

\$~

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

+

W.P.(C) 4028/2007

VIKRANT FILLING STATION & ANR Petitioners

Through: Mr. A. Maitri, Advocate.

versus

UNION OF INDIA & ANR Respondents

Through: Mr. Rajiv Kapur, Advocate for
HPCL.

CORAM: JUSTICE S. MURALIDHAR

ORDER

%

07.10.2010

1. This writ petition seeks the quashing of the letter dated 30th December 2006 issued by the Hindustan Petroleum Corporation Ltd. ('HPCL') Respondent No. 2 herein terminating the retail outlet/petroleum pump dealership of Petitioner No.1.

2. On 25th May 2007 while directing notice to issue in the writ petition, this Court noticed that the retail dealership of the Petitioner already stood terminated. As regards the possession of the land and the assets of the Petitioner thereon, status quo was directed to be maintained. This Court also noticed that an appeal filed by the Petitioner was pending consideration. By the subsequent order dated 27th August 2008 the interim order was made absolute.

3. On 5th May 2010 this Court passed the following detailed order:

“1. Learned counsel for the parties have been heard at

length.

2. The show-cause notice dated 29th August 2006 issued to the Petitioner refers to two kinds of irregularities. One was that the totalizer seal of HSD Dispensing Unit (Avery Make S.No. BM03817051) was found broken and unit was delivering short by 40 ML in 5 ltrs. The second was that there was interconnection between two underground HSD tanks.

3. By a supplementary notice dated 29th September 2006 the Petitioner was informed that the MS samples collected at the time of inspection on 19th August 2006 failed in the clinical tests. A copy of the test report of 1st September 2006 was enclosed.

4. The Appellate Authority in its order dated 31st October 2007 did not accept the explanation offered by the Petitioner about the test report of the Weights and Measures ('W&M') Department of the State Government on 11th September 2006 which had concluded that the seals were in order and that the short delivery was within the permissible limits. The Appellate Authority simply stated that "their explanation in this regard is not acceptable."

5. As regards this aspect this Court finds that the W&M Department is essentially the authority which has to opine on whether the dispensing unit meets the requirement and where the seals affixed by the said Department are in tact. It appears that the HPCL itself does not affix any seal on the dispensing unit. Therefore, it is really the W&M Department which has to concern itself with the alleged breaking of seal. The inspection report of 19th August 2006 also raises doubts whether in fact the inspection team of the HPCL found the seal on the Avery dispensing unit to be

broken. The Inspection Team appears to have not indicated the seal of the HSD Unit - 2 was broken although at the bottom of the report there is a reference to the seals being broken without specifying the particular dispensing unit. This therefore does not establish the precise case in the show cause notice.

6. In the considered view of this Court, in view of the subsequent report dated 11th September 2006 of the W&M Department of the State Government finding both the seal of dispensing unit as well as the shortfall of 10 ML in 5 litres tank to be within permissible limits, the benefit of doubt in this regard ought to be granted to the Petitioner.

7. As regards, the failure of the MS sample to pass the clinical tests, this Court's attention is drawn to a subsequent show cause notice dated 11th June 2007 whereby action was initiated against the transporter by the HPCL.

8. A reference is also made to the fact that the density of the sample as indicated in the inspection report when compared with the subsequent clinical test, showed that there was discrepancy in the figures. The Appellate Authority has not adverted to the fact that action has been taken against the transporter. If indeed, the transporter has been found liable for adulteration of the supplies, then it is not possible that the dealer is also held responsible for the same act. The Appellate Authority notes the fact that the inspection team found the density of MS at 748.6 on 19th August 1996 whereas the laboratory test report about a week later showed it to be 750.9. This has been explained by the Appellate Authority by stating that there was consistency in the test report vis-a-vis the two other parameters. This Court is of the view that it does not sufficiently explain how there can possibly be a variation in the density of the same

sample within one week. The benefit of doubt in this regard has also to go to the dealer.

9. As regards the third aspect of the interconnection between two underground HSD tanks, the Petitioner has through an application made under the Right to Information Act 2005 ('RTI Act') obtained the complete information regarding the approved plan of the petrol pump and the location of the underground tanks. Learned counsel for the Petitioner has shown to this Court a lay out plan which indicates that the two underground tanks were interconnected even from the beginning i.e. 1983 onwards.

10. This information regarding interconnection of the two underground tanks has emerged in these proceedings for the first time. For some reason, the HPCL did not produce it before the Appellate Authority. The burden was cast on the dealer to show that interconnection between two underground tanks was permitted by the HPCL.

11. Learned counsel for the Petitioner states that he will file a short affidavit explaining the circumstances in which the above information was obtained and also place on record the said lay out plan. The affidavit be filed within one week from today with advance copy to learned counsel for the HPCL. It will be open to learned counsel for the HPCL to file a response thereto within one week thereafter.

12. List on 24th May 2010. Order be given dasti to learned counsel for the parties.”

4. Pursuant to the above order an additional affidavit was filed by the Petitioner. A reply thereto was also filed by the HPCL. The matter was further heard at length on 16th July 2010 when the following order was passed:

“1. On the question whether there is interconnection between two HSD tanks, in the show cause notice dated 29th August 2006 issued by the Respondent No. 2 Hindustan Petroleum Corporation Limited (‘HPCL’) apart from stating that “interconnection between two underground HSD tanks was observed”, no reference was made to the material on the basis of which the above conclusion was drawn. In the impugned order passed by HPCL on 30th December 2006, there was no mention of the termination of dealership on account of the interconnection between the two underground HSD tanks. The termination order appears to have proceeded on other grounds relating to the tampering of the seals, the short delivery and the MS samples having been found to be adulterated.

2. The Appellate Authority in its order dated 31st October 2007 has recorded the submissions of the Petitioner herein in para 10 as under:

“10. As regards the interconnection between the two underground HSD tanks, the Appellant has contended that these were installed as per the guidelines of the Company in 1994 by M/s. Anand & Co, a Contractor of HPCL. No other proof is produced. Respondent contends that there is no such guidelines and did not accept this explanation.”

3. However, there is no definite conclusion on the above submissions. By the previous order dated 5th May 2010 this Court had, while accepting the contention of the Petitioner that the allegation of tampering of seals, short delivery and purity of the sample were not substantiated, required the Petitioner to file an affidavit placing on record the site plan obtained by the Petitioner through an application made under the Right to Information Act 2005 (‘RTI Act’) which showed the location of the two underground tanks and which, according to the Petitioner, were interconnected from 1993 onwards and were in turn connected to the diesel

dispensing unit.

4. Pursuant to the above order dated 5th May 2010 the Petitioner has filed an affidavit stating that HPCL took necessary permission from the Controller of Explosives by submitting fresh drawings which were then approved and Explosive License was renewed in 1993 itself. It is pointed out that a copy of plan shown to the Court was the site plan submitted by the HPCL to the Explosives Department. This showed that the two HSD tanks were interconnected and diesel was being pumped to the diesel dispensing unit. It is stated that “the Respondent company itself interconnected the tanks and then both the tanks were connected with one dispensing unit.”

5. Today it is further pointed out by Mr. A. Maitri, learned counsel appearing for the Petitioner that on 17th February 2006 the Ministry of Petroleum, Government of India issued the Marketing Discipline Guidelines 2005 (‘MDG 2005’) whereby a new penal provision was introduced which stated that “the interconnection of tanks at retail outlets was not permitted and the same, wherever provided initially were to be removed.” It is accordingly, submitted in the case of the Petitioner’s outlet the interconnection of the two HSD tanks was already provided and the obligation to remove the interconnection consistent with the above penal provision in MDG 2005 lay with the HPCL. The Petitioner could not be held responsible for not removing the interconnection.

6. In the reply to the additional affidavit, it is contended by HPCL that the interconnection between the two underground HSD tanks is not permissible and that “the site plan filed by the Petitioner alongwith his affidavit does not establish that the two diesel tanks were interconnected.” It is denied that

the HPCL itself interconnected the tanks. It is further submitted by Mr. Kapur, learned counsel for the Respondent that this being a disputed question of fact should not be examined by this Court and the matter should be referred to arbitration as explained by the Supreme Court in *State of Bihar v. Jain Plastics and Chemicals Limited AIR 2002 SC 206* and *Hindustan Petroleum Corporation Limited v. M/s. Super Highway Services 2010 STPL (Web) 136 SC*.

7. The affidavit filed by the HPCL does not explain on what basis the HPCL came to the conclusion that there was no interconnection between the two HSD tanks to begin with and that subsequently this was done by the Petitioner. Also if as per the site plan, there was only one dispensing unit for diesel, then it could not pump out diesel from the two underground HSD tanks, without such interconnection. It is also not known if HPCL took steps to inform the Petitioner that the interconnection of the HSD tanks should be immediately removed. While this Court may not in exercise of its writ petition examine a disputed question of fact, it can call upon HPCL to produce the record which would show if there was material to justify the conclusion that the Petitioner was responsible for the interconnection between the two underground HSD tanks.

8. Mr. Kapur submits that he will, on the next date of hearing, produce the records on the basis of which the above conclusion was reached by HPCL.

9. At his request, adjourned to 13th September 2010. Order be given dasti to learned counsel for the parties.”

5. Pursuant to the above order, no further affidavit has been filed by the HPCL. On the other hand, today learned counsel for the HPCL handed

over a copy of the general Circular dated 31st December 2006 addressed by the HPCL to all retail outlet dealers to the following effect:

“To,

All Retail Outlet Dealers
Meerut Retail Region

Sub : Inter-connection of Tanks

Dear Sir/Madam,

This has reference to the Marketing Discipline Guidelines, 2005 which are in vogue since 1st August 2005.

Pl note that no interconnection has been provided at the retail outlet and that if any such interconnection is detected at the retail outlet at a later date, penal action as given hereunder will be taken against the dealership.

If any interconnection is detected at the retail outlet, following actions would be taken:

“Termination, even in case of 1st instance”

Clarification, if any may be sought from respective area sales officers.”

6. This Court finds that there is still no response by the HPCL to the queries posed by this Court in para 7 of its order dated 16th July 2010. If, as asserted by the Petitioner, the approved site plan provided for two underground HSD tanks and one Dispensing Unit for diesel, then it could not pump out diesel from the two underground HSD tank, without such interconnection. However, it is the case of the HPCL that the interconnection of the two tanks was brought about by the Petitioner and was not part of the original plan. However, HPCL has failed to produce any documents to substantiate this. The only explanation

offered by Mr. Kapur, learned counsel for the HPCL is that these are old records which are unable to be traced.

7. The second aspect is whether, after the interconnection was detected, the HPCL took steps to inform the Petitioner and ask for the removal of the interconnection. According to the Petitioner, the interconnection was removed on 29th August 2006 even before the above Circular dated 31st December 2006 was issued. Therefore, there was no justification for termination of the dealership on that ground. Again, in the absence of records, the HPCL is unable to inform this Court whether it wrote to the Petitioner asking it to remove the interconnection. HPCL has also not been able to show that it was the Petitioner which was responsible for the interconnection between the two underground HSD tanks.

8. In the circumstances, this Court is of the view that the benefit of doubt should go to the Petitioner. It is accordingly held that the case of the Petitioner that the interconnection of the two HSD tanks was in accordance with the original approved site plan and not got done clandestinely by it, merits acceptance.

9. It was urged by Mr. Kapur that since these are disputed questions of fact, this Court should not adjudicate upon them. Reliance is placed on the recent judgment of the Supreme Court in *Hindustan Petroleum Corporation Ltd. v. Pinkcity Midway Petroleums* (2003) 6 SCC 503 and *State of Bihar v. Jain Plastics and Chemicals Ltd.* AIR 2002 SC 206.

10. Over the many hearings of this case, the disputed area as to the facts has got narrowed by an order dated 5th May 2010, this Court has already held that on the issue of the broken seal of the Dispensing Unit and the shortfall of 10 ML in 5 litre tank the benefit of doubt ought to be given to the Petitioner. In the same order dated 5th May 2010, this Court held that as regards failure of the MS sample to pass the clinical tests, again the benefit of doubt should go to the Petitioner. The case was thereafter kept pending only to consider the issue of interconnection of the two HSD underground tanks and in that context for production of the records available with the HPCL. In the absence of any records produced by the HPCL to counter the case of the Petitioner, this Court holds that even on this aspect the Petitioner's case should be accepted. In the circumstances, this Court finds it not appropriate to send the parties to arbitration or to seek other remedies.

11. In that view of the matter, the impugned termination letter dated 30th December 2006 and the order dated 31st October 2007 of the Appellate Authority are hereby set aside.

12. The consequential steps would be taken by the HPCL within a period of four weeks from today.

13. The writ petition is disposed of in the above terms.

S. MURALIDHAR, J

OCTOBER 07, 2010

ak