

SUPREME COURT OF INDIA

Indian Oil Corporation Ltd.

Vs.

R.M.Service Centre

C.A.No.8257 of 2019

(L.Nageswara Rao and Hemant Gupta,JJ.,)

06.11.2019

JUDGMENT

Hemant Gupta,J.,

SLP(Civil)No.25746 of 2018

1. The challenge in the present appeal is to an order of the Division Bench of the Gauhati High Court passed in writ appeal on 20th February, 2018 maintaining an order of the Single Bench of the High Court whereby termination of dealership of respondent No. 1 for violation of Marketing Discipline Guidelines, 2012 was set aside.

2. The dealer was granted retail dealership for sale of motor spirit (petrol), High Speed Diesel, motor oil and grease as a physical disabled person on a depot located at Ghograpar, National Highway -31 in the District of Nalbari, Assam. The sale and supply from the retail outlet of the dealer was suspended by the appellants on 6th May, 2013 when it was found, on the joint inspection, variation of stock of High Speed Diesel beyond permissible limit; density of Tank No. 2 was not available and that tanker truck retention of the corresponding tank was not available at the time of inspection. The appellant had drawn three samples from Tank No. 2. One sample was sent for testing, another sample was retained by the Field Survey Officer and the third sample was handed over to the dealer. A show cause notice was issued to the dealer on 6th May, 2013, alleging violation of Clauses 5.1.9 and 5.1.11 of the Guidelines. The dealer submitted his explanation on 21st May, 2013, inter alia, stating that dispensing unit was not working properly and, therefore, wrong readings were shown.

3. The dealer was informed on 27th June, 2013 that test report of High-Speed Diesel samples drawn from the tank on 6th May, 2013 had been received. The report was that the samples failed to meet the specifications. Thereafter, in response to a show cause notice dated 27th June, 2013 to explain the non-conformities detected, the dealer vide letter dated 17th July, 2013 requested to seek retesting of the umpire sample which was drawn on the same day, sealed, and certified by the appellants. The stand of the dealer was that the

dispensing unit was 20 years old and due to lack of maintenance on account of the road-widening project, the totalizer had been showing wrong readings.

4. The request of the dealer for retest was accepted on 6th August, 2013. The retest was carried out in the Laboratory of the appellants on two sets of samples including the one retained by the Field Survey Officer of the appellants. The report of the aforesaid two sets of samples was issued on 19th August, 2013. The report of the sample which was retained by Field Survey Officer of the appellants was that it did not meet the BIS III specifications whereas, the sample of the dealer was not fit for testing due to presence of sludge.

5. On the basis of the test reports dated 29th May, 2013 and 19th August, 2013, the dealership was terminated on 25th April, 2014 after serving another show cause notice dated 10th December, 2013 wherein, it has been stated that deviation was observed during inspection pertaining to stock variation and non-availability of reference density. The appellants have mentioned details of non-conformity and the violation of the Clauses in the letter of termination dated 25th April, 2014, which read as under:

SN NON CONFORMITY VIOLATION OF CLAUSE REF NO MDG 2012

1. Stock Variation (Positive) of HSD beyond permissible Clause No. 5.1.11
2. Non-availability of reference density (Tank-2) at the time of inspection. Clause No. 5.1.9

6. It was also pointed out that out of three samples drawn from Tank No. 2 on 6th May, 2013, one sample was sent to the Laboratory, another was retained by the Field Survey Officer and the third sample was handed over to the dealer. The result of the three samples is as under:

SN	Test report number	Test report date	Status	Details of sample
1.	NERL/MDG/HS-62/2013	29.05.2013	Does not meet specification	Nozzle sample collected on 06.05.2013 and sent to Betkuchi for testing
2.	NERL/MDG/HS-77/2013	19.08.2013	Does not meet specification	Nozzle sample collected on 06.05.2013 and retained with Field Officer till subsequent test on 19.08.2013.
3.	NERL/MDG/HS-77/2013	19.08.2013	Test not conducted	Nozzle sample collected on 06.05.2013 and retained with you till 19.08.2013 could not be tested due to presence of sludge.

7. In view of the above, the following violations were detected and the penal action was taken:

"In view of the above the cumulative MDG violations detected and established in the Retail Outlet are as follows:

- a. Stock variation beyond permissible limit (Violation of MDG-2012 Clause no. 5.1.11)
- b. Nozzle Sample failure of HSD. (Violation of MDG 2012 Clause no. 5.1.1)
- c. Non availability of reference density (Violation of MDG- 2012 Clause no. 5.1.9)
- d. Non availability of TT retention sample (Violation of MDG-2012 Chapter 5 notes-i)

The penal action for the irregularity mentioned in point no (a) & (b) is termination in the first instance as per Clause no 8.2 of MDG-2012. The penal action for the irregularity mentioned in point no (c) & (d) is Warning cum Guidance letter in the first instance as per Clause no 8.4 of MDG- 2012.

The above stated irregularities are also in violation of the provisions made under clause no. 27 and clause no. 40 of the dealership agreement executed by and between you and the corporation on 20.12.1995."

8. The dealer challenged the termination of the dealership before the Gauhati High Court. The learned Single Judge allowed the writ petition on 13th October, 2015 holding that as per the Guidelines, the samples were required to reach the Laboratory preferably within ten days whereas, the first sample was tested on 29th May, 2013 that is after ten days and the umpire sample given to the dealer was tested on 19th August, 2013. It was held that there is non-compliance of the time line fixed. The learned Single Judge held as under:

"27. Turning to the provisions under Clause 2.4.4 Notes (2), Clause 2.5 and Clause 2.10 of the Guidelines, the time-limits prescribed for sending the samples to the laboratory from the date of collection as well as the time within which the sample should be tested from the date when it reached the laboratory, are provisions that requires strict adherence. If a contrary view is adopted to allow the respondent Corporation to take as much time at its discretion for sending the sample to the laboratory and thereafter to get it tested, the said provisions prescribing time-limits would be rendered otiose and redundant. On that account, the time-limits ought not to have been prescribed/mentioned in the said Clauses in the first place. Surely, this cannot be the intention of IOCL being full well aware that time gap between the sample taken and laboratory test is essentially to be maintained so as to avert any variations in the density test of the sample so collected. The argument of Mr. MK Choudhury that the word "preferably" occurring in the said clauses cannot be construed as "mandatory", this Court rejects the said contention and holds that the adherence of the time-limits prescribed under the Guidelines is directly proportionate to the ultimate decision that would be reached. The time-limits and adherence thereof is a contractual obligation that has to be discharged by the Oil Corporation in letter and spirit."

9. The learned Single Judge also found that the stock variation is not a critical irregularity within the meaning of Clause 8.2 of the Guidelines and cannot entail termination of dealership.

10. The Division Bench of the High Court, in appeal, agreed with the finding recorded by the learned Single Bench. The Court relied upon judgments of this Court in *Hindustan Petroleum Corporation Limited & Ors. v. Super Highway Services & Anr¹* and *Bharat Petroleum Corporation Limited v. Jagannath And Company & Ors²*. . It was held by the Division Bench of the High Court that the finding recorded by the learned Single Judge is a plausible finding, therefore, does not warrant interference in an intra-court appeal.

11. Learned counsel for the appellants argued that the findings recorded by the High Court that the Guidelines require strict adherence is a total misreading of the Guidelines. For such an argument, reference is made to Note 2 of Clause 2.4.4; Sub-Clauses A and I of Clause 2.5; Clause 8.2 classifying critical irregularities; Clause 8.3 classifying major irregularities as well as Clause 5.1.1 of what is meant by the adulteration and Clause 5.1.11 providing for consequences of stock variation to contend that in the event of failure of sample in the cases of positive stock variation beyond permissible limit, action in line with that of adulteration is to be initiated. Thus, apart from the adulteration, even the stock

variation in the event of failure of sample leads to critical irregularity. It is contended that the High Court erred in allowing the writ petition and setting aside the termination of the dealership. The relevant Clauses from the Guidelines read as under:

"1.5 Observance of statutory and other regulations

(i) All statutory rules and regulations in connection with storage and sale of petroleum products must be followed and implemented, such as maintaining stock/sales & density records, display of daily stock, price board etc.

xx xx xx

(v) The provisions contained in the Motor Spirit and High Speed Diesel (Prevention of Malpractices in Supply & Distribution) Order issued by the Government of India (or any amendment or revision thereof) and instructions issued by the Oil Company/State Govt. authorities etc. from time to time shall be strictly adhered to and all concerned records shall be maintained and produced to Inspecting officials on demand.

2.4.4 Drawal of samples by mobile laboratories

xx xx xx

Notes:

(1) xx xx xx

(2) All the above samples should reach the laboratories for testing preferably within 10 days of the collection of the samples.

xx xx xx

2.5 General procedure for drawal of samples

(A) All samples should preferably be suitably coded before sending to lab for testing preferably within 10 days of drawal.

xx xx xx

(I) The purpose of mentioning time frame for various activities e.g. sending samples to lab preferably within 10 days etc. is to streamline the system and is no way related to quality/result of the product.

xx xx xx

5.1 MS/HSD

5.1.1. Adulteration of product Definition:

"Adulteration" means the introduction of any foreign substance into Motor Spirit/High Speed Diesel illegally or unauthorizedly with the result that the product does not conform to the requirements of Bureau of Indian Standards specification number IS:2796 and IS:1460 for Motor Spirit and High Speed Diesel respectively and amendments thereon, and/or

If the observations on the sample under scrutiny and the reference sample do not fall within reproducibility/permissible limits of the test method for which the samples are examined, and/or

Any other requirement for the purpose to identify adulteration, issued by the Competent Authority from time to time.

xx xx xx

5.1.11 Stock variation of MS/HSD (Beyond permissible limits) Fuel

Stock reconciliation should be carried out and variation, if any, established after taking into account the normal operational variation of 4% of tank stock and after considering the following factors:

xx xx xx

In case of positive stock variation beyond permissible limits, samples will be drawn and sent to laboratory for testing. Sales and supplies of all products to be suspended immediately. Study to be carried out to identify the reasons for stock variation. If the sample passes but some other irregularity like unauthorized purchase etc. is established action to be taken accordingly. However, if the sample fails, action in line with that of adulteration will be initiated.

xx xx xx

8. Action to be taken by OMC under the Marketing Discipline Guidelines

8.1 All irregularities (mentioned in chapter-5) are classified into three categories, i.e. Critical, Major and Minor.

8.2 Critical Irregularities: The following irregularities are classified as critical irregularities:

i. Adulteration of MS/HSD (5.1.1)

xx xx xx

Action:

Termination at the First instance will be imposed for the above irregularities.

8.3 Major Irregularities: The following irregularities are classified as major irregularities:

i. xx xx xx

ii. Non availability of reference density at the time of inspection. (5.1.9)

iii. xx xx xx

iv. Stock variation beyond permissible limits but sample passing quality tests. (5.1.11)

xx xx xx

Action: Except in case of (iii), (vii), (viii), (ix) and (x) above:

First instance: Suspension of sales and supplies for 15 days.

Second instance: Suspension of sales and supplies for 30 days.

Third instance: Termination of the dealership.

xx xx xx

8.5.1 The above are general guidelines and the actions prescribed in MDG 2012 are minimum. The competent Authority of the concerned Oil Company can however take appropriate higher action against the erring dealer, if deemed necessary including termination in the first or any instance in line with the provisions of the Agreement."

12. On the other hand, Mr. Goswami, learned counsel for the dealer argued that if three samples were drawn at the same time, it is not believable that the sample with the dealer alone has been found to be containing sludge. If the samples were taken at the same time, finding of sludge from the umpire sample completely knocks down the stand of the appellants that the samples have failed in the test, as the authenticity of the samples taking

process is doubtful. It is further contended that in terms of Clause 1.5 (v) of the Guidelines, the Motor Spirit and High Speed Diesel (Prevention of Malpractices in Supply & Distribution) Order, 2005 issued by the Government of India is applicable. The said order provides for a procedure of search and seizure. The search and seizure in terms of Clause 7 of the Control Order issued under Section 3 of the Essential Commodities Act, 1955 can be effected only in the presence of two independent witnesses as is required under Section 100 of the Code of Criminal Procedure, 1973 . Since, the sample has not been taken in the manner prescribed in the order read with Section 100 of the Code, therefore, the termination of the dealership is wholly illegal. It is argued that such argument was raised before the learned Single Judge but the same was not examined in view of the fact that the Guidelines were found to be mandatory in nature. It is contended that the findings recorded by the High Court, that the time limit in the Guidelines is mandatory, owing to the larger public interest to serve and the appellants cannot take benefit of its delay, in sending samples for testing to lead a penal consequence of termination of the dealership is the correct enunciation of law. It is contended that termination of dealership is a serious consequence affecting right of a dealership under Articles 21 and 14 of the Constitution of India. Learned counsel for the dealer relied upon the judgments referred to by the Division Bench of the High Court.

13. The first issue required to be examined is whether the appellants were required to follow the procedure under the Control Order read with Section 100 of the Code. The Control Order has been issued under Section 3 of the Act. Such Act has been enacted for control of the production, supply and distribution and trade and commerce, of certain commodities. In respect of High Speed Diesel and Motor Spirit, the Control Order is issued for regulation of supply and distribution and prevention of the malpractices. Section 6A of the Act provides for confiscation of the essential commodity whereas, Section 7 of the Act makes any person who contravenes any order made under Section 3 liable for criminal prosecution. Therefore, we find that the effect of issuance of the Control Order is that in the event of violation of such Control Order, any person who contravenes any order made under Section 3 of the Act i.e. the Control Order, he is liable to be punished by a Court. Therefore, the violation of the Control Order has penal consequences leading to conviction. The provisions of search and seizure contained in Clause 7 read with Section 100 of the Code will come into play only in the event a person is sought to be prosecuted for violation of the provisions of the Control Order. Admittedly, in the present case, the dealer is not sought to be prosecuted for the violation of the Guidelines, therefore, the procedure for drawing of samples which is a necessary pre-condition under the Control Order for prosecuting an offender does not arise for consideration.

14. The dealer has entered into an agreement on 20th December, 1995. It is not disputed that the dealer is bound by the Guidelines issued by the Public Sector Oil Marketing Companies. Clause 2.4.4 of the Guidelines provides for procedure for drawing of samples. Note 2 provides that the samples drawn should reach the laboratory for testing "preferably within ten days of the collection of the samples". Similarly, sub-clause A of Clause 2.5 of the Guidelines provides that all samples should be suitably coded before sending them to the laboratory for testing 'preferably' within ten days of drawing the samples. Sub-clause I

of Clause 2.5 of the Guidelines is that the purpose of mentioning time frame for various activities such as sending samples to the laboratory preferably within ten days is to streamline the system and is in no way related to quality/result of the product. In view of the language of the Guidelines, the findings recorded by the High Court that the time line is to be strictly adhered to cannot be sustained.

15. The Guidelines as mentioned in sub-clause I of Clause 2.5 of the Guidelines is to streamline the functioning i.e. the oil companies should not arbitrarily or without any justification send the sample for testing at their sweet will. The sample in this case was drawn on 6th May, 2013 and was sent for testing on 22nd May, 2013 i.e. there was a delay of 5 days. Since the Guidelines use the time line as a preferred time line, it cannot be said that the time line mentioned has to be strictly adhered to and is mandatory. The language, the purport and the effect of testing do not warrant to read the word 'preferably' as mandatory time line. It is not the case of the dealer that the sample sent after five days will lose its efficacy as the umpire sample would be sent only after the first report is confronted to the dealer. Still further, the dealer has not raised any objections regarding delay in sending the sample in the two replies submitted by him on 17th July, 2013 and 2nd January, 2014. The argument that the umpire sample in the hands of the dealer could not be tested because of sludge and to doubt the other two samples is totally untenable. Such argument is based upon conjectures as the other two samples collected and sealed cannot be permitted to be disputed only because one sample was found with sludge. There is no material to doubt the correctness of the samples taken.

16. The first test report dated 29th May, 2013 was found deficient in the density as also in K.V. @40 degree celsius, sulphur and distillation recovery. Even the report dated 19th August, 2013 is found to be deficient in density, K.V., distillation recovery and sulphur. The result of the second report is almost the same as the sample tested on 29th May, 2013. Thus, the appellant has rightly terminated the dealership for adulteration of the High Speed Diesel.

17. There was variation in stock beyond permissible limits. In case of positive stock variation beyond permissible limits and on account of failure of sample, action in line with that of adulteration is to be initiated. The adulteration in these circumstances is a critical irregularity falling in Clause 8.2 of the Guidelines and the action required to be taken is termination of the dealership. However, in case of stock variation beyond permissible limits and the sample passing the quality test, it leads to suspension of sale and supply for fifteen days in the first instance, suspension of sale and supply for thirty days in the second instance and termination of dealership in the third instance. In this case, since the stock variation was beyond permissible limits and the sample failed, therefore, the action was rightly taken under Clause 5.1.11 of the Guidelines which is a critical irregularity when read with sub-clause (i) of Clause 8.2 and sub-clause (iv) of Clause 8.3 of the Guidelines.

18. The judgments referred to by the learned counsel for the dealer are not applicable to the facts of the present case as in both the cases, the action taken by the oil company was found to be in violation of the principle of natural justice as no notice was served upon the

dealer but, in the present case, after failure of the first sample in the test report dated 29th May, 2013, the dealer was informed, who opted for testing of umpire sample in his possession. The said sample along with the sample in possession of the Field Survey Officer was sent for testing and in the report dated 19th August, 2013, the sample was found to have the same deviations as in the first sample tested on 29th May, 2013. The dealer was informed of the result of the second test and was also given a show cause notice as to why the dealership should not be terminated. Therefore, the action taken against the dealer is in terms of the Guidelines, as a consequence of contractual obligations by the dealer.

19. Consequently, we find that order passed by the High Court is not legal and sustainable and, thus, the same is set aside. The writ petition is dismissed and the termination of dealership is held to be valid and legal. Civil Appeal is allowed.

Judgment Referred.

¹(2010) 3 SCC 0321

²(2013) 12 SCC 0278