing stock at the time of suspension of sale was 22642 litres. This all has been reported in the relevant books under the handscript and the writing of the concerned officers.

3. So, a show-cause notice was issued on 24.1.2006 as to why the licence of the plaintiff be not terminated thenceforth for running the petrol pump. The plaintiff submitted his reply on 30.1.2006 and strived to show to his best by explaining that, in fact, there was no variation as reported, but the reality was that an entry of 12000 litres had been made in the concerned register by a Class III/Class IV employee who was employed at the unit on 12.1.2006 and this entry was made because the tanker no. UA06-8049 filled with 12000 litres of HSD had arrived on that day (12.1.2006) for dispensing such HSD in the underground tank and since this tanker while on way to the destination had met with some minor accident with a tractor trolley, hence there developed some snag in the valve box of the

tanker and as a result thereof, the HSD present in the tanker could not be dispensed in the underground tank on the same day, i.e. on 12.1.2006, while the entry of the same was unwittingly made by the person employed there and this can transparently be noticed in the register concerned where the entry on 12.1.2006 showing the incoming of 12000 litres diesel in the underground tank had been made and thereafter only, the report of inspecting officers had been mentioned in their handscript.

4. Anyhow, higher officers of the respondents were not satisfied with the explanation so submitted by the plaintiff and terminated his dealership vide order dated 7.4.2006. One thing which is consistently striking and haunting in the mind of the Court that after finding the dealer guilty for the alleged variation of the stock on 13.1.2006, the show-cause notice was issued at least after 11 days on 24.1.2006. What was the cause of this delay in issuing such notice to the appellant/plaintiff herein is shrouded with the reasons best known to the respondents. Besides this when show-cause notice was soon replied on 30.1.2006. Then further a delay of 2 months 7 days was made in terminating the dealership, and again what was the cause of this inordinate delay in taking the disciplinary action against him can be discerned, but best known to the officers of the respondents. It is difficult to encourage such practices.

5. So, the plaintiff instituted a suit on 12.5.2006 seeking the reliefs as hereinbefore mentioned. When a temporary injunction was moved, learned Civil Judge granted an injunction order in favour of the appellant restraining the defendants/respondents from interfering in any manner with the land, building and possession of the appellant/plaintiff. However, the prayer of grant of temporary injunction for supply of petroleum products was rejected by the order dated 10.1.2008. When this order was challenged by way of filing the AO No. 99/2008, the Hon"ble Chief Justice of this Court dealt with the issue vide his order dated 21.5.2009 (Annexure 12) and observed as follows:

"It is not the case of the respondents Corporation that the sample was found adulterated. The only ground, therefore, upon which the license of dealership was terminated, was a discrepancy in the stock of HSD. Whereas the discrepancy earlier shown was to the tune of 15,464 litres, later on, as claimed by the appellant/plaintiff, it was brought down to 2700 litres. As per the learned counsel for the respondents, however, this reduced discrepancy of 2700 litres was brought about between 13th January, 2006 and 4th October, 2006." It was further observed that "in view of the report of the Territory Manager along with his affidavit dated 16th April, 2009 filed pursuant to the Court Order dated 15th April, 2009, I, prima facie, find and feel that the only issue which might survive ultimately for the consideration by the learned Trial Court would be the alleged ground of cancellation of the dealership arising out of some alleged discrepancy in HSD between the stock reading and what was actually found on ground. There are strong suggestions/indications that the discrepancy figures are varying. There are conflicting claims and counter claims with respect to the discrepancy

figures. One of the important claims of the appellant/plaintiff relates to and arises out of his contention that the Tanker Lorry containing 12,000/- litres had not been decanted. This indeed is an important issue of fact to be considered by the Trial Court..... However, I am convinced that the dealership of the appellant, if continued to remain suspended, would adversely affect the commercial interest of the appellant and would cause irreparable loss to it because the appellant, in the ultimate analysis, may not be compensated, in any manner, for this recurring loss."

6. With these observations, the Hon"ble Chief Justice allowed the temporary injunction application of the appellant directing the respondents to resume the supply of MS and HSD to the appellant subject to the condition that the resumption of supply by the respondents shall abide by the result of the suit.

7. So, the supply was thus resumed, but on dismissal of the suit for all the major reliefs, the licence stood terminated and the supply of all items including MS and HSD were stopped and since then the plaintiff/appellant has been deprived of his business.

8. I have heard learned Counsels of the parties and have gone through the major issues, which have been adjudicated against the plaintiff leading to the dismissal of the suit and out of these issues, I would like to deal with the issue no. 3, 4, 5, 6 and 7. Need not to mention that rest of the issues were pertaining to jurisdiction, suit valuation and the court fees, and those were decided in favour of the plaintiff. So, there is no controversy on those issues as no appeal has been preferred by the defendants.

9. As regards the issue no. 3 and 4, these pertain to the fact, as claimed by the plaintiff, that diesel dispensation machine was rendering excess delivery to the consumers and this defect was brought to the notice of the concerned authorities of the Weights and Measurement Department by making the complaint dated 20.12.2005. Department checked the whole system of dispensing unit, as is evident from Ex. Ka-1 and his endorsement dated 31.12.2005, but I am not able to read the endorsement made by the person concerned in the relevant registers. Otherwise also, this factor is not so relevant in the light of other facts and circumstances of the case.

10. Issue no. 4 was framed that whether the tanker no. UA06-8049 while on way to the petrol pump met with an accident causing the technical defect in its valve box and as a result thereof the HSD which had arrived in the unit could not be decanted on the same day. Plaintiff has strived to prove such fact by producing the driver/owner of the tanker as well as from other ancillary evidence, but at the same time, I am of the view that whether the tanker met with an accident or not loses its significance in the light of the factum that such tanker had arrived on 12.1.2006 and that is why the entry of 12000 litres HSD was inducted into the relevant register by the reckless, irresponsible employee of the plaintiff even before such quantity of the HSD was, in fact, decanted into the underground

tank and such fact cannot be belied, inter alia, on account of following major reasons:

(a) The handscript long endorsement of at least six lines has been made after induction of the entry of 12000 litres HSD on 12.1.2006 and this handscript endorsement has been made on 13.1.2006 under the signature of the responsible officer, who is not less than a Deputy Manager.

(b) The factum of presence of 12000 litres HSD cannot be denied for yet another reason that such tanker remained parked on the petrol pump itself for a long period and it could be decanted only on or after the order of the learned Civil Judge made on 19.9.2006.

In this backdrop, I find that the inference of the learned Trial Judge suffers with infirmity for the following reasons:

(a) As per the own handscript of the Deputy Manager (Accounts) of the defendant/respondent, there was a variation of 12272 litres in the book stock vis-a-vis physical stock and it has been discussed by this Court, as indicated above, that the presence of 12000 litres HSD filled up tanker was there on the date of inspection on 13.1.2006, but unfortunately due to the defect in the valve box, it could not be decanted in the underground tank and the entry has been made in the concerning register. So, there remains the variation of 272 litres only ($12272 - 12000 = 272$) and as per the clause 6.1.10, which deals with the stock variation of MS/HSD (beyond permissible limits), the variation of $\pm 4\%$ of tank stock is permissible. Since the stock at the time of suspension of sale was 22642 litres, hence its 4% comes to 905.68 litres, while the variation at the most was of only 272 litres. So, it was within the permissible limits.

(b) It is difficult to understand that in what manner, the concerned officers of the respondents nay the learned Trial Court had based their findings/decisions placing the plaintiff in the category of maintaining such a HSD dispensing unit which was under the stock variation beyond permissible limits at the time of inspection.

(c) That apart, if I look another report under the signature of the same officers, which is Paper No. 158Ka-11 prepared at the spot on the same date 13.1.2006 (not proved during the course of evidence, even it has not been exhibited), another figure of stock variation to the tune 15464 has been shown.

(d) So, how these discrepant reports can be made the basis for taking such a drastic decision against the plaintiff when there are two reports of the same officers prepared on the same date at the same spot and one is showing variation of 12272 litres, while another is showing variation of 15464 litres. That is why, the Hon'ble Chief Justice of this Court was constrained to discuss these or the like variations in the different reports in his order dated 21.5.2009 passed in AO No. 99/2008, as discussed hereinbefore (Annexure 12 in the appeal file).

11. Argument of learned Counsel for the respondents that PW-1 Gopal Krishan

Agrawal in his cross-examination dated 10.7.2009 has accepted the variation of 15464 litres is wholly devoid of any substance, because he has not accepted such variation in reality, but he has accepted the mentioning of such variation in the inspection report. Mentioning of such variation in the inspection report cannot be inferred as the acceptance of factual position by the witness.

12. So in view of what has been discussed above, I do not agree with the finding of the learned Trial Judge, and I hold that such finding is perverse and beyond the evidence which is available on the record. Therefore, I overturn this finding and decide it in favour of the plaintiff.

13. Now, so far as the issue no. 5 is concerned, it has not been denied that the inspection was made by a team on 13.1.2006 at 6.30 PM by dip rod method. Evidence has been adduced that at the relevant time, the Supervisor of the petrol pump Mr. Anil Raizada (examined as PW5) was asked to stay away. So, he could not be a witness as to what was being done by the inspecting team. His evidence has not been countered by the defendants to the distrust of this Court. Same analogy was also dealt by the Hon"ble Apex Court in Civil Appeal Nos. 8620-8621/2002, Harbanslal Sahnia & Another v. Indian Oil Corporation Ltd. & Others, decided on 20.12.2002, wherein it was emphasized that in the interest of natural justice, the inspecting official should test the sample for quality and density at the retail outlet itself in the presence of the dealer with necessary equipments such as filter paper, hydrometer, thermometer, jar and the conversion table which are available at the retail outlets and record density thereat only in the presence of the dealer. This has also been contemplated in the Government Orders No. 1459/29-7-97-731-PP dated 25.4.1997 and 2722/29-7-2000-PP/2000.

14. It can be discerned that time of 6.30 PM of the chilly winter days in mid January was enough to visualise that it must have been dark by such time. So, on applying the dip rod in the underground tank and then pulling such rod out and take the measurement of the wetting point on such rod, there is every chance of mistake in the measurement.

15. Further, it has not been proved that the underground tank was rectangular in shape so that the correct measurement could have been made by the dip rod method. In most of the petrol pumps, the underground tanks are of cylindrical shape. On dipping the rod, if its end touches to the net bottom of a cylindrical shaped tank, then the measurement of the available oil in such tank can precisely be of correct value, and if the end of the rod inside the cylindrical tank touches not its core bottom but with a slight variation upward, then the measurement of the available oil would be quite different. In that eventuality, it would be quite a harsh penalty so much so to deprive the plaintiff from his bread earning means and it cannot be permitted to be sustained.

16. This factor of variation on the basis of shape of the underground tank, whether rectangular or cylindrical, has also been taken into consideration by the

Hon"ble Allahabad High Court in Civil Misc. Writ Petition No. 32187/2007, M/s Pestonji Brothers & Another v. Deputy General Manager (I/C), M/s Indian Oil Corporation Limited & Others, decided on 3.1.2008 holding that when the dealer was not found indulged in malpractice, adulteration or short supply for the last 46 years, then slightly little variation in the stock should not be made the basis for taking such a harsh step inasmuch as cancellation of the licence. Such technical lapses, in the opinion, of the Allahabad High Court, should not be extended too far so as to inflict the extreme punishment of termination of the agency and that too when in the last more than 46 years no complaint qua the functioning of the dealer was reported. Therefore, the extreme punishment of termination of agency of the petitioner on such lapses was considered too harsh and disproportionate to the extent of being rendered arbitrary and violative of Article 14 of the Constitution of India.

17. Akin to the facts of M/s Pestonji Brothers case, licence of the plaintiff/appellant has been cancelled, nonetheless no similar complaint was ever highlighted in running the petrol pump and dealing in the petroleum products for the last 50 years.

18. In view of what has been discussed by me, I overturn the finding of learned Trial Judge on issue no. 5 as well and decide it in favour of the plaintiff.

19. As regards the issue no. 7 that the suit was found barred by Section 38, 41(h) and 41(e) of the Specific Relief Act, I am of the view that the petrol pump and other petroleum products were being sold under the licence subject to an agreement between the parties. So, when there were terms and conditions in a particular agreement, such terms were enforceable by way of instituting the suit provided it is not in the prohibitory limits, as envisaged under Section 41 of the Specific Relief Act. I have perused the clauses of Section 41 of the Act and find that the suit of the plaintiff is not barred by the provisions of the Specific Relief Act and the learned Trial Judge has committed an obvious error in recording the finding in this regard against the plaintiff. So, I overturn this finding and decide the same in favour of the plaintiff.

20. Since issues no. 4 and 5 have been decided by me in favour of the plaintiff, hence I think the licence termination order dated 7.4.2006 is wholly illegal, void and ineffective and its effect shall be that the defendants are bound to resume the supply of petroleum products as usual.

21. Now, I would like to refer the precedents cited by the learned Counsel for the defendants/respondents. He placed reliance on a judgment of a coordinate Bench of this Court rendered on 7.11.2008 in M/s Harbans Motor Works & Others v. Bharat Petroleum Corporation Ltd. & Others. This writ petition filed by the dealer was dismissed on quite different footing. His dealership was cancelled on account of several irregularities found in running the retail outlet. In a surprise inspection, the seal of totalizer unit was found tampered and from both the dispensing unit of HSD, there was 70 ml. short supply in each 5 litre as against

the permissible limit of 15 ml. This was a case of dishonesty on the part of the licence holder. So, the facts of this case are not applicable in the present controversy.

22. Other case, relied by the learned Counsel for the respondents, is M/s Kishor Auto Sales & Others v. Bharat Petroleum Corporation Ltd. & Another, 2010 (81) ALR 854. This precedent is also not applicable in the present case because in that case the sample of motor spirit taken from the petitioner's outlet failed in market test and it was found adulterated when tested in laboratory of the Corporation. The case in hand does not pertain to the adulteration of petroleum products, but it is entirely on different footing.

23. Appeal, thus, stands allowed. The impugned judgment and order of the learned Trial Judge dated 16.7.2011 is hereby set aside. Defendants/respondents are directed to restore the licence of the plaintiff/appellant and resume the licence of petroleum products including HSD, as the same was being made available to him on or before 7.4.2006.

24. Let the LCR be sent back.