

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Reserve: 13.04.2009

Pronounced on: 06.05.2009

+ W.P.(C) 2927/2005

M/S ALLIED MOTORS LTD.

..... Petitioner

Through : Mr. Gaurav Banerjee, Sr. Advocate with Ms. Diya Kapur,
S. Trehan and Ms. Paromita Mukherjee, Advocates.

versus

M/S BHARAT PETROLEUM CORPN.LTD

..... Respondent

Through : Mr. A.D.N. Rao, Advocate, for Resp. No.1.

CORAM:

Mr. Justice S. Ravindra Bhat

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

Mr. Justice S. Ravindra Bhat:

1. The writ petitioner challenges an order of the respondent Hindustan Petroleum Corporation Ltd ("HPCL") terminating its dealership.
2. The facts, briefly, for the purpose of deciding this case are that the petitioner entered into an agreement dated 28.01.1971 with the HPCL's predecessor-in-interest in respect of a dealership license for a petrol pump at Vikas Marg, Preet Vihar, New Delhi. The said premises

were inspected in the early hours of 15.05.2000 where an unauthorized tank lorry was found decanting products; samples were drawn. A first information report (FIR) was registered; one Mr. Pradeep Gupta was arrested. He was managing the petrol pump, consequent upon an arrangement executed with the Directors of the petitioner company and one Ms. Kanta Talwar dated 28.09.1998. The petitioner contends to learning about the incident on 16.05.2000 and issuing a notice to Mr. Pradeep Gupta as to why the management agreement should not be terminated. However, on that date, HPCL terminated the dealership agreement with the petitioner on account of sample failing the test. The reasons given were:-

“Following irregularities were observed in operation of subject dealership:

(i) We have been informed that the police party of the Crime Branch headed by Shri Azad Singh, Inspector raided the Petrol Pump Premises and caught red handed an unauthorized Tank Lorry having Registration No. DL1GB-4233 decanting product other than products supplied by the company into two underground storage tanks meant for Unleaded Petrol (ULP) unauthorisedly around 4.00 a.m. on 15.5.2000. A FIR no.193/2000 was also lodged by the local police.

(ii) Further the said unauthorized tank lorry was properly connected through hose pipes to two of underground tanks (meant for storage of ULP at the retail outlet) decanting unauthorized product may be with the view to adulterate ULP product supplied by the company for the purposes of illegal gains at the cost of reputation of the company and cheating public at large or any other reason/intention best known to you.

(iii) One of the sample of tank no.1 out of the samples taken for laboratory test has failed on specifications of ULP.

From the foregoing it is clear that you have failed in the performance of your obligations under the aforesaid agreement entered by in between us, thereby causing inter-alia a breach of trust.

In the past also a product sample collected from this outlet was found to be failing the specifications. While we were entitled to terminate as per Dispensing Pump Selling Licence Agreement we had taken lenient view and had given you another chance. With the present instance it is clear that you have completely violated the agreement with you.

We take an extreme serious view of the aforesaid breaches committed by you and in the circumstances referred above, we find no option but to terminate the aforesaid licence agreement which is TERMINATED with immediate effect and we are not willing to carry on our business with you any more. In view of above termination, henceforth, you, your agents and your representatives should not enter upon or make any attempt to enter upon the aforesaid retail outlet.”

The petitioner protested against the above, by its letter, dated 20.05.2000.

3. The samples were sent on 15.05.2000 to the laboratory (“lab”) at Shakurbasti; the report was submitted on 16.05.2000. The samples failed on account of the Registration Octane Number (for short, ‘RON’) requirement. There are different test reports for the different samples drawn and six of the samples were tested on 15.05.2000 itself being the date of receipt, but three samples drawn on 15.05.2000 were received by the Lab on 17.05.2000; consequently, those reports are dated 17.05.2000. A Criminal Writ Petition bearing No.877/2000 was filed by Mr. Pradeep Gupta. It was disposed of on 06.12.2000 directing that the sample lying in the custody of the police to be produced before the trial court and if the trial court was satisfied that the same was not tampered with, it was to be sent to Indian Institute of Petroleum at Dehradun (“IIP”) for expert opinion. The sample was accordingly sent and a report was submitted under the cover of the letter dated 15.02.2001. The sample was found not to be defective, but surprisingly, the report showed that the RON test was omitted; which was the reason for the sample failing in the earlier test.

4. By an order passed by the Metropolitan Magistrate dated 27.05.2002, Mr. Pradeep Gupta was discharged. Charges were not framed since the FIR was registered under Section 420 read with Section 120-B of the Indian Penal Code; the court found that a case was not made out under those provisions of cheating or conspiracy to cheat and that rather it was a

case of adulteration of petrol for which the provisions of the Essential Commodities Act should have been invoked. The discharge order was not challenged further.

5. The writ petitioner challenged the termination letter dated 16.05.2000, contending that it was in violation of principles of natural justice; that the sampling and testing after the directions dated 06.12.2000 showed that the samples were clear and had passed and that the FIR registered against Mr. Pradeep Gupta did not even result in framing of charges, as was clear from the order of the Court dated 27.05.2002. In the writ petition, four issues were considered by the Court; (a) the allegation of failure of principles of natural justice (b) that the BPCL had acted with a predisposed mind; (c) that the samples had not failed and (d) that the criminal proceedings did not lead to any adverse presumption against the petitioner. By the judgment and order dated 09.09.2004, a Single Judge of this Court in W.P. 7382 /2001 allowed the writ petition, on the ground that principles of natural justice had not been followed. The Court relied upon the ruling in *Harbanslal Sahnia v. Indian Oil Corporation* 2003 (2) SCC 107 and *Bharat Filling Station v. Indian Oil Corporation Ltd.* 104 (2003) DLT 601. The Court while allowing the Writ Petition held as follows:

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38. *In view of the aforesaid facts and circumstances of the case, I am of the considered view that the ends of justice would be met if a hearing is now granted to the petitioner and the impugned order dated 16.05.2000 is taken as an intent on the part of the respondent to take action against the petitioner. The petitioner is granted 4 weeks’ time to make a detailed representation and the petitioner shall be granted a personal hearing through its representative. A reasoned order shall be passed after hearing the petitioner and the process be completed within a maximum period of 2 months of the petitioner making the representation. The interim order restraining the respondent from creating any third-party interest shall continue to enure for the benefit of the petitioner during this period of time and in the case of an adverse order against the petitioner, for*

a further period of one months of the receipt of communication of such decision, in order to enable the petitioner to take recourse to legal remedy as may be advised. It is made clear that if a favourable decision is arrived at, nothing precludes the respondent from restoring possession of the petrol pump to the petitioner.”

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6. After the judgment of this Court, the writ petitioner addressed a detailed representation to the BPCL on 06.10.2004. It relied upon provisions of Motor Spirit and High Diesel (Regulation of Supply and Distribution and Prevention of Malpractices) Order 1998, particularly, Regulation 4 and contended that the safeguard provided had not been followed while searching and seizing the products. It was also submitted that the sampling of product was similarly contrary to Regulation 5. Specifically, it was stated that the Inspecting Officer had to take notice and seal samples of one litre each of the Motor Spirit out of which two samples were given to the dealer or transporter or concerned person with instructions to preserve it in a safe custody till testing and investigations were completed. Two samples had to be kept by the concerned oil company and the other two samples were to be sent for laboratory analysis. The petitioner alleged that neither the six samples were taken nor were two samples given to it. The petitioner also alleged serious discrepancies in the two analysis reports, i.e. one of the BPCL Laboratory and the other of the Indian Institute of Petroleum, Dehradun. It is alleged that that the latter report had clarified that the samples were in order.

7. The petitioner was given a personal hearing by the BPCL’s Chairman and Managing Director on 31.12.2004. In the reply letter dated 25.01.2005, which is impugned in these proceedings, the BPCL *inter alia* alleged that the petitioner’s sales figures had dipped and that it was not performing to the extent of the potential available with it. As regards the allegations

concerning the samples, the BPCL's position was as follows:

"7. With reference to the samples dated 16.05.2000 and 17.05.2000, it is seen that the report dated 16.5.2000 was relating to sample drawn from tank no.1 whereas report dated 17.5.2000 was relating to samples drawn from dispensing pump no.1 which is clearly substantiated from the annexure enclosed by you with your representation dated 6.10.2004. Hence, it is clear that both the samples referred in the para failed to meet specifications upon testing. It is further stated that test report were neither erroneous nor having any discrepancy whatsoever. The sample was found to be failing by IIP also. Refer table-4 & others. As per BPCL Test report, the same fails to meet ULP requirement with reference to Octane number and ASTM distillation. These tests were not carried out by IIP Dehradun."

8. With regard to the allegation about its samples being cleared, the BPCL stated as follows:

"9. The contents of Para 9 of your letter does not give the date on which an application was moved for fresh testing of the samples taken on 15.5.2000 which were lying in the police custody through an authorized laboratory. You are aware that as per section 5(5) of MS/HSD Control Order 1998 the petroleum products are required to be sent for testing within 10 days of withdrawal of sample. We reproduce the said section for your ready reference.

5(5). The authorized officer shall send the sample of the product taken under sub clause (2) within 10 days to any of the laboratories mentioned in Schedule III appended to this Order of such other laboratory as notified by the Government in the Official Gazette for this purpose, for analysis with a view to checking whether the density and/or other parameters of the product conform in requirements indicated in Schedule-I.

10. That it is evident from test report issued by Indian Institute of Petroleum (IIP), Dehradun vide their letter dated 15-2-2001 that they have not carried out the test as per Bureau of Indian Standard specifications including for RON which is most relevant for testing of ULP product to ascertain the quality of the product whether it is on spec or off spec. Hence the report of IIP has no relevance in the matter and cannot be considered as it is not full proof test report. Whereas it is an admitted fact and evident that our Laboratory had carried out test for RON as per BIS specification wherein it was found that the RON test result was 81.8 as against required min. result of 87.

Similarly, ULP samples drawn from Tank No.3 & 5 and Tank Lorry No. DL 1 G 4233 were also failed upon testing in its specifications including RON test result which were recorded as 64.6, 59.1 & 51.5 in its respective test reports. Hence it is an admitted fact that the ULP stock lying in Tank No.1, 3 and 5 was adulterated. You and your associates are directly responsible for such adulteration and we have rightly terminated the dealership vide our letter dated 16.5.2000."

9. Refuting the allegations about the samples, it was also stated that:

"(D) That in reply to para D, it is stated that it is evident from the report of IIP, Dehradun vide letter dated 15-2-2001 that the test is not carried out as per BIS specifications including RON which is most relevant test for ascertaining the quality of ULP product as to whether or not the product is on spec or off spec. Hence, the test reports of IIP, Dehradun has no relevance and can not be relied on such test report. It is an admitted fact and evident that Laboratory at Shakurbasti had carried out test for RON as per BIS specifications and observed that RON test result was 81.8 against requirement of min. 87 and the same was rightly recorded in its test report dated 16-5-2000 for ULP Tank No.1. Similarly, ULP samples drawn from Tank No.3 & 5 and Tank Lorry No. DL 1G 4233 were failed in its specifications including RON test result were recorded as 64.6, 59.1 & 51.5 respectively. Further, even as per test report of IIP, Dehradun have failed in many respect as per the summary of results annexed in your letter under reply. It is pertinent to mentioned that sample no. 3, 6 & 9 have failed in density exigent gum & distillation characteristics in full.

(E) That in reply to para E & F it is stated that we have drawn samples very much in line with MS/HSD Control Order 1998. The officers who have drawn the samples were not below the rank of Sales Officer and the samples were rightly tested in the laboratory at Shakurbasti which is an prescribed laboratory under Schedule 3 of said order.

(F) That in reply to para G it is stated that the samples were drawn in line with the procedures. It is evident from both the results drawn by us and the police the samples have failed upon testing its specifications.

(G) That the contents of para H it is stated that the samples failed both in testing in BPCL laboratory and test conducted through police authorities at IIP, Dehradun. The second test as stated above are not as per BIS specifications including test for RON. Hence, the second test carried out by IIP, Dehradun cannot be relied upon. It is pertinent to mention that when the test results failed to meet the specifications it means that is not the product which can be sold to customers during the normal business in petroleum products, hence it is adulterated."

10. The petitioner submits as grounds in support of its present proceeding that the sample test reports, on the basis of which its agency was terminated, could not have been relied upon. For the two reports dated 16.05.2000 and 17.05.2000 in respect of tank no.1, the Research Octane Number (RON) of the sample shown was 81.8 and 68. These, says the petitioner, reveal serious discrepancy and that there could not have been so much of difference. The petitioner relies upon the test reports submitted by the IIP, Dehradun, which were also taken into consideration in the criminal proceeding where it was observed that they were clear samples and not contaminated or adulterated. Likewise, the discrepancy in regard to the sample alleged drawn by the police from the lorry container and the samples drawn by the BPCL were sought to be relied upon; the petitioner further challenges high octane content of the samples from tank no. 6, i.e. 94.3, which could not have been possible at all.

11. It is submitted that the respondent did not follow the procedure mandated by Regulation 4 of the Order which empowered only a Gazetted Officer of the Central Government or a specially empowered Deputy Superintendent of Police (DSP) to conduct search and seizure proceedings. It was submitted that similarly, Regulations 5, particularly, 5(3) was violated because the samples were not stored in the manner indicated. Learned counsel relied upon the decision of the Punjab and Haryana High Court, reported as *State of Punjab v. Balak Ram* 1992 (1) SCC 165; *Gian Chand Luthra v. State of Punjab* 1988 (2) Chand. LR (CrI) 652; *Bompada Chandrashekhar v. State of Andhra Pradesh* 1999 Cr. LJ 995.

12. It is submitted that the respondents betrayed a completely biased and premeditated approach in seizing the samples and following a procedure unknown to law. They first attempted to terminate the dealership without even show cause notice and thereafter,

continued with the same action, despite the Court's order, to violate principles of natural justice and act in an unfair manner. In these circumstances, it is submitted that this Court should, while following the decision in *Harbanslal Sahnia* case (*supra*), direct restoration of the dealership. Learned counsel also relied upon the previous decision of the Court, stating that in the event of an adverse order against the BPCL, it was bound to reconstitute the petitioner and restore the dealership.

13. The respondent, in its counter affidavit lists out various irregularities, including previous inspections dated 30.05.1995, 28.04.1998 and 12.12.1998. It was submitted that the last inspection revealed that lubricant samples from the dealership had failed to meet specifications and that consequently, sale and supply of all petroleum products was suspended to the petitioner outlet for a two week period, from 03.03.1999 till 17.03.1999.

14. The respondent also refers to two complaints having been made in 1997 and alleged that the dealership was "dried" of petroleum products on one day as a result of which a complaint was received. The BPCL relies on clause 10(g) of the agreement entered into with the petitioner on 28.01.1971, which obliges the dealer not to adulterate the petroleum products supplied by the company and at all times take all reasonable precautions for ensuring that Motor Spirit or HSD is kept free from water, dirt and other impurities. The BPCL states that it is not bound by the report of IIP, Dehradun since it is not a laboratory in line with BIS requirements and that its report does not indicate certain parameters; testing by the IIP was not sent to its (BPCL's laboratory) for testing as required in Regulation 5(5). It is further submitted that since the determination that dealership could not be restored and had to be cancelled was taken on the basis of objective materials and in the course of commercial

dealings, this Court should not intervene with such decision and pass any order favoring the petitioner.

15. It may be seen from the above discussion that though four issues were urged in the previous writ petition, three of them were rejected by the Court. The Court pointedly overruled petitioner's submission with regard to the samples, in the following manner:

"9. The fourth issue arising from the order of the learned M.M. dated 27.05.2002 cannot be of much assistance to the petitioner since it is neither a case of clean acquittal nor of charges not being framed on account of no material being found. The charges have not been framed because the learned M.M. found that wrong provisions of law had been invoked and the prosecution should have been initiated under the Essential Commodities Act.

10. Similarly, on the third issue of the sample being cleared, it is to be noticed that the direction passed by the Division Bench in Crl. W.P. No. 877/2000 was not in the presence of the respondent herein. Be that as it may, the report submitted in pursuance thereto shows that no test had been done for RON which is the basis for failing of the sample of the petitioner, as per the earlier test. If the said test had not been done, the report cannot be of use to show that the sample is cleared.

11. The second plea raised by the petitioner is that the sample had been tested after the termination. However, as noticed above, six out of nine samples were sent on the same date of being drawn, i.e. 15.05.2000 and the report was received on 16.05.2000 and the termination decision was taken on the same date soon thereafter. No doubt, three of the samples were sent two days later and tested only on 17.05.2000 when the report was received. Be that as it may, once majority of six of the samples had failed out of nine samples drawn, the absence of the report on other three samples cannot preclude the respondent from taking the decision nor can it be said that the decision has been taken in the absence of any adverse report of sampling.

.....(emphasis applied)"

16. In view of the above specific observations, this Court is of the opinion that the petitioner's substantive arguments in respect of the samples having failed cannot be gone into by the Court at this stage. In the circumstances, the question which has to be considered is the

extent of the hearing granted to the petitioner. The answer to this is provided for in paras 33-38 of the judgment where the Court discussed the need to grant opportunity. However, this Court did not have the benefit of the respondent's stand in the light of any order. The Court further accepted that 6 out of 9 samples had failed and that the petitioner's discharge in the criminal proceedings, were not of much assistance.

17. This Court cannot be unmindful of the fact that the orders made in violation of natural justice, especially if they adversely impact an individual's right or commercial interests, are susceptible to the charge of arbitrariness. Consciously therefore, a direction was made to grant an opportunity to the petitioner and a personal hearing. Thereafter, a representation was made to the respondent BPCL; the latter also granted personal hearing. After duly considering all aspects, a detailed 11-page order was issued. The BPCL, in its order specifically refuted the allegations concerning violation of Regulations 4 and 5. The BPCL's stand that the IIP report could not be accepted since it was not in conformity with Regulation 5 due to the test not having been carried out in accordance with BIS standards is nowhere refuted in these proceedings. The BPCL has reiterated that allegation in its return; the petitioner has not denied it.

18. There is one more aspect to the issue. As to whether the 6 samples did not conform to specifications, is an aspect which this Court can hardly be expected to adjudicate upon in the proceedings under Article 226 of the Constitution of India. Besides the obvious circumstance that it involves examination of disputed questions of fact the other aspect is that such dispute between the parties to a contract ordinarily would not fall within the public law domain. Although the observations in *Harbanslal Sahnia* case (*supra*) point to one view of the Supreme

Court in such cases; a close reading of this judgment would show that the Court had noted that the Commissioner, in terms of a statute in an appeal preferred against the dealer's suspension, had held that the samples had not been drawn properly and that there was a delay in carrying out the laboratory test. In these circumstances, the order terminating the dealership was set aside.

19. In this case, out of 9 samples, 6 had failed. The petitioner seeks to rely upon the sample report of 11-page; the respondent has disputed its correctness on certain grounds. The jurisdiction under Article 226 of the Constitution of India is extremely limited; as declared by the Supreme Court in *G.B. Mahajan v. Jalgaon Municipal Council & Others*, (1991 (3) SCC 91):

“While it is true that principles of judicial review apply to the exercise by a government body of its contractual powers, the inherent limitations on the scope of the inquiry are themselves a part of those principles. For instance, in a matter even as between the parties, there must be shown a public law element to the contractual decision before judicial review is invoked. In the present case the material placed before the court falls far short of what the law requires to justify interference.

The present proceedings are hardly proper for adjudicating whether the samples conformed to the guidelines and also whether they or some of them had been drawn contrary to the procedures prescribed. In the circumstances, this writ petition has to fail. However, it is open to the writ petitioner to seek remedies under the dealership agreement terminated by BPCL, through arbitration or other civil proceedings as may be applicable.

20. The writ petition is dismissed but in the above terms.

S.RAVINDRA BHAT
(JUDGE)

MAY 06, 2009

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