

IN THE HIGH COURT OF DELHI AT NEW DELHI
CIVIL APPELLATE JURISDICTION
LETTER PATENT APPEAL NOS. 1121-22 OF 2006

Reserved On : October 08, 2010
Date of Judgment : November 19, 2010

Diesel Engineering Co. Pvt. Ltd. & Anr. Appellant
Through Ms. Radhika Chadrashekhar, Advocate

Versus

Union of India & Ors. Respondents
Through Mr. A.D.N.Rao, Advocate for R2.
Mr. Ramesh Kumar, Advocate for R4.

CORAM :

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

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

SUDERSHAN KUMAR MISRA, J.

1. This appeal under the Letters Patent has been filed by Diesel Engineering Company Pvt. Ltd., impugning the order of a Single Judge, dated 8th May, 2006, whereby the writ petition filed by the appellant came to be dismissed at the preliminary stage primarily on the ground that the petitioner has failed to show any violation of the guidelines which require the sample lifted from the petrol pump of the appellants to be tested within ten days. It was noted that counsel for the petitioner has not been able to show anything that would enable the Court to conclude that the sample which was lifted on 28th

September, 2004 was tested after 37 days. We might also notice that after the writ petition came to be dismissed, the petitioner moved another application before the writ court praying that the court take on record the fact that before the writ petition came to be filed in this Court, the appellant had in fact instituted a Suit against the respondents claiming the same relief. That application was dismissed as frivolous. While dismissing that application, the Court also noted that the pendency of the suit seeking the same or similar relief at the time when the writ petition came to be filed would in fact have been another ground for dismissing the petition.

2. Notice in this matter was issued after the counsel for the appellant demonstrated that in fact the relevant test report of the sample in question, which had also been annexed to the writ petition, showed that the sample was lifted on 28th September, 2004 and was received in the lab on 1st November, 2004 i.e. after 33 days, whereas the sample is required to be sent within 10 days in the ordinary course.

3. The central pillar of the appellant's case is a circular of the respondents titled, "Marketing Discipline Guidelines – 2001." The relevant portion on which reliance is placed is as follows:-

"SAMPLE TESTING AND RESULTS:

.....

All samples should reach the labs within 10 days from the date of drawal and they should test the samples within the next 10 days. Results are to be communicated to the dealer by the concerned Oil

company within the next 10 days (of the testing of the sample).

While in general above procedure should be strictly followed and the time frame as stipulated above to be adhered to, however, during special drives, in view of the large number of samples, the labs may accept the samples upto 15 days after drawal and the testing should be completed within 30 days of the receipt of the sample.

.....”

It is contended by counsel for the appellant that the aforesaid guidelines govern all sample testing and results, and, according to this, all samples taken “should reach the laboratory within 10 days.” from the date they are drawn and that the lab should test the sample within the next 10 days. In the case of special drives, since a large number of samples are likely to be drawn, the laboratory may accept the sample up to 15 days after the date on which it was drawn, but the testing must be completed within 30 days of drawing the sample. Counsel further contends that in the instant case, the sample was received by the laboratory after 33 days as a result the sample could only be analyzed after about 36 days. This, according to the counsel for the appellant, was a clear violation of the guidelines. Not only that, keeping in mind the fact that petrol is a volatile substance, its quality could well have changed over this period of time and, therefore, the test results could not be relied upon. Counsel has also referred to a decision of the Supreme Court in the case of **Harbans Lal Sahnia Vs. IOCL, AIR 2003 SC 2120**, in which a portion of another circular issued by the Government of Uttar Pradesh on 25th April, 1997, which, inter alia, states that the strength/friction of petrol and diesel change

after 10 days and it is for that reason that the time limit of 10 days is fixed for testing all such products.

4. Counsel for the respondent No. 2 sought to urge that the limit of 10 days for the sample to reach the laboratory after it is drawn, has been fixed only for administrative reasons, with a view to ensuring efficiency, and not because the sample would become useless thereafter. In support, he also relies on the next paragraph in the guidelines which states, "while in general, the above procedure should be strictly followed, however, during special drives in view of large number of samples, the labs may accept the sample up to 15 days after drawal and the testing should be completed within 30 days of receipt of the sample." He submits that it is thus clear that the guidelines contemplate testing of samples upto 45 days after they are drawn.

5. On analyzing the aforesaid extract of MDG – 2001, which is relied upon by counsel for the appellant, one thing is clear that although there is a direction to respondent No. 2 to ensure that the samples must reach the lab within 10 days from the date they have been drawn in normal circumstances and within 15 days in case of a special drive resulting; the further and relevant direction is that the testing of the samples, which have been lifted within 15 days, "should be completed within 30 days of the receipt of the samples." Therefore, even according to the aforesaid circular, relied upon by the appellant, the outer limit for testing a sample is 45 days and not 30 days as contended. Furthermore, an overall reading of this provision

can only mean that the respondent company is confident that at least up to 45 days, there would not be any variation in the quality and composition of the sample which might render it useless for ascertaining the purity of the goods being sold by the appellant. Another factor is that the full name of the guidelines relied upon by the petitioner, is 'Marketing Discipline Guidelines – 2001'. This also leads us to infer that the above time limits have been prescribed in these guidelines for ensuring, "Marketing Discipline", and fortifies our conclusion that there is nothing in these guidelines that would persuade us to conclude that if a sample is either forwarded or tested after the time limit of either 20 or 45 days prescribed here, it would have lost certain vital characteristics and could no longer be considered representative of the quality of the product from which it was drawn. We are inclined to agree with the submission of counsel for the respondent that, therefore, the time limit for the samples to reach the laboratory, and be tested thereafter, mentioned in these guidelines is largely for administrative reasons.

6. What we are concerned with here is whether the sample in question would have retained the essential characteristics for which it is required to be tested on the date when it was actually tested. In this context, although we have no doubt that the aforesaid guidelines relied upon by the appellant are aimed at administrative efficiency, they can nevertheless be a useful guide on this case. This is because the respondent, which is a Public Sector Company, controlled by the Government is unlikely to prescribe a time limit for testing samples, albeit for administrative efficiency, which exceeds the life of the

product sampled. Here, in fact the sample was lifted on 28th September, 2004 and it was analyzed on 4th November, 2004. It was therefore analyzed after 36 days i.e. on the 37th day. In other words, the time taken to analyze the sample was sixteen days more than the first period prescribed by the aforesaid guidelines. It was, however, well within the overall period of 45 days contemplated in the second paragraph of the same guidelines.

7. In support of its contentions, the second respondent has also filed an additional affidavit contending that there can be no question of any change of strength/friction of gasoline within 40 to 60 days. In support of this contention, it has quoted, reports of three different institutes. The first is from the South West Research Institute, Texas, USA, which has stated in its report on, "Evaluation of Motor Gasoline Stability", as follows:-

"The fuel will be stable for one year at ambient temperatures. 1 year at ambient temperature of 23°C would be equivalent to 2 years at 13°C."

Similarly, Chevron, which is another energy company, is stated to have concluded that, "gasoline stored in a tightly closed container in a cool place will stay good for at least a year." Finally, it has also relied upon Indian Standard IS 2796:2008, which states as follows:

"Investigations had established that the potential gum corresponding to 4 h of ageing at 100°C and under

oxygen pressure of 690 kPa (ASTM D 873) represents gum content after storage for three months at 43°C."

A perusal of these extracts relied upon by the respondents shows that the stability of motor spirit deteriorates overtime and with increasing temperature.

8. Therefore, what is important is the conditions under which the sample was lifted from the pump and was kept before it was tested and to see whether the quality of the sample lifted from that could have deteriorated substantially before being tested on the 37th day. All this is dependent upon the manner in which the sample was taken and preserved and other relevant factors. There is nothing to show these facts. However, these writ proceedings are hardly the place to determine the relevant facts with regard to the average ambient temperature at which the sample was stored and what would be the rate of deterioration of the gasoline and over what period of time. These are facts that could best be established only by a trial. Looking to the aforesaid reports including that of the Indian Standard IS 2796:2008 cited by the respondents, it is very likely that the petrol would have remained stable for some time, including the 36 days before the sample was tested on the 37th day. As regards the circular, which has been reproduced in **Harbans Lal Sahnia (supra)**, is concerned, we are not inclined to give any weightage to the same since it appears to be an administrative circular drawing conclusions about the volatility and stability of petrol and diesel after 10 days, without any scientific basis or reasoning. If we were to accept this as

correct, then even the aforesaid, "Marketing Discipline Guidelines – 2001", which have been relied on by the petitioner itself, would also have to be set aside since they have prescribed a maximum period of 45 days for testing the sample after the same has been drawn. Furthermore, the conclusion in the aforesaid circular appears to be quite contrary to the additional affidavit filed by senior officer of the respondent No. 2, which is a public sector corporation dealing exclusively in petroleum products, and which has relied on reports of the experts in field, as well as on Indian Standards 2796:2008. Under the circumstances, we are inclined to rely on the latter in preference to the aforesaid circular.

9. In reaching our decision we have also kept in mind the demonstrated conduct of the appellant in admittedly having filed the instant writ petition in this Court whilst its own civil suit filed seeking similar reliefs, was pending in the Court at Rampur, without disclosing the fact that the said suit was pending at Rampur. The fact that the suit came to be dismissed by the Rampur Court for want of jurisdiction thereafter is, to our mind, wholly irrelevant. This is because it cannot be said that on the date the writ petition was moved in this Court, the appellant had any inkling that his suit would be dismissed for want of jurisdiction. Admittedly, at the time when it filed the writ petition before this Court on 4th April, 2006; the appellant was also maintaining its suit before the Rampur Court with full force. Not only that, it was only on an application moved by the defendant that the suit was dismissed for want of jurisdiction by the Civil Judge Ist Class, Rampur, later on 6th May, 2006, by a detailed order and that too after

hearing arguments of both parties on that aspect. It was always open to appellant to file a suit in Delhi after its plaint was returned by the Rampur Court. Had it done so, all relevant facts may have been properly established after trial. We are, therefore, satisfied that the appellant did not approach this Court with clean hands.

10. Consequently, looking at the overall picture and in view of the peculiar facts of this case, which, to our mind, in any case could best be established by trial, which option the appellant failed to exercise after the return of its plaint by the Rampur Court; and also because even the guidelines permit testing upto 45 days, we are not inclined to reverse the decision of the learned Single Judge merely because the sample in question came to be tested after 36 days, on the 37th day.

11. The appeal is dismissed with costs of ₹ 25,000.

SUDERSHAN KUMAR MISRA, J.

SANJAY KISHAN KAUL, J.

November 19, 2010.

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