

Atrayee Gas Service Vs Indian Oil Corporation Limited and Others

Court: Calcutta High Court

Date of Decision: Aug. 31, 2004

Acts Referred: Constitution of India, 1950 " Article 14, 19(1)

Citation: (2005) 1 CALLT 517 : (2005) 2 CHN 50 : (2004) 2 ILR (Cal) 282

Hon'ble Judges: Soumitra Pal, J

Bench: Single Bench

Advocate: Rabilal Moitra and P.S. Deb Barman, for the Appellant; Tapan Kumar Mukherjee and Tapas Ghosh for the Respondent No. 6 and Vineeta Meharia, Arindam Guha and Sandip Das Gupta, for the Respondent

Final Decision: Allowed

Judgement

Soumitra Pal, J.

The petitioner was appointed as a dealer by the Indian Oil Corporation (for short "the IOC"), the respondent No. 1, for the sale of liquefied petroleum gas during the year 1996. The said dealership was terminated by the IOC by an order of suspension dated

8.3.2004, being Annexure P-18 to the writ petition. Being aggrieved by the said order of suspension, the petitioner has preferred the instant writ

application. The prayers which are relevant are as follows :

(b) A writ of and/or in the nature of Mandamus commanding the respondents and/or their men, agents or subordinates to show cause as to why

the impugned alleged decision of competent authority of the Corporation to suspend the functioning of the petitioner's distributorship with

immediate effect as communicated vide letter bearing reference No. WB/LPG/208/40 dated 8th March, 2004 signed by the respondent No. 4

being Annexure "P-19" to this writ petition should not be cancelled, quashed and/or withdrawn;

(c) A writ of and / or in the nature of Mandamus commanding the respondents and/ or their men, agents or subordinates to show cause as to why

the writ petitioner should not be allowed to carry on his business of Liquefied Petroleum Gas distributorship in the name and style of Atrayee Gas

Service without any disturbance.

2. It is contended by the writ petitioner, that the IOC while issuing the order of suspension has acted upon a complaint regarding an alleged

agreement between the writ petitioner and respondent No. 6 entered into before being appointed a dealer without the consent of the IOC, but

neither any date of such agreement nor any other particulars of such agreement have been disclosed to the petitioner. The said order under

challenge has been served without supplying the document sought to be relied upon by the authorities and without giving any opportunity to the

petitioner to contradict the allegations of the respondent No. 6. The said action is violative of Articles 14 and 19(1)(g) of the Constitution of India

as it affects the fundamental rights of the petitioner to carry on trade and business. Allegations are that the respondent No. 6 who was removed

from the administration of the petitioner's business sometime during August, 2003, having a personal grudge, is trying to harass the petitioner. The

said respondent No. 6 filed two writ petitions, but was unsuccessful.

3. Mr. Rabilal Moitra, learned senior counsel appearing for the writ petitioner, reiterating the statements made in the petition submitted that the

Deputy Superintendent of Police, Balurghat in his findings appearing at pages 42 and 43 of the affidavit-in-opposition (for short "the opposition")

filed by the IOC, came to a finding that the petitioner may continue the business maintaining formalities. Submission was made that in the agreement

between the petitioner and the IOC, though there is no provision for suspension, the IOC has sought to cover up their position by an averment in

paragraph 18 of the opposition that wider power of termination includes a lesser power of temporary termination by way of suspension. Referring

to the agreement dated 16.9.96 between the I.O.C and the petitioner, it was submitted that Clause 27 of the agreement gives power to terminate

the agreement forthwith, if the distributor commits any breach of the agreement and fails to rectify such breach within four days of the receipt of a

written notice in that regard. Clause 28 of the agreement gives power to terminate the agreement after giving 30 days notice to the other party

without assigning any reason for such termination. Submission was made that in case of failure of adhering to the principles of natural justice, a writ

can be filed for enforcement of fundamental rights though the agreement provides for an arbitration clause. In support of such contentions, Mr.

Moitra referred to the decisions of the judgment of the Supreme Court in the matter of Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd.

and Others, , wherein it has been held that the High Court can exercise its jurisdiction where writ petition seeks enforcement of any of the

fundamental rights. Reference was made to the judgment of the Supreme Court in Modern Steel Industries vs. State of U.P., (2001) 10 SCC 491

, in support of his contentions. Reliance was also placed on the judgment of the Supreme Court in Tata Cellular Vs. Union of India, . Submission

was made that there is no notice of show cause prior to the issue of the order of suspension. Mr. Moitra submitted though the reasons for

suspension appear from the averments from paragraphs 13, 14 and 15 of the opposition, there is no mention of any date as to when during

October, 2003, IOC received the complaint, who were the members of the committee to investigate and how the investigation was carried on,

since the petitioner was not called during such investigation. Such complaint or carrying on the investigation which form the basis for issuing the

suspension order do not appear from the records. Mr. Moitra denied that any deed of partnership, being Annexure R-2 of the opposition, was

entered into by the writ petitioner and the respondent No. 6 on which reliance has been made by the IOC while issuing the order of suspension.

Moreover, deed of partnership is not genuine as it does not appear from the said annexure, as when the stamp was purchased and by whom. It

was submitted that though the order of suspension was passed, the same is not based on records since paragraphs 13, 14, 15 and its sub-

paragraphs of the opposition have been affirmed as true of knowledge. In short, it was submitted that as nothing is on record to show that an

agreement was entered into by the writ petitioner with the respondent No. 6, entire action taken by the IOC in suspending the distributorship of the

petitioner is illegal and thus, should be set aside and quashed. ..

4. Ms. Vineeta Meharia, learned counsel appearing for the IOC, submitted that the writ petition is not maintainable as under Clause 37a of the

agreement, the dispute should be adjudicated under arbitration proceedings. The Corporation could have terminated the agreement by invoking

Clauses 27 or 28 of the agreement, but in the instant case, as there was breach of the agreement, notice of suspension has been issued. Pursuant to

a complaint, the IOC has investigated and prima facie found breach has been committed by the petitioner. Investigation is going on at present and

show cause notice has been issued on 9.6.2004. The petitioner should reply to the said show cause notice. Submission was made that as the

dispute is regarding contractual obligations and disputed questions of fact are involved, writ petition is not maintainable. Ms. Meharia in support of

his submissions relied on the judgments of the Supreme Court in Life Insurance Corporation of India and Ors. v. Asha Goel and Anr., reported in

2001(2) SCC 160, State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., , ABL International Ltd. and Another Vs. Export Credit

Guarantee Corporation of India Ltd. and Others, and the judgment of the Division Bench of this Court in the matter of Engineers India Limited and

Anr. v. D. Wren International Ltd. and Ors., reported in 1997(II) CHN 1. Ms. Meharia distinguished the judgment of the Supreme Court

reported in Modern Steel Industries (supra) by submitting no challenge was thrown to the arbitration agreement and in the instant case show cause

notice has been issued. As show cause notice has been issued, there is no failure of natural justice and hence, the principles laid down in Harbanslal

Sahania & Anr. (supra) are not applicable. Referring to paragraph 18 of the opposition and relying upon the judgment of Hindustan Petroleum

Corporation Ltd. and Ors. v. Shyam Sundar Ganeriwala, reported in 91 CWN 217, it was submitted that power to terminate entails a lesser

power of suspension which is not equal to termination. After receiving the complaint and being prima facie satisfied, since there was a fundamental

breach, suspension order was issued relying on the judgment of Life Insurance Corporation of India and Ors. v. Asha Goel and Anr., reported in

2001(2) SCC 160 and General Manager, Kisan Sahkari Chini Mills Ltd., Sultanpur, U.P. Vs. Satrugan Nishad and Others, , it was submitted

that a writ petition is not maintainable in enforcement of contractual rights more so if disputed questions of fact are involved. Ms. Meharia

submitted that writ petition should be dismissed and the petitioner should reply to the show cause notice.

5. Appearing for the respondent No. 6, Mr. Tapan Kumar Mukherjee submitted, that the enquiry proceedings should be allowed to continue.

Suspension pending enquiry is always allowed and issues cannot be prejudged. Mr. Mukherjee relied on the judgment of the Supreme Court in

Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, , Radhakrishna Agarwal and Others Vs. State of Bihar and

Others, , Divisional Forest Officer Vs. Bishwanath Tea Co. Ltd., , C.K. Achuthan Vs. The State of Kerala and Others, , Kerala State Electricity

Board and Another Vs. Kurien E. Kalathil and Others, , Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others, and Ashwani Kumar

Singh Vs. U.P. Public Service Commission and Others, and the judgments relied on by the IOC in support of his contentions.

6. Mr. Rabilal Moitra, in reply, submitted that the entire action is an afterthought, since the decision making process leading to the suspension is not

available from the records. There were no proceedings. Further such deed of partnership has not been disclosed in the affidavit in opposition of the

respondent No. 6. There is no document of partnership in the records of IOC. Collusion is evident from the action of the IOC and the respondent

No. 6 in suspending the dealership of the petitioner.

7. Heard learned Advocates for the parties. Affidavit-in-opposition and the affidavit-in-reply have been filed and the same are on record.

8. I find that the entire dispute arises out of the suspension of the distributorship of the petitioner by the IOC by order dated 8.3.2004, on the

allegation that the petitioner had entered into an agreement with the respondent No. 6 without the written consent in violation of Clause 23(c)(i) of

the agreement. The events leading to the suspension of dealership have been set out in paragraphs 13,14 and 15 of the opposition filed by the

IOC. The said paragraphs of the opposition are extracted hereunder :

13. In or about October, 2003, the respondent IOC received a complaint alleging that the writ petitioner's distributorship was being benami

operated by one Sri Santosh Chowdhury, being the respondent No. 6 herein.

14. On receiving the said complaint the respondent IOC formed a committee to investigate into the matter. During investigation the said committee

made enquiries from, inter alia, Sri Harendra Nath Rabidas and the private respondent No. 6.

15. The investigation conducted by the said committee revealed the following facts :

(a) On the 31st of August, 1996, Sri Harendra Nath Rabidas entered into a partnership agreement with the private respondent No. 6 for running

the said distributorship jointly as partners. A copy of the deed of partnership dated 31st of August, 1996 is annexed hereto and is marked with the

letter "R-2".

(b) Thereafter the said distributorship was being operated and controlled by the respondent No. 6.

(c) On the 23rd of June, 2003, Sri Harendra Nath Rabidas wrote a letter to respondent No. 6 discontinuing the running of the distributorship

agreement with respondent No. 6 with the intention of running the same with a third party. Copies of letters dated 23rd of June, 2003, 9th of July,

2003 and 16th of August, 2003 written in this regard by Harendra Nath Rabidas to respondent No. 6 are annexed hereto and are collectively

marked with the letter "R-3".

(d) An investigation was also made by the Superintendent of Police, Dakshin Dinajpur, Balurghat into the running of the said distributorship. The

said investigation also revealed that right from its inception the said distributorship was being operated by the respondent No. 6. A copy of the

police report dated 25th of November, 2003 is annexed hereto and is marked with the letter "R-4".

The manner in which the opposition has been affirmed is as under :

"That the statements contained in paragraphs 1 to 15, 18 to 32 of the foregoing petition are true to my knowledge and those contained in

paragraphs 16, 17 and 33 thereof are my respectful submissions before this Hon'ble Court."

9. I find paragraphs 13, 14 and 15 of the opposition have been affirmed as true to knowledge. Thus, the entire action of the IOC leading to the

suspension of the distributorship of the petitioner is based on information and not on records. It assumes significance as the petitioner in the writ

petition and in the affidavit in-reply has submitted that no investigation was carried out and the deed of partnership dated 31.8.1996 which forms

the basis of issuing the order of suspension is not genuine, since there was no partnership. Any authority under the State issuing an order of

suspension in such circumstances should disclose its basis in its affidavit-in-opposition in relation to the records it possesses, since suspension

vitaly affects the fundamental rights of a citizen to carry on trade or profession under Article 19(1)(g) of the Constitution of India. In the instant

case, I find the basis and manner of information derived have not been disclosed in the opposition by the IOC. It cannot be on the basis of

information of the deponent. Such information should be on substance - records. Disclosure of information based on records is sine qua non in

such matters affecting fundamental rights of a citizen. In the absence of such disclosure based on records, as in the instant case, the IOC cannot

justify its stand.

10. In course of hearing, it was submitted by Ms. Meharia that the instant writ petition is not maintainable as there is an arbitration clause in the

agreement and the point of maintainability has been kept open. I am of the view, that if the action of the State cannot be justified and affects

fundamental rights, a citizen has every right to invoke writ jurisdiction. The Supreme Court in the case of Harbanslal Sahania & Anr. (supra) held

as follows :

So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and, therefore,

the writ petition was filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ

jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of

the alternative remedy, the High Court may still exercise its jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement

of any of the fundamental rights: (ii) where there is failure of principles of natural justice or (iii) where the orders or proceedings are wholly without

jurisdiction or the vires of an Act is challenged. (See Whirlpool Corporation v. Registrar of Trade Marks). The present case attracts applicability

of the first two contingencies. Moreover, as noted, the petitioners' dealership which is the bread and butter, came to be terminated for an irrelevant

and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving

them to the need of initiating arbitration proceedings.

11. Thus, in the case of Harbanslal Sahania & Anr. the Supreme Court, while dealing with the case of termination of dealership, laid down three

contingencies where the High Court may still exercise its writ jurisdiction even if there is an arbitration clause. One such contingency is the

enforcement of any of the fundamental rights.

12. In the instant case, as I find that there is nothing on record to show that petitioner entered into an agreement with the respondent No. 6, the

petitioner has quite justifiably sought for the enforcement of fundamental rights under Article 19(1)(g) of the Constitution of India since his

livelihood has been affected due to the suspension.

13. Therefore, for the reasons in the preceding paragraphs, the writ petition is maintainable.

14. Thus, the writ petition is allowed. The order of suspension dated 8.3.2004 at pages 64 and 65 of the writ petition is set aside and quashed.

15. No order as to costs.

16. Urgent xerox certified copy of this judgment and order be given to the appearing parties, if applied for, on priority basis.

Leter:

31.8.2004

17. After the judgment is pronounced, Mr. Das Gupta, the learned Advocate appearing for the Indian Oil Corporation prays for stay of the

operation of the order for a period of four weeks.

18. Let there be stay of operation of the order till 20.9.2004.