IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.V.RAMAKRISHNA PILLAI

FRIDAY, THE 27TH DAY OF MARCH 2015/6TH CHAITHRA, 1937

WP(C).No. 16865 of 2014 (G)

PETITIONER(S):
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1. ALL KERALA FEDERATION OF PETROLEUM TRADERS,
   HAVING HEAD OFFICE AT 41/2884, 2885, MARUTHI BUILDING,
   PROVIDENCE ROAD, ERNAKULAM, COCHIN-682 018,
   REPRESENTED BY ITS PRESIDENT MURALIDHARAN.

2. K.P. SIVANANDAN,
   S/O.K.P.CHATHUKUTTY, KANNANGHAT HOUSE,
   KUNNAMANGALAM, CALICUT DISTRICT, KERALA.

BY SRI.P.RAVINDRAN, SENIOR ADVOCATE.
ADV. SRI.K.PRAVEEN KUMAR.

RESPONDENT(S):
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1. UNION OF INDIA,
   REPRESENTED BY ITS SECRETARY,
   MINISTRY OF PETROLEUM AND NATURAL GAS,
   SASTHRIBHAVAN, NEW DELHI-110 001.

2. HINDUSTAN PETROLEUM CORPORATION LTD.,
   REPRESENTED BY ITS SENIOR REGIONAL MANAGER,
   P.O.BOX NO.1601, ERNAKULAM NORTH P.O, KOCHI-682 018.

3. INDIAN OIL CORPORATION LTD.,
   REPRESENTED BY ITS GENERAL MANAGER,
   PANAMPILLY AVENUE, PANAMPILLY NAGAR P.O., KOCHI-682 036.

4. BHARATH PETROLEUM CORPORATION LTD.,
   REPRESENTED BY ITS GENERAL MANAGER,
   1ST FLOOR, PETRONET CCK LTD, IRUMPANAM P.O., KOCHI-683 309.

R1 BY ADV. SRI.N.NAGARESH, ASSIST. S.G. OF INDIA.
R2 TO R4 BY ADVS. SRI.M.GOPIKRISHNAN NAMBIAR,
SRI.P.GOPINATH,
SRI.P.BENNY THOMAS,
SRI.K.JOHN MATHAI,
SRI.JOSON MANAVALAN,
SRI.KURYAN THOMAS.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 06-03-2015, THE COURT ON 27-03-2015 DELIVERED THE FOLLOWING:

rs.

WP(C).No. 16865 of 2014 (G)

APPENDIX

PETITIONER'S EXHIBITS:-

EXT.P1 -	TRUE COPY OF THE NORMS DATED 17-09-2009.
EXT.P2 -	TRUE COPY OF THE CIRCULAR DATED 31-12-2010.
EXT.P3 -	TRUE COPY OF THE JUDGMENT IN WP(C).NO.1017/2010 DATED 23-05-2011.
EXT.P4 -	TRUE COPY OF THE JUDGMENT IN WA NO.818/2011 AND CONNECTED CASES DATED 19-10-2011.
EXT.P5 -	TRUE COPY OF THE JUDGMENT IN CIVIL APPEAL NOS.2784-2792/2013 DATED 02-04-2013.
EXT.P6 -	TRUE COPY OF THE REPRESENTATION DATED 10-04-2013.
EXT.P7 -	TRUE COPY OF THE JUDGMENT IN WP(C).NO. 13023/2013 DATED 24-05-2013.
EXT.P8 -	TRUE COPY OF THE COMMUNICATION DATED 18-03-2014.
EXT.P9 -	TRUE COPY OF THE NORMS DATED 06-02-2014.

RESPONDENT'S EXHIBITS:-

EXT. R1A	COPY OF THE LETTER DATED 07/10/2013 ISSUED TO THE 1ST RESPONDENT.
EXT, R1B	COPY OF THE LETTER DATED 06/01/2014 ISSUED TO THE 1ST RESPONDENT.
EXT. R1C	COPY OF THE LETTER DATED 06/02/2014 ISSUED BY THE 1ST RESPONDENT.
EXT. R1D	COPY OF THE ORDER DATED 02/12/2009 IN WP(C).NO.64268/2009 OF THE HON'BLE HIGH COURT OF ALLAHABAD.
EXT. R1E	COPY OF THE ORDER DATED 16/08/2011 OF THE HON'BLE HIGH COURT OF JUDICATURE AT MADRASS IN WP(C).NO.27357/2010 AND WP(C).NO. 1198/2011.
EXT. R1F	COPY OF THE ORDER DATED 20/09/2011 IN SBCWP NO.10441/2010 OF THE HON'BLE HIGH COURT OF RAJASTHAN.
EXT. R1G	COPY OF THE ORDER DATED 21/11/2011 IN WP(C).NO. 6820/2011 OF HON'BLE HIGH COURT OF BILASPUR.

//TRUE COPY//

rs. P.S. TO JUDGE

A.V.RAMAKRISHNA PILLAI, J

WPC No.16865 of 2014

Dated this the 27th day of March, 2015

JUDGMENT

The petitioners have approached this Court seeking the following reliefs:

> i) call for the records leading to Ext.P9 and quash the same by issuing a writ of certiorari or any other such appropriate writ, order or direction;
>
> ii) issue a writ in the nature of mandamus commanding the respondents to frame the regulations in accordance with the undertaking given before this Court and as directed by the Apex Court before grant of further retail outlets in the State of Kerala.

2. The first petitioner is an association of Petroleum Traders in the State of Kerala and the second petitioner is a petroleum retail dealer. Respondents 2 to 4 are companies fully owned by the Government of India engaged in the process of refining, supplying and distribution of petroleum products.

3. Sanction of petroleum retail outlets was done in

the State of Kerala after assessing the demand for these products. With the request from the petroleum dealers to introduce some rationale in the sanctioning of the retail outlets, Government issued Exts.P1 and P2 norms for sanction of new petroleum outlets. Alleging that the petroleum companies started flouting the norms by sanctioning retail outlets indiscriminately, writ petitions were filed and by Ext.P3 judgment, one of the writ petitions were disposed of recording the factum of a committee being set up which would look into the demands of the traders for rationalising the grant of retail outlets and directing the committee to prescribe a set of guidelines. The matter went up to the Apex court as evidenced by Exts.P4 and P5. The petitioners allege that a combined reading of Exts.P3 to P5 would show that the courts have taken note of the fact that regulations are required for the grant of petroleum outlets.

4. The petitioners point out that inordinate delay in giving effect to the Constitution of the committee constrained the petroleum dealers to file writ petitions

and by Ext.P7 judgment the companies were directed to take a decision. Refusal to comply with Ext.P7 resulted in filing of contempt petition and in order to wriggle out of the contempt proceedings, Ext.P9 norms were hurriedly issued which is not in accordance with the directions issued by the court and also not in accordance with the assurance given to the Court; it is alleged. According to the petitioners, Ext.P9 violates the various directions issued by this Court as well as the Supreme Court, which if allowed to stand will result in unfair trade practice and would not be beneficial to the traders, the consumers and the Government which own the companies. It is with this background the petitioners have come up before this Court.

5. In the counter affidavit filed by the first respondent, he has contended as follows:

The oil Marketing companies estimate the internal rate of return (IRR) which is a measure of profitability from prospective retail outlets and when expected sales potential (in litres) is enough to provide a certain IRR, under certain assumptions of cost and revenue, the retail outlet location is selected. The expected sales potential, i.e. volume norms (combined for MS and HSD) which have been worked out by the OMCs broadly are 150 KL per month from A & B cities, 150 KL per month for national Highways and 100 KLPM for C class towns/State Highways. The volume norm for rural outlets is 25/KL pm. These volume norms are expected to be reached within two years of commissioning of new retail outlets. Letters dated 7.10.2013 and 6.1.2014 received from OMCs in this regard are attached as Annexures R1(a) and R1(b) respectively.

The Oil Marketing companies are competent to take commercial decisions regarding opening of new retail outlets, keeping in view volume norms and target IRR as decided by each company. The retail outlets are opened by Oil Marketing Companies based on the marketing plan and after conducting feasibility studies with reference to volume norms and target IRR in their commercial interest and judgment. Since the Oil Marketing companies invest considerable capital resources in retail outlets, they are required to ensure that target IRR is achieved. Therefore, it is not conceivable that OMCs will indiscriminately open new outlets with no regard to their viability as they are Maharatnas (IOCL)/Navratnas (HPCL & BPCL) responsible to their shareholders and have a duty to make commercially sound judgments while making investments in new ROs. There is competition for business and market share between the three oil marketing companies. Entry of private companies has resulted in additional competition, which is expected to increase in the future. Keeping in view the market dynamics, it is necessary that the Oil Marketing Companies take their own commercial decisions for opening of new retail outlets, keeping in view their marketing plans, marketing strategy and target IRR. Thus, deciding the volume norms for opening the retail outlets is essentially a purely commercial matter which is best left to the judgment of individual OMCs keeping in mind the strategy, business interest and competitive positions.

It is further contended that the petitioners have failed to produce any evidence to show that there are shortcomings in the feasibility studies or process followed by OMCs. The petitioners are existing dealers who want to continue their monopoly of the market and do not want to face competition from the new retail outlets. No fundamental rights of the petitioners have been violated by the proposal of OMCs to set up the new retail outlets and hence, there is no justification to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India; it was contended.

It is stated that though the petitioners have prayed for issuance of a writ in the nature of mandamus commanding the respondents to frame the regulations in accordance with the undertaking given before this Court and as directed by the Apex Court before grant of further retail outlets in the State of Kerala, it is stated that it is not clear as to which undertaking is being referred by the petitioner. It is stated that a meeting was convened by the Minister, Ministry of Petroleum and Natural Gas

(MoPNG) with the All India Petroleum Traders on 18.9.2010 to look into the issue of growth of retail outlets in the country. This issue remained under consideration. In continuation, a meeting was convened by the Minister for State, MoPNG on 9.6.2011 in which it was decided that the OMCs would work out the financial parameters for opening the new retail outlets. The Minister, MoPNG approved these decisions. In the meanwhile, in pursuance to the developments in a court case wherein the petitioner was also a party, the Apex Court allowed the SLP Nos.1728-1736 of 2012 titled as *HPCL* v *Liju Reji and others* vide order dated 2.4.2013 and held that *"We find no justification for the Division Bench to upturn the judgment and order of the Single Judge dismissing the writ petition. Accordingly, the impugned judgment is set aside. However, it is observed that the guidelines framed by the High Court may be kept in view by the Central Govt. if there is need to frame guidelines with regard to establishment of retail outlets of the Oil Marketing Companies."* It is stated that Ministry of Petroleum &

Natural Gas taking into account the direction of the Apex Court in the matter has then conveyed to OMC's that the volume norms worked out by OMC's for opening of new retail outlets have been noted by the MoP&NG with the understanding that these may be subject to variation by OMCs from time to time. True copy of the letter dated 6.2.2014 is Annexure R1(c).

6. The second respondent has filed a separate counter affidavit supporting the case put forward by the other respondents justifying their action.

7. Arguments have been heard.

8. Respondents 2 to 4 which are Government companies are brought into existence for the equitable and fair distribution of petroleum products. In Ext.P3 judgment, this Court took note of the fact that a committee chaired by a high ranking officer of the Government of India is constituted to study the problem of existing petroleum. This Court was told that this committee would study the issue and come out with remedial measures. It was pointed out by the learned

senior counsel for the petitioner that Ext.P9 is not the decision of the committee as it was directed by this Court. Therefore, according to the learned senior counsel for the petitioner, Ext.P9 is a fraud on this Court.

9. The respondents, per contra, would submit that the scope of judicial review is limited with regard to the policy matters of the executive and in this case, the petitioners are seeking to quash Ext.P9 which is a policy document.

10. The learned counsel for the second respondent invited my attention to the decision of the Apex court in ***MP Oil Extraction*** v ***State of MP*** (1997) 7 SCC 592) wherein it was held that the executive authority of the State must be held to be within its competency to frame policy for the administration of the State. Unless such policy is so arbitrary as may be apparent from the face of it or unless such policy is in violation of constitutional provisions or other statutory provisions, the Courts cannot and should not step its limit and tinker with the policy decision of the executive functionary of the State.

11. The learned senior counsel for the petitioners per contra, would submit that respondents 2 to 4 are instrumentalities of State and every action of the respondents should satisfy the test of fairness. It was argued that respondents 2 to 4 cannot act as though they are private companies. According to the learned senior counsel, existing retail dealers accepted the dealership on the representation that retail outlets are allotted taking into consideration the demand for the products of the area and they invested huge amounts of money on this representation. Therefore, according to the learned senior counsel, respondents 2 to 4 cannot go back on this assurance and behave in a manner violating the assurance given. It was pointed out that retail dealers are citizens of India and respondents 2 to 4 being instrumentalities of the State, their action *vis* a *vis,* the retail dealers should pass the test of fairness. Indiscriminate grant of retail outlet without reference to the demand for the products is not only economically ill advised, but also illegal; so submitted the learned senior

counsel.

12. As rightly pointed out by the petitioners, a combined reading of Exts.P3, P4 and P5 would make it clear that this Court as well as the Apex Court took note of the fact that regulations are required for the grant of petroleum retail outlet. There cannot be indiscriminate grant of retail outlet ignoring viability. As there was inordinate delay in giving effect to constitution of the committee as submitted before this Court, the first petitioner submitted Ext.P6 representation pointing out that the existing retail petroleum dealers find it difficult even to reach break even and indiscriminate grant of fresh outlet will not be of advantage to anybody. This Court as per Ext.P7 judgment ordered the respondents to take a decision on Ext.P6. Non-compliance resulted in a contempt case. The petitioners point out that in order to wriggle out of the position the respondents found themselves in, some sort of a proceeding, was drawn up naming it as “norms” and the first petitioner was issued with a communication on 18.2.2014 informing it that the

representation stands disposed of along with such communication, a copy of so called norms was also furnished. Ext.P8 is a communication and Ext.P9 is the norms.

13. I see valid force in the submission made by the learned senior counsel for the petitioners that Ext.P9 is a proceeding drawn up in a hurry in order to meet the dead lines fixed by this Court in Ext.P4 judgment and Ext.P9 is not a decision taken by the committee stated to be set up as assured before this Court in Ext.P3 judgment.

14. As rightly submitted by the learned senior counsel, the representation did not get the attention which it deserves in view of Ext.P7 judgment of this Court. As the serious contention raised by the petitioners have not been referred to in Ext.P9, this Court feels that the matter requires reconsideration.

In the result, Exts.P8 and P9 are quashed. The respondents are directed to reconsider the issue, after affording the petitioners an opportunity of being heard, in the light of what has been stated in Ext.P7 judgment. This shall be done within a period of three months from the date of receipt of a copy of this judgment.

sd/- A.V.RAMAKRISHNA PILLAI
JUDGE

css/ **true copy**

P.S.TO JUDGE