

(2013) 12 AP CK 0072

Andhra Pradesh High Court

Case No: Writ Petition No. 28062 of 2013

Ranjith Filling Station and
Another

APPELLANT

Vs

The Indian Oil Corporation
Limited

RESPONDENT

Date of Decision: Dec. 11, 2013

Hon'ble Judges: P. Naveen Rao, J

Bench: Single Bench

Advocate: E. Manohar Rao, for Sri Shaik Jeelani Basha, for the Appellant; Deepak Bhattacharjee, Counsel, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

P. Naveen Rao, J.

First petitioner is the partnership firm and second petitioner is one of the partners in the partnership firm. This writ petition is instituted by the petitioners assailing the Order, dated 16.09.2013 passed by the Executive Director (Retail Sales) of the Indian Oil Corporation Limited, terminating the dealership agreement of the petitioners. In April, 2011, respondent-corporation appointed the first petitioner as Dealer in Petrol (Motor Spirit) and High Speed Diesel Oil (Retail Outlet). On 21.04.2011, an agreement was signed between the first petitioner and the respondent corporation. The agreement incorporates various clauses, which bind both the parties. In terms thereof, the first petitioner is operating the Retail outlet. In addition to clauses in the agreement, dealer is also bound by Marketing Discipline Guidelines.

2. On 05.02.2013, inspection was conducted by the Anti Adulteration Cell. During inspection, the Anti Adulteration Cell noticed additional unauthorized electronic fitting in Midco MMSH 1112 ASPI 07ECO591V). This unauthorized electronic fitting was noticed in dispensing unit. Samples were collected. By order, dated 06.02.2013,

first petitioner was advised not to dispense fuel from this Dispensing unit. First petitioner was called upon to submit his explanation on finding of unauthorized electronic part. Petitioner submitted a detailed explanation. First petitioner expressed his ignorance about the alleged additional unauthorized fitting in the dispensing unit. First petitioner stated that he was not technically qualified and competent to know the functioning of electronic units and the relevancy of such unit. It is also pointed out that as per the samples taken prior to opening of dispensing unit and after, found that delivery was accurate and there was no variation in the delivery. First petitioner was also afforded personal hearing. First petitioner has taken the same plea during the personal hearing and in his written submissions. On all aspects, the findings are favourable to the petitioners. However, since unauthorized electronic unit was found in dispensing unit, first petitioner was held guilty by invoking Clauses 7(a) and (b), 8(i) and 42 of the Dealership agreement and Clause 5.4.1 of Marketing Discipline Guidelines and the dealership was terminated.

3. Heard learned senior counsel Sri E. Manohar for Sri Shaik Jeelani Basha, counsel for the petitioners and Sri Deepak Bhattacharjee, counsel for the respondent-corporation.

4. Learned Senior counsel submits that order of termination of the dealership is based on surmises and conjunctures and is liable to be set aside on that ground alone. He submits that having agreed with the submissions of the dealer as with reference to the functioning of the dispensing unit, delivery system and performance of the dealer during the subsistence of the dealership, erred in holding that dealer is guilty on the ground that unauthorized electronic part was noticed in the dispensing unit. He submits that the order is non-speaking order as it does not assign reasons attributing the involvement of the first petitioner in inserting the unauthorized object in the dispensing unit. The order impugned is made in arbitrary exercise of power; is ex facie illegal. On account of such illegal actions, petitioners are deprived of right to livelihood. Learned senior counsel further submits that clause 5.1.4 of Marketing Discipline Guidelines has no application to the facts of the case as there was no allegation of tampering.

5. Learned senior counsel further contends that when petitioner has taken specific plea that petitioner was not aware of such unauthorized part and manufacturer is responsible, no effort is made to ascertain from manufacturer. The dispensing unit is supplied and maintained by a company, by name, Midco. No effort is made to find out from the company as to how the said additional unit is found in the dispensing unit, more particularly when there was no allegation of variation in dispensing of fuel from the unit with or without the presence of the additional part. According to learned senior counsel, it is possible that due to mistake or oversight, the unit was inserted into the dispensing unit by the supplier. Learned senior counsel also highlighted by reading the order impugned in the writ petition and the clauses in

the agreement that it is the responsibility of respondent-corporation to attend to the maintenance and repair of dispensing unit and earlier when the inspections were conducted, no variation is found. It is not the allegation of the respondent-corporation that there was tampering of seals and that deliberately an external part is inserted to manipulate the delivery of fuel.

6. Learned counsel Sri. Deepak Bhattacharjee submits that clause 8(i) of the agreement is violated, resulting in invocation of termination clause. The dealer is also obligated to scrupulously follow the marketing discipline guidelines. Clause 5.1.4 of the marketing discipline guidelines prescribes insertion of mechanism/fittings/gear found fitted in the dispensing unit with an intention of manipulating the delivery is a critical irregularity and the consequence is termination of the dealership. Learned counsel submits that as an additional fitting was found in the dispensing unit, clause 5.1.4 of Marketing Discipline Guidelines is attracted and therefore, rightly the dealership is terminated. Learned counsel fairly submits that no tampering is noticed and no variation in dispensing fuel from the unit is found. However, the very possibility of altering dispensing of fuel is sufficient to terminate the dealership as it would adversely affect the consumer and also the reputation of the respondent-corporation. Learned counsel further submits that against order of termination of dealership, in terms of clause 8.9 of the Marketing Discipline Guidelines, appeal is provided to the Executive Director (Retail) in Headquarters and petitioner invoked the jurisdiction of this court without exhausting right of appeal provided to him and on that ground alone the writ petition is not maintainable.

CITATIONS:

7. On the issue of maintainability of the writ petition, several decisions are cited on both sides. They are:

A. For Petitioners:

- i) W.A. No. 318 of 2011 dated 21.07.2011.
- ii) [The Superintending Engineer and Another Vs. Pioneer Builders](#)
- iii) [Zonal Manager, Central Bank of India Vs. Devi Ispat Ltd. and Others,](#)
- iv) [Union of India \(UOI\) and Others Vs. Tania Construction Pvt. Ltd.,](#)
- v) W.P. Nos. 12355 of 2007 and 11931 of 2009 dated 06.02.2013 as affirmed in W.A. No. 517 of 2013 dated 24.04.2013 as affirmed in SLP (Civil) No. 22481 of 2013
- vi) [National Energy Trading and Service Limited and Others Vs. Central Power Distribution Company of A.P. Ltd. and Others,](#)

B. For Respondents:

- i) [S. Suresh Vs. Indian Oil Corporation Ltd., Southern Region and Another,](#)

ii) [Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others,](#) and

iii) [Choday Sanyasi Rao, HPC Retail outlet Vs. Hindustan Petroleum Corporation Limited,](#)

8. On decision to terminate dealership of retail outlet:

i) [P. Laxmikant Rao and Sons, Dealers of Hindustan Petroleum Corporation Limited Vs. The Union of India \(UOI\) and Others](#)

ii) W.P. No. 20350 of 2010 dated 14.10.2011 as affirmed in W.A. No. 1119 of 2011 dated 07.12.2011.

iii) [M/s. IBC Ltd. Vs. The A.P. Mineral Development Corporation Ltd.,](#)

iv) [M/s. Trimex Industries Limited Vs. The A.P. Mineral Development Corporation Ltd.,](#)

9. Learned senior counsel submitted that the writ petition is maintainable since the petitioner did not have an effective alternate remedy of appeal. He submits that the order impugned in this writ petition is made by the Executive Director (Retail Sales), whereas clause 8.9 of the Marketing Discipline Guidelines, provides appeal to the Executive Director (Retail). Thus, appeal as provided in Clause 8.9 is available only if an order is passed by an authority below the rank of Executive Director. Learned senior counsel relying on the precedents cited submitted that the order is vitiated on account of non application of mind is made in arbitrary exercise of power and in violation of principles of natural justice and hence even if the alternative remedy of appeal is available, the same cannot be a bar and, therefore, the writ petition is maintainable.

10. The decisions cited by the standing counsel are on the issue of availability of effective alternate remedy in the form of arbitration clause.

11. I have gone through all the decisions cited by the learned senior counsel as well as learned counsel Sri Deepak Bhattacharjee on the issue of maintainability of the writ petition in matters governed by contract and on scope of interference in termination of dealership. The Division Bench of this Court in W.A. No. 318 of 2011 held as under:

... In the circumstances, if the jurisdiction of this Court extends to examining the vitality of a conduct under a contract entered into by a public authority, such jurisdiction cannot be excluded either by legislation or by a contract including by an arbitration clause.

12. The principle deducible from plethora of decisions is where an instrumentality of the State acts arbitrarily and in an unfair manner in enforcing a term of contract writ petition is maintainable.

13. In Zonal Manager, Central Bank of India, Supreme Court held as under:

It is clear that (a) in the contract if there is a clause for arbitration, normally, a writ court should not invoke its jurisdiction; (b) the existence of effective alternative remedy provided in the contract itself is a good ground to decline to exercise its extraordinary jurisdiction under Article 226; and (c) if the instrumentality of the State acts contrary to the public good, public interest, unfairly, unjustly, unreasonably discriminatory and violative of Article 14 of the Constitution of India in its contractual or statutory obligation, writ petition would be maintainable. However, a legal right must exist and corresponding legal duty on the part of the State and if any action on the part of the State is wholly unfair or arbitrary, writ courts can exercise their power.

14. In Union of India, on maintainability of writ petition even if arbitration clause is incorporated in the contract, Supreme Court held as under:

Apart from the above, even on the question of maintainability of the writ petition on account of the arbitration clause included in the agreement between the parties, it is now well established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The various decisions cited by Mr. Chakraborty would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution.

We endorse the view of the High Court that notwithstanding the provisions relating to the arbitration clause contained in the agreement, the High Court was fully within its competence to entertain and dispose of the writ petition filed on behalf of the respondent Company. We, therefore, see no reason to interfere with the view expressed by the High Court on the maintainability of the writ petition and also on its merits.

15. As noticed above, in the instant case, the allegation held proved against petitioner is violation of clause 5.1.4 of marketing discipline guidelines and in the order impugned it was clearly specified that appeal would lie as per clause 8.9 of the marketing discipline guidelines, whereas arbitration clause is incorporated in the dealership agreement. The order impugned is passed by same cadre officer and, therefore, petitioners do not have remedy of appeal. In the facts of this case, it cannot be said that petitioners have an effective alternate remedy and erred is not availing the same. Furthermore, for the reasons set out hereunder, petitioners need not be relegated to remedy as provided in the dealership agreement and marketing discipline guidelines.

16. The allegation against the dealer is that on inspection, an unauthorized electronic item is found in the dispensing unit. However, the samples taken prior to

inspection and after inspection have not shown any variation in the delivery of fuel from dispensing unit. That being so, the effect of insertion of external item into the dispensing unit required to be analyzed to ascertain whether there is a possibility to influence dispensing of fuel in future, even though no such variation is noticed. The record discloses that no effort was made to find out the impact of additional part in the delivery of fuel from the dispensing unit. Unless it is proved that the insertion of this additional part does impact the delivery of fuel, it cannot be alleged that dealer has violated clause 5.1.4 of the marketing discipline guidelines.

17. Clause 5.1.4 of Marketing Discipline Guidelines reads as under:

5.1.4 ADDITIONAL/UNAUTHORISED FITTINGS/GEARS FOUND IN DISPENSING UNITS/TAMPERING WITH DISPENSING UNIT

Any mechanism/fittings/gear found fitted in the dispensing unit with the intention of manipulating the delivery.

Removal, replacement/manipulation of any part of the Dispensing Unit including microprocessor chip/electronic parts/OEM software will be deemed as tampering of the dispensing unit.

In case of this irregularity sales from the concerned dispensing unit to be suspended, DU sealed. Samples to be drawn of all the products and send to lab for testing.

18. The clause 5.1.4 pre-supposes fitting of an external part with an intention of manipulating the delivery. The manipulation or possibility to manipulate delivery is not proved. On the contrary, delivery was found to be accurate. Thus, this clause is not attracted. Clauses 7(a) & (b), 8(i) and 42 of dealership agreement are general in nature and invoked on the ground that dealer violated clause 5.1.4 of marketing discipline guidelines.

19. The petitioner dealership was found to be performing its dealership, responsibilities, all through strictly in terms of the agreement and there was no complaint whatsoever against the petitioner dealer. The competent authority has agreed with all the submissions made by the dealer. Few of the findings are extracted hereunder:

(i) "They found everything to be normal and within the permissible limits. The explanation offered by you in this regard is factually correct and acceptable" (para 5 in page 6 of the order).

(ii) "Therefore it can be safely concluded that there is no impact of the said additional fitting for delivery of the product. Apart from the alleged unauthorized fitting found in the Midco Dispensing unit everything was in permissible limits. The explanation offered by you is factually correct and convincing". (para 6 of page 6)

(iii) "Your explanation that the no variation in so far as delivery of fuel is concerned is acceptable". (first para of page 7)

(iv) "It is true that as per our records you have been carrying on the business as per the terms and conditions of the Dealership agreement until the above referred irregularities were detected by Anti Adulteration Cell-Southern Region on 05.02.2013".

20. Dealing with defence of the dealer that he had no idea of alleged unauthorized fittings in the electronic part of the dispensing unit, that he does not deal with electronic part of the dispensing unit, that whenever problem was noticed in the dispensing unit, dealer would register the complaint online and get the problem rectified by the authorized agents of the corporation, it is held as under:

The explanation offered by you in this regard is not convincing and acceptable as it is the responsibility of the dealer to ensure that the dispensing units installed in the Retail Outlet must be checked on daily basis that there will not be any leakage and all other fittings inside the dispensing units are intact. Without the dealer knowledge nothing can be installed or fitted inside the dispensing unit.

21. As seen from the reading of the order, the only reason assigned for rejecting the explanation of the petitioner was that it could not have been possible to insert an unauthorized unit without the consent of the dealer. However, what is not considered by the competent authority was that at what point of time this unauthorized unit is inserted into the dispensing unit and how the dealer is manipulating the distribution of fuel. No material, much less credible one is brought on record by the respondents to disclose the unauthorized access to the equipment by the petitioner. There is no allegation that the petitioner has tampered with the seals. It was specific stand of the petitioner that periodically the Weights and Measurements Department officials inspected the seals and seals are found to be intact. Further more, what is the impact on insertion of cable like item in delivery unit is not disclosed. How the dealer can manipulate delivery of fuel by inserting such unit is not explained. The only objective of a dealer to tamper with dispensing unit is to manipulate delivery of fuel. In this case, the delivery of fuel was found to be accurate prior to checking of unit and after the checking. Furthermore, the defence of the petitioner that it is possible that the supplier himself has supplied that particular cable is not dealt with; no effort was made to ascertain from the supplier as to whether there was some significance in insertion of such unit and whether it was inserted for proper functioning of the unit by supplier himself. As admitted by the respondent-corporation in the order impugned, there was a periodical inspection prior to this inspection and that seals are found to be intact and the fact that no ascertainment is made from the supplier, it cannot be concluded to hold that petitioner was solely responsible for insertion of an additional part into the delivery unit. More particularly when it is proved that by virtue of presence of additional part, there was no variation in dispensing of fuel.

Though, it is an elaborate order, it is a non-speaking order on crucial issue. The order accepts the defence of the petitioner in all respects except on the availability of external part in the delivery unit, but does not deal with the principal issue of when the part was inserted and the impact of a part found in the dispensing unit in delivery of fuel. In the absence of such crucial determination, on the only assumption that the external part was found in the delivery unit of the dealer premises, the petitioner dealer cannot be visited with severe consequence of termination of dealership. It has severe civil and evil consequences. Thus, the action of the respondent-Corporation, in the facts of this case, in terminating the dealership of the 1st petitioner on the sole ground that an external object was found in the dispensing unit is illegal, unreasonable, excessive and made in arbitrary exercise of power and hence unsustainable, more particularly when performance of the petitioner-dealer all along has been appreciated. Accordingly this writ petition is allowed. No costs.

Miscellaneous petitions if any pending in this petition shall stand closed.