SUPREME COURT OF INDIA

Hindustan Petroleum Corp.Ltd.

Vs.

Super Highway Services

S.L.P.(Civil) No.104 of 2009

(Altamas Kabir and Cyriac Joseph JJ.)

19.02.2010

JUDGEMENT

Altamas Kabir, J.

1. This Special Leave Petition involves the question as to whether the dealership of the Respondent No.1 had been validly terminated in accordance with Clause 58 of the Dealership Agreement executed between the parties on 30th August, 2003. In addition, it would also have to be considered as to whether the termination of the 2 Agreement was in keeping with the procedure/ guidelines in conducting Marker Test in retail outlets.

2. By virtue of the aforesaid Agreement, the petitioner Corporation entered into an Agreement with the Respondent No.1 for the retail sale or supply of petrol, diesel, motor oils, grease and such other products as might be specified by the Corporation from time to time, at the premises in question. The Agreement was to remain in force for 15 years with effect from 30th August, 2003.

> "However, both the parties would be at liberty to determine the Agreement without assigning any reason by giving three months' notice in writing to the other of its intention to terminate the Agreement and upon expiration of such notice, the Agreement would stand cancelled and revoked, without prejudice to the rights of either party against the other in respect of any matter or thing 3 antecedent to such termination. It was also indicated that such liberty would not prejudice the rights of the Corporation to terminate the Agreement earlier on the happening of any of the events mentioned in Clause 58 of the Agreement.
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> Clause 4 of the Agreement provided that the licence and permission granted for the use of the outfit would terminate immediately on the termination of the Agreement or on any breach of any of the terms thereof. The relevant portion of Clause 58 of the Agreement is reproduced hereinbelow :-

"58. Notwithstanding anything to the contrary herein contained, the Corporation shall also be at liberty to terminate this agreement forthwith upon or at any time after the happening of any of the following events, namely:- (a) If the dealer shall commit a breach of any of the covenants and stipulation contained in the agreement, and fail to remedy such breach within four days of the receipt of 4 a written notice from the corporation in that regard.

(b) .....

(c) .....

(d) .....

(e) .....

(f) .....

(g) .....

(h) .....

(i) If the dealer shall contaminate or tamper with the quality of any of the products supplied by the Corporation.

(j) .....

(k) .....

(l) .....

(m) If the dealer shall either himself or by his servants or agents commit or suffer to be committed by any act which in the opinion of the Chief Senior Regional Manager of the Corporation of the time being at Patna whose decision shall be final, is prejudicial to the interest or good name of the Corporation or its products the Chief Senior Regional Manager shall not be bound to give reason for such decision."

3. On 26th May, 2008, a check was conducted at the outlet of the Respondent No.1 Company, where a sample of High Speed Diesel (HSD) failed the Marker Test, which indicated that the same had been contaminated. On the same day, the petitioner Corporation's authorized representative, SGS India Pvt. Ltd. submitted its report on the Marker Test indicating such contamination. Accordingly, in terms of the Marketing Disciplinary Guidelines, referred to hereinabove, on 27th May, 2008, sales and supplies of all the products from its outlet were suspended by the petitioner Corporation to the Respondent No.1 because of the sample failure.

> "According to the petitioner Corporation, on the very next day on 28th May, 2008, the Respondent No.1 was given notice that a Nozzle Test of HSD was to be conducted at the Barauni Terminal on 29th May, 2008. According to the petitioner Corporation, the Respondent No.1's representative refused to acknowledge the notice. However, the Area Sales 6 Manager of the petitioner Corporation is alleged to have informed the Respondent No.1 telephonically of the Nozzle Test to be conducted on 29th May, 2008, at its Barauni Terminal. Despite having been given notice, no one appeared on behalf of the said respondent when the comparison test was conducted in Barauni and the same was held at the Barauni Terminal on 29th May, 2008, in the presence of the representative of SGS India Pvt. Ltd. (the agent of the petitioner), the Manager, Barauni Terminal, Transporter's representative and the petitioner's Area Sales Manager. Further to the result of the test, the Respondent No.1 was served with a notice dated 14th July, 2008, asking it to show cause as to why its dealership should not be cancelled on account of the failed Marker Test. According to the petitioner Corporation, the reply sent by the Respondent No.1 on 21st July, 2008, was entirely vague. Immediately thereafter, the respondent No.1 filed a Writ Petition, being CWJC No.11172 of 2008, in the Patna High Court praying for issuance of appropriate writs to quash the entire proceedings arising out of the Marker Test. On 9th September, 2008, the petitioner Corporation, upon consideration of the reply sent by the Respondent No.1 to the Show Cause Notice, terminated the Dealership Agreement of the Respondent No.1 under Clause 58(1) thereof."

4. On 25th September, 2008, a counter affidavit was filed on behalf of the petitioner Corporation in the Writ Petition mentioning the refusal on the part of the Respondent No.1 to acknowledge the notice dated 28th May, 2008, informing it of the Nozzle Sample and T/T Retention Sample Test which was to be conducted at the Barauni Terminal on 29th May, 2008.

5. On 15th October, 2008, the learned Single Judge allowed the Respondent No.1's writ petition, upon holding, inter alia, that mere statement on affidavit that an unsuccessful attempt had been made to serve the Respondent No.1, was insufficient for taking such a drastic step such as termination of the Dealership Agreement. The learned Single Judge held that even if the Respondent No.1 had refused to acknowledge the letter, the same could have been sent to it by registered post and the testing could have been delayed, as there was no urgency involved, as, in any event, the pump of the Respondent No.1 had been sealed. Apart from the above, the learned Single Judge took note of the fact that as per the version of the Respondent No.1, no information had been given to it about the testing to be conducted at the Barauni Terminal on 29th May, 2008. What also weighed with the learned Single Judge was that on behalf of the Respondent No.1 it was asserted that the person who is supposed to have served the letter on the Respondent No.1, was not in Barauni on 29th May, 2008, when the same is supposed to have been refused by the representative of the Respondent No.1. The learned Single Judge was of the view that since the retesting had been done without proper notice to the Respondent No.1, as per the Marketing Discipline Guidelines, the same had

caused severe prejudice to the Respondent No.1 and the order of termination of the Dealership Agreement dated 9th September, 2008, could not, therefore, be sustained.

6. Appearing for the petitioner Corporation, Mr. U.U. Lalit, learned Senior Advocate, submitted that the Nozzle Test had been conducted at site in the presence of the representative of the Respondent No.1 and also the transporter and samples had been drawn for testing at site and also for future testing, in the presence of the parties. Since the Respondent No.1 failed the Marker Test during the Nozzle Test, the samples taken earlier were sent to the Forensic Laboratory at Barauni for cross- checking. Mr. Lalit submitted that notice had been duly given to both the Respondent No.1 and the transporter, but that while the representative of the transporter was present, the Respondent No.1 chose to be absent during the Marker Test in the laboratory. Mr. Lalit submitted that the Show Cause Notice issued to the Respondent No.1 on 14th July, 2008, categorically indicated that the representative of the Respondent No.1 had refused to acknowledge the receipt of the notice dated 28th May, 2008, and that the petitioner Corporation had no alternative but to proceed with the Marker Test at Barauni in the presence of the representative of the transporter. Mr. Lalit submitted that when the Respondent No.1 failed the Marker Test even in the laboratory, the petitioner Corporation had no option but to terminate the agreement with the Respondent No.1. Mr. Lalit also emphasized the fact that all the samples had been drawn/collected not by the employees of the petitioner Corporation themselves, but by its authorized agent, M/s SGS India Pvt. Ltd.

7. Mr. Lalit then contended that the proceedings before the High Court in its writ jurisdiction stood vitiated in view of Clause 68 of the Agreement between the petitioner Corporation and the Respondent No.1 which provided for arbitration in respect of disputes or difference of any nature whatsoever or relating to any right, liability, act or omission between any of the parties arising out of or in relation to the agreement and the same were to be referred to the sole arbitration of the Managing Director of the Corporation or of some officer of the Corporation who might be nominated by the Managing Director. Mr. Lalit submitted that without taking recourse to the arbitration clause, the Respondent No.1 was not entitled in law to move the writ Court against the order terminating its agreement with regard to operation of the retail outlet.

8. In support of his submissions, Mr. Lalit firstly referred to and relied upon the decision of this Court in *Indian Oil Corporation Ltd. vs. Amritsar Gas Service & Ors.*[1], wherein an Award made under the Arbitration Act, 1940, was under challenge and it was held that even if the clause providing for termination of the agreement for sale of LPG by Indian Oil Corporation was not available, the agreement was terminable by either party under Clause 8 and hence, the only relief which could be granted was award of compensation for loss of earning for the period of notice and not restoration of the distributorship.

9. Reference was also made to the decision of this Court in *Mrs. Sanjana M. Wig vs. Hindustan Petro Corporation Ltd.*[2], in which this Court was dealing with the termination of a petrol pump dealership. In the said case, one of the objections taken to the writ petition was

that the said jurisdiction had been wrongly invoked since an alternative remedy was available and questions relating to the termination gave rise to serious questions of fact arising out of the contract between the parties, which, ordinarily the writ Court would not be entitled to go into. The Supreme Court went on further to hold that in such circumstances the writ petition was not the proper remedy and the refusal of the High Court to entertain the writ petition on the ground of existence of an alternative remedy should not be interfered with. Several decisions on the same lines, including that of Amritsar Gas Service's case, were taken into consideration while arriving at the said decision on being fully conscious of the fact that only if a question of public law character was involved, could a writ petition be entertained in the existing circumstances.

10. Mr. Lalit, however, pointed out that a differing view had been taken by this Court in *State of Himachal Pradesh & Ors. vs. Gujarat Ambuja Cement Ltd. & Anr.*[3] in which the question as to whether the High Court should interfere under Article 226 of the Constitution, when an alternative remedy was available, fell for consideration and it was held that the power relating to alternative remedy is a rule of self- imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. It was also held that despite the existence of an alternative remedy it is within the discretion of the High Court to grant relief under Article 226 of the Constitution, though, it should not interfere if an adequate efficacious alternative remedy was available. Mr. Lalit also pointed out that since the Gujarat Ambuja Cement's case was rendered by a three Judge Bench, in the case of M/s. Ankur Filling Station vs. Hindustan Petroleum Corp. Ltd. & Anr. being SLP(C)No.11193/2009, a Bench consisting of two Judges of this Court was of the opinion that the question regarding the jurisdiction of the High Court to entertain a writ petition in a similar situation and to direct restoration of supply by itself, may not be a ground to entertain a writ application, particularly when the remedy of the petition in such an event may also lie by filing a civil suit. Accordingly, while issuing notice on the basis of the earlier view taken by this Court, it was felt that the matter should be considered by a larger Bench. The Special Leave Petition was, therefore, directed to be placed before the Hon'ble the Chief Justice of India for appropriate orders.

> "We are informed by Mr. Lalit that the same is still pending."

11. Mr. Lalit submitted that in view of the failure of the Respondent No.1 to avail of the alternative remedy available to it, the writ petition should have been dismissed at the initial stage.

12. Mr. Lalit's submissions were vehemently opposed by Mr. Ramesh P. Bhatt, learned Senior counsel, who pointed out that the entire procedure adopted by the petitioner had been vitiated on account of the fact that the notice dated 25th December, 2008, which was alleged to have been sent by the petitioner to the Respondent No.1 regarding the test conducted at the Barauni Terminal had not been served on the Respondent No.1 and it was, therefore, completely unaware of the fact that such a test was to be conducted. Mr. Bhatt also submitted that it was the stand of the Respondent No.1 that no Marker Test had, in fact, been held on

26th May, 2008, at the retail outlet itself. The learned counsel pointed out that by letter dated 30th May, 2008, the Respondent No.1 informed the Senior Regional Manager of the petitioner that although the representative of S.G.S. India Pvt. Ltd. had come to the retail outlet on 26th May, 2008 in order to conduct a marker test of the nozzle sample of MS and HSD from the dispensing unit, such a test could not be conducted since the retail outlet was dry in respect of both MS and HSD, which made it impossible for samples to be drawn from the nozzles of the dispensing units of the said products. Similarly, the underground tanks were also dry and there was hardly any MS or HSD available in tank Nos.1 and 2 from which samples could be extracted through the nozzle. Mr. Bhatt also pointed out several other letters of protest written on behalf of the Respondent No.1 against the termination of supply of petroleum products to the said Respondent and requesting that the same may be restored immediately.

13. Mr. Bhatt then referred to the reply given on behalf of the Respondent No.1 on 25th June, 2008, to the show cause notice wherein again the above facts were reiterated and it was also asserted in no uncertain terms that the notice regarding the conducting of laboratory test at the Barauni Refinery of the petitioner had not been served upon the respondent. Referring in particular to the alleged notice dated 28th May, 2008, informing the Respondent No.1 that the Marker Test was to be held at the Barauni Terminal on 29th May, 2008, Mr. Bhatt pointed out that the alleged refusal to acknowledge receipt by an employee of the Respondent No.1 was dated 29th May, 2008 itself and it was highly doubtful as to whether such notice was at all meant to be served on the Respondent No.1 to enable its representative to be present at the Marker Test at Barauni on the same day. It was also pointed out that upon information which had been taken by the Respondent No.1, Mr. Dilip Kumar Dash, the Area Sales Manager of the petitioner Corporation, who was said to have tendered notice to the representative of the Respondent No.1, was not even present in Barauni on 29th May, 2008.

14. Mr. Bhatt submitted that in failing to serve notice on the Respondent No.1 regarding the conducting of the laboratory test at the Barauni Terminal, the entire process of decision making culminating in the termination of the petitioner's agreement, stood completely vitiated and the said decision had been correctly set aside by the learned Single Judge whose decision was not interfered with by the Division Bench in appeal.

15. Mr. Bhatt submitted that even if the case sought to be made out on behalf of the petitioner Corporation regarding refusal of acceptance of notice by the representative of the Respondent No.1 is accepted, the same could have been sent by registered post with acknowledgement due and the Marker Test could have been postponed for some time for the said purpose as there was no immediate threat to the T/T Samples or the samples at site becoming contaminated in any way. It was pointed out that even the ordinary norms relating to service of notice were not followed in the instant case and in that regard reference was made to a similar notice issued to another retail dealer, made Annexure A-4 to the additional affidavit on behalf of the Respondent No.1. It was pointed out that the said letter dated 23rd December, 2008, not only had a reference number, but was printed and sent to the dealer concerned, whereas in the instant case the notice alleged to have been given to the

Respondent No.1 by Shri D.K. Dash was in hand written script. In addition, the same did not have any reference number and though dated 28th May, 2008, was alleged to have been tendered on 29th May, 2008, the very date on which the Marker Test was to be held in the Barauni Terminal at 3.00 p.m. Mr. Bhatt urged that the said notice was obviously manufactured for the purpose of termination of the dealership of the Respondent No.1.

16. Having carefully considered the submissions made on behalf of the respective parties and also having considered the various decisions referred to by learned counsel, we are of the view that the case made out on behalf of the Respondent No.1 is more probable. Although, the transporter's representative was present at the terminal at the stipulated time on 29th May, 2008, that by itself cannot give rise to a presumption that service had been effected also on the Respondent No.1, in the absence of any proof in that regard. Except for the endorsement on the hand-written notice said to have been given by Mr. Dash, there is nothing else on record to even suggest that notice had been sent to the Respondent No.1 and that the same had been refused. It is also rather difficult to accept that in respect of a test to be conducted on 29th May, 2008, at 3.00 p.m., an attempt was made to serve the said notice on the representative of the Respondent No.1 on the date of the proposed test itself. Although, the notice is dated 28th May, 2008, the endorsement alleged to have been made by the representative of the Respondent No.1 is dated 29th May, 2008, and we would be justified in assuming that the Respondent No.1 could not have arranged for being represented at the laboratory in the Barauni Terminal of the petitioner Corporation on such short notice. Nothing has been shown by the petitioner to disprove the allegation made on behalf of the Respondent No.1 that the notice alleged to have been tendered to the representative of the Respondent No.1 was not in the manner and the form in which such notice is required to be given to a dealer. It is obvious that the same had been made out in haste to indicate that service had been attempted on the Respondent No.1.

17. The cancellation of dealership agreement of a party is a serious business and cannot be taken lightly. In order to justify the action taken to terminate such an agreement, the concerned authority has to act fairly and in complete adherence to the rules/guidelines framed for the said purpose. The non-service of notice to the aggrieved person before termination of his dealership agreement also offends the well- established principle that no person should be condemned unheard. It was the duty of the petitioner to ensure that the Respondent No.1 was given a hearing or at least serious attempts were made to serve him with notice of the proceedings before terminating his agreement.

18. In the instant case, we are inclined to agree with Mr. Bhatt's submissions that the High Court did not commit any error in allowing the writ petition filed by the Respondent No.1 herein, upon holding that notice of the Laboratory Test to be conducted at the Barauni Terminal had not been served upon the Respondent No.1, which has caused severe prejudice to the said respondent since its dealership agreement was terminated on the basis of the findings of such Test. Admittedly the dealership agreement was terminated on the ground that the product supplied by the petitioner corporation was contaminated by the respondent.

> "Such contamination was sought to be proved by testing the T.T. retention sample in the laboratory at Barauni Terminal. The Guidelines being followed by the Corporation require that the dealer should be given prior notice regarding the test so that he or his representative also can be present when the test is conducted. The said requirement is in accordance with the principles of natural justice and the need for fairness in the matter of terminating the dealership agreement and it cannot be made an empty formality. Notice should be served on the dealer sufficiently early so as to give him adequate time and opportunity to arrange for his presence during the test and there should be admissible evidence for such service of notice on the dealer. Strict adherence to the above requirement is essential, in view of the possibility of manipulation in the conduct of the test, if it is conducted behind the back of the dealer. In the present case, there is no admissible evidence to prove service of notice on the respondent or refusal of notice by the respondent. Further, the notice dated 28.05.2008 which was allegedly refused by respondent, did not give him adequate time to arrange for the presence of himself or his representative during the test to be conducted at 3.00 PM on 29.05.2008. It is also to be noted that the endorsement regarding the alleged refusal is dated 29.05.2008 itself. Thus, the termination of the dealership agreement of the respondent was arbitrary, illegal and in violation of the principles of natural justice."

19. Although, Clause 68 of the Dealership Agreement refers to arbitration, it is unfortunate that the said question was not raised before the High Court.

> "It is now too late in the day for the petitioner Corporation to contend that in view of Clause 68 of the Dealership Agreement, the Respondent No.1 was not entitled to seek its remedy before the writ Court. In any event, by filing appeal against the order of the learned Single Judge, the Petitioner herein also submitted to the jurisdiction of the writ Court, without objecting to the same."

20. In the aforesaid circumstances, we are not inclined to admit the Special Leave Petition, which is, accordingly, dismissed, without, however, any order as to costs.

[1] *(1991) 1 SCC 533*
[2] *AIR 2005 SC 3454*
[3] *(2005) 6 SCC 499*