

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.03.2015

Date of Reserving the Order	Date of Pronouncing the Order
02.03.2015	13.03.2015

Coram

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM

W.P. No.33598 of 2013

M/s.Venkateswaraa Agencies,
Rep., by its Sole Proprietor, Tmt.K.Sudha
HPC Dealer,
Madugarai Main Road,
Karikalampakkam,
Puducherry - 605 007.

... Petitioner

Vs

1. Hindustan Petroleum Corpn., Ltd.,
Chennai Retail Regional Office,
3rd Floor, Thalamuthu Natarajan Building,
8 Gandhi Irwin Road, Egmore,
Chennai - 600 008.

2. The Chief Regional Manager and
Duly Constituted Attorney,
Hindustan Petroleum Corporation Ltd.,
Chennai Retail Regional Office,
3rd Floor, Thalamuthu Natarajan Building,
8 Gandhi Irwin Road, Egmore,
Chennai - 600 008.

3. The Chief Regional Manager and
Duly Constituted Attorney,
Hindustan Petroleum Corporation Ltd.,
Trichy Retail Regional Office,
No.90, II Floor, MDSR Enclave,
Bharatidasan Road, Cantonment,
Trichy - 620 001.

... Respondents

Prayer :-Petition filed under Article 226 of the Constitution of India praying to issue Writ of Certiorari, to call for the records relating to the order dated 03.12.2013 in Ref.TRO/MDG/RET of the third respondent and quash the same.

For petitioner .. Mr.A.R.L.Sundaresan Sr. Counsel for
A.L.Ganthimathi

For Respondents .. Mr.M.Vijayan for
King & Partridge

ORDER

This Writ Petition has been filed by a dealer of the Hindustan Petroleum Corporation seeking for issuance of a Writ of Certiorari, to quash the order, dated 03.12.2013, by which the dealership agreement, dated 25.11.2004, executed in favour of the petitioner was terminated.

2. The petitioner was granted a dealership by the respondent, Hindustan Corporation Ltd., (hereinafter referred to as "respondent Corporation"). The petitioner is the owner of the site in which the Petrol Pump has been established and she has executed a lease deed in favour of the respondent Corporation in 2004 and the lease is for a period of 30 years. The dealership agreement between the petitioner and the respondent corporation was entered into on 25.11.2004, and the period of dealership is for 15 years. The petitioner's retail outlet is situated in Pondichery. The petitioner would state that they have purchased the dispensing pump from M/s.Larsen & Turbo Ltd, (L&T), as directed by the respondent Corporation and the pumps are regularly serviced by L&T. The petitioner would further state that during 2004, the petitioner brought to the notice of the respondent Corporation that the Pump display and the totalizer reading are not matching. It is stated that the respondent Corporation in turn lodged a complaint to L&T on 24.12.2004, and on the same day, the Service Engineer of L&T inspected the pump and replaced the totalizer and also issued a certificate. It is further submitted that periodically the dispensing pumps are inspected by the Inspector of Legal Metrology, Weights and Measures Department, Puducherry and stamping has been done to ensure dispensing of correct amount of fuel. It is stated that the last of such stamping was done on 12.12.2006. The petitioner is said to have lodged a complaint with the second respondent regarding the malfunctioning of Z-Line Pump and the Service Engineer of L&T is said to have inspected the pump on 09.12.2006 and rectified the mistake and the meter unit was replaced, as it was found defective and a report dated 09.12.2006, was

furnished.

3. On 12.12.2006, the officials of the respondent Corporation inspected the retail outlet and made certain observations regarding the type of nuts used in the Totalizer, which according to the petitioner is beyond the purview of the respondent Corporation, since it is maintained by L&T. The second respondent issued a show cause notice dated 29.01.2007, calling upon the petitioner to show cause as to why action as deemed fit, including the termination of the Dealership Agreement cannot be taken as provided for under Clauses 15, 16, 18, 36, 42, 55(A) and 55(K) of the Dealership Agreement. The petitioner was granted seven days time to submit its reply. The show cause notice was based on an inspection, which was conducted by the Manager-Vigilance on 12.12.2006. The petitioner submitted its reply on 14.02.2007, explaining that the Weight and Measures seals were put on 12.12.2006 and it was done immediately after the Z-Line pump was serviced by L&T and the repairs and replacement were made by the Service Engineer, who attended the same on 09.12.2006. Regarding the Hexagonal nuts, the petitioner would state that it was fixed by L&T, during service. Regarding the other allegations that free air pump equipment was not available, it was stated that due to electricity problem, it was not functioning during inspection. As regards the Tank truck retention sample, the petitioner stated that the sample was taken on the previous night at 12.00 pm., and therefore, the same was not kept properly sealed when inspection was done on the next day, at about 8.00 am. After submitting their reply, the petitioner filed a Writ Petition in W.P.No.21071 of 2007, to forbear the respondents from in any manner interfering with the running of the retail outlet and an order of interim stay was granted and the petitioner continued to run the retail outlet. Subsequently, the Writ Petition was disposed of by order dated 05.03.2013, giving liberty to the respondent Corporation to finalise the show cause notice and pass orders and till such a decision is arrived at, the respondent Corporation were directed not to stop the supply of the Petroleum products to the petitioner's retail outlet. Pursuant thereto, an Enquiry Committee came to the petitioner's place of business and conducted an enquiry on 04.06.2013. Subsequently, an opportunity of personal hearing was granted by the third respondent on 08.08.2013. Thereafter, the impugned order has been passed terminating the dealership of the retail outlets. Challenging the same, the present Writ Petition has been filed.

4. The learned Senior counsel appearing for the petitioner submitted that copy of the enquiry report submitted by the Enquiry Committee, who held the enquiry on 04.06.2013, has not been furnished to the petitioner. Further, it is submitted that the third respondent having referred to the findings of the Committee ought to have communicated the copy of the report and afforded an opportunity to the petitioner to rebut the same. Further, it is submitted that the opportunity of personal hearing was granted by an authority, who

was not competent to pass the impugned order. Further, it is submitted that in the record of the minutes of the meeting, the petitioner had clearly stated about the repairs effected by L&T and all other factual details, which have not been considered by the respondent. Further, the Senior learned counsel for the petitioner submitted that the clauses of the Dealership Agreement which have been referred in the show cause notice as well as in the impugned order, have absolutely no relationship to the allegations made against the petitioner and in this regard, the learned counsel referred to each of the clauses, which have been referred to in the impugned order. Further, it is submitted that the petitioner was not selling from the concerned dispensing unit and there is no violation of provisions of the Weights and Measures Act and therefore, petitioner's Dealership Agreement ought not to have been cancelled. Further, it is submitted that in the light of the above contentions, which have been raised by the petitioner, it is clear that there is serious violation of principles of natural justice and the petitioner need not be driven to resort to arbitration proceedings. In support of such contention, reliance has been placed on the decision of the Hon'ble Supreme Court in the case of ABL International Ltd., & Anr., vs. Export Credit Guarantee in Appeal (Civil) No.5409 of 1998, dated 18.12.2003, and Harbanslal Sahnia & Anr., vs. Indian Oil Corporation Ltd., & Ors., reported in 2003 (1) CTC 189, and the decisions of the Hon'ble Division Bench of this Court in the case of The Indian Oil Corporation Ltd., vs. Bommai Kadhivelu in W.A.No.731 of 2006, and in the case of M/s.Hindustan Petroleum Corporation Ltd., vs. Geetha Kasturirangan in W.A.No.1250 of 2008, dated 11.03.2010.

5. The learned counsel appearing for the respondent Corporation submitted that the Dealership Agreement, dated 25.11.2004, is a non-statutory contract between the petitioner and the respondent Corporation and the termination was done in accordance with the covenants in the agreement and if the petitioner is aggrieved, they are entitled to invoke clause 66 of the agreement, which provides for referring the dispute to Arbitration in accordance with the Arbitration and Conciliation Act, 1996. Therefore, it is submitted that the Writ Petition is not maintainable. In this regard, reliance has been placed on the decision of the Hon'ble Supreme Court in the case of Sanjanam Wig(Ms)., vs. Hindustan Petroleum Corpn., Ltd., reported in (2005) 8 SCC 242, and Empire Jute Company Limited & Ors., vs. Jute Corporation of India Limited & Anr., reported in (2007) 14 SCC 680 and the decision of the Hon'ble Division Bench of this Court in the case of The Chief Regional Manager, Hindustan Petroleum Corporation Limited, vs. M/s.K.M.Batchu and Company, in W.A.No.1215 of 2010, dated 26.04.2013. It is submitted that the dispensing pumps at the retail outlet belongs to the respondent Corporation and there is no direction issued to the petitioner to purchase the pump from L&T. In this regard clause 13 of the second Schedule of the Dealership Agreement was referred to. Further, it is submitted that

the termination of Dealership was pursuant to the inspection made on 12.12.2006 and it has no relevance to the service done on 24.12.2004 and the petitioner is trying to mix up unnecessary details in order to confuse the matter. It is submitted that on 12.12.2006, the Manager-Vigilance South Zone conducted an inspection of the retail outlet and found the following irregularities:-

- (i) W&M Seals were not found available in the metering unit of MS DU L&T Sr.No.342.
- (ii) L&T Electronic MS DU Sr.No.5023 totalizer seal's rectangular nuts were replaced by hexagonal nuts.
- (iii) Free Air Service not available.
- (iv) TT (Tank Truck Retention) Retention sample not available.

6. Further, it is submitted that during the course of inspection, glaring violations were noticed such as Weights and Measures seals were not found available in the metering unit of MS DU L&T Sr.No.342; the nuts in dispensing unit No.5203, were replaced by hexagonal one instead of rectangular one clearly suggesting pilferage or adulteration; and Tank Truck Retention samples were not sealed. It is submitted that the sale of petroleum products from the outlet was suspended only after the personnel from Legal Metrology, Weights and Measures Department inspected the outlet in the evening. Further, it is submitted that the petitioner was operating the unit without stamping by the Legal Metrology Department till the inspection done on 12.12.2006 and therefore, the petitioner could not have continued the same without stamping. This serious misconduct came to light only at the time of inspection. It is further submitted that the dispensing unit No.342, was not working properly, since 01.11.2006, and inspite of the same without having any Weights and Measures Stamping, fuel was supplied to the consumers from the said unit. Further, it is submitted that the petitioner had only lodged a complaint regarding the L&T Dispensing Unit No.342 and not anything about dispensing unit No.5203 and it was in Unit No.5203, the rectangular nuts were replaced with hexagonal nuts. Further, it was found that free air pump was not working and therefore, it is submitted that violations are very serious and hence, show cause notice was issued and after affording full and effective opportunity to the petitioner, the respondent passed the impugned order. Further, the learned counsel referred to the counter affidavit wherein they have stated about how the husband of the petitioner was unwilling to receive the termination order owing to which it was pasted in the front glass of the sale building and the respondent Corporation had to take over the retail outlet after recording the Panchanama Report. It is further submitted that the respondent Corporation has appointed Pondicherry Agro Products Food and Civil Supplies Corporation as an ad-hoc dealer on 09.12.2013 and this was brought to the notice of this Court on 10.12.2013. However, on the strength of the interim order of status-quo granted by this Court, the petitioner along with henchmen, prevented the respondent Corporation from running the retail outlet through the adhoc dealer.

Further, it is submitted that the petitioner has not raised any contention in the Writ Petition that there was violation of principles of natural justice. Therefore, if the petitioner is aggrieved by the termination, he should necessarily resort to arbitration as provided under the Dealership Agreement. With the above submissions, the learned counsel sought to sustain the impugned order.

7. In reply, the learned Senior counsel appearing for the petitioner referred to the grounds raised in the Writ Petition and submitted that in more than one place, the petitioner has pointed out about the violation of principles of natural justice and therefore, the petitioner should not be relegated to the Arbitration proceedings.

8. Heard Mr.A.R.L.Sundaresan, learned Senior counsel assisted by M/s.A.L.Ganthimathi, learned counsel appearing for the petitioner, Mr.M.Vijayan, learned counsel appearing for the respondent Corporation and perused the materials placed on record.

9. The first question to be considered in the instant case is whether the Writ Petition is maintainable in the light of the binding of the Arbitration agreement between the petitioner and the respondent Corporation as contained in the Dealership Agreement. Admittedly, the contract of Dealership between the petitioner and the respondent Corporation is a non-statutory contract and merely because the respondent Corporation is a Government of India Undertaking, it will not change the colour and character of the contract and it remains to be a non-statutory contract. In such circumstances, the normal corollary that follows is that the party should abide by the terms and conditions of such contract. The order of termination of Dealership passed by the respondent Corporation is admittedly, well within the powers of the respondent Corporation as stipulated under the Dealership Agreement. Whether the order of termination was justified or not should be adjudicated in the manner provided for under the contract. If the above principle is applied, the petitioner has to necessarily invoke the arbitration clause under clause 66 of the Dealership Agreement, which is very widely couched. The reason for bye-passing such a remedy is by contending that there has been violation of principles of natural justice, there has been totally non-application of mind and the person who afforded an opportunity of personal hearing, is not competent to decide the matter and finally, the report of the Enquiry Committee which conducted the enquiry on 06.06.2013, was not communicated to the petitioner. On these grounds, the learned Senior counsel submitted that the petitioner should not be compelled to avail the alternate remedy. In support of such contention, the learned counsel relied on the decisions of the Hon'ble Supreme Court and the Hon'ble Division Bench of this Court referred above.

10. The legal principle deducible from these decisions and with particular reference to the decision in the case of Harbanslal Sahnia & Anr., vs. IOC., & Ors., (supra), are that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. It is further pointed out that in an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ 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 and is challenged. In this regard reference has been made to the decision of the Hon'ble Supreme Court in the case of Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors., reported in (1998) 8 SCC 11. The decision in the case of Harbanslal Sahnia & Anr., vs. IOC., & Ors., (supra), was taken note of by the Hon'ble Supreme Court in the case of Sanjanam Wig(Ms)., vs. Hindustan Petroleum Corpn., Ltd., (supra), and after referring to the several decisions on the said point including the decision in the case of Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and Ors., (Supra), it was pointed out that access to justice by way of public law remedy would not be denied when a lis involves public law character and when the forum chosen by the parties would not be in a position to grant appropriate relief. It was further pointed out by that while entertaining a writ petition even in such a case, the Court may not lose sight of the fact that if a serious disputed question of fact is involved arising out of a contract qua contract, ordinarily a writ petition would not be entertained. This legal principle has not been consistently reiterated by the Hon'ble Supreme Court as well as this Court. Therefore, whether the Writ Petition would fall within any one of the contingencies which would justify a party to invoke the writ jurisdiction entirely depends on the facts of the each case. Therefore, without examining the facts, it cannot be stated as to whether the petitioner was justified in by-passing the Arbitration remedy provided under the contract. Therefore, I proceed to consider the factual matrix only to the extent to consider as to whether the Writ Petition is maintainable and whether the petitioner shall be entitled to canvass the correctness of the termination order in this Writ Petition.

11. The complaint made by the petitioner alleging violation of principles of natural justice is primarily two fold. Firstly by contending that a Committee enquired into the matter after the earlier Writ Petition in W.P.No.21071 of 2007, was disposed of on 05.03.2013, and the report of the Committee was not furnished to the petitioner. Secondly, it is contended that a personal hearing was conducted after the Committee's report and the person who conducted the personal hearing is not the competent person to pass the impugned order; therefore, there is a serious violation of principles of natural justice.

12. The petitioner was issued a show cause notice on 29.01.2007, pursuant to an inspection conducted by the Manager-Vigilance of the respondent Corporation on 12.12.2006 at about 8.00 am. The Vigilance found that the Calibration Knob and Weights and Measures Seal on MS Pump of L&T Make, 'Z' Line Serial No.342 Unit was absent. It was further found that the totalizer seal rectangular nuts of L&T Electronic Pump Serial No.5023 were replaced by hexagonal nuts. The other two violations being free air was not provided and Tank Truck Retention samples were not available. Therefore, it was stated that the petitioner had violated the various clauses in the Dealership Agreement. The petitioner was granted opportunity to submit his explanation. In the petitioner's explanation dated 14.02.2007, the petitioner has virtually admitted that the dispensing pump 342 was stamped only on 12.12.2006. Regarding Hexagonal nuts, the petitioner states that it was fixed by L&T during service. The other two allegations were also explained stating that as there was an electrical problem, the Free Air Pump equipment was not functioning. The Tank Truck retention samples were not sealed, since delivery was effected on the previous day night at about 12.00 P.M. Further, the petitioner stated that they are very sorry for the above problems and assured that in future such type of mistakes will not happen and requested for them to be excused. Immediately thereafter, the petitioner moved this Court and filed the Writ Petition in W.P.No.21071 of 2007, stating that the respondent Corporation should not stop supply of Petroleum Products to the petitioner's retail outlet and the petitioner also obtained an order of stay. Thus, it appears that further proceedings in the show cause notice were kept in abeyance from 2007 onwards and the petitioner continued to run their outlet on the strength of the interim order granted in the earlier Writ Petition. Ultimately, the Writ Petition was disposed of by order dated 05.03.2013, stating that the impugned proceedings is only a show cause notice and therefore, the Court was not inclined to interfere with the same and the respondent Corporation was permitted to proceed further in the matter based on the reply submitted by the petitioner and liberty to take a decision after conducting proper enquiry by following due process of law and after giving a reasonable opportunity to the petitioner. Till such decision is arrived at by the respondent Corporation, the respondents were directed not to stop the supply of Petroleum Products to the petitioner's retail outlet. Therefore, the procedure adopted by the respondent Corporation after the Writ Petition was disposed of on 05.03.2013, is based on the direction issued by this Court. In order to comply with the direction issued by this Court, an Enquiry Committee consisting of three officers visited the petitioner's retail outlet on 06.06.2013, in order to give an opportunity to the petitioner to appraise the officials with regard to the irregularities and violations, which have been pointed out in the show cause notice. Thus the Committee consisting of three Senior Officers of the respondent Corporation went to the petitioner's retail outlet in order to ascertain the

views of the petitioner. This was to ensure compliance of principles of natural justice, as per the directions of this Court.

13. The record of the minutes of the meeting of the Enquiry Committee has been filed in the typed set of papers and it is a typed copy from which it is seen that the petitioner as well as the three officers had signed the minutes in the presence of two witnesses. Therefore, the plea raised by the petitioner that she is unaware about what transpired before the Committee is a plea to be rejected. In order to provide one more opportunity, the General Manager afforded an opportunity of personal hearing on 08.08.2013, in which it appears that the petitioner has admitted the violations.

14. In fact, the learned counsel appearing for the respondent Corporation referred to the reply given by the petitioner to the show cause notice dated 14.02.2007 and stated that the petitioner had admitted the guilt and stated that they are very sorry for the problems which have happened and assured that in future such type of mistakes will not happen.

15. Be that as it may, the third respondent who passed the impugned order was one of the Officers, who held the enquiry in the petitioner's retail outlet along with two other Officers. Therefore, the person, who passed the impugned order, heard the petitioner in person. The minutes of the meeting were recorded and the petitioner has also signed in those minutes. Thus, the petitioner has been afforded full and effective opportunity to put forth their plea.

16. It is to be noted that the procedure adopted by the respondent Corporation is not as spelt out under the Dealership Agreement. The departure from the procedure as per the agreement was because the petitioner had filed a Writ Petition in W.P.No.21071 of 2007, in which an order of interim stay was granted in 2007, based on which supplies were being granted and ultimately, when the Writ Petition was disposed of in 2013, by order dated 05.03.2013, certain directions were issued to the respondent Corporation. Infact, this Court while considering the same, found it inappropriate to interfere with the show cause notice and permitted the respondent Corporation to proceed further and take a decision after conducting proper enquiry following due process of law and giving a reasonable opportunity to the petitioner. The three directives issued by this Court has been complied with, since enquiry was conducted by not one officer, but by three officers and one among them is the Officer, who passed the impugned order. Therefore, the enquiry conducted was proper and procedure followed, is as per directions of this Court was complied with and the petitioner has been given reasonable opportunity.

17. In such circumstances, the petitioner's case does not fall

within one of the contingencies, which has been pointed out by the Hon'ble Supreme Court which would be a justifiable ground to bye-pass the alternate remedy available under the Dealership Agreement. Furthermore, there is one serious disputed question of fact, which alone would be sufficient to relegate the petitioner to the remedy of the Arbitration. The findings against the petitioner is that in the dispensing unit 5023, the rectangular nuts were replaced by hexagonal nuts. This according to the respondent Corporation is a serious violation as it would directly affect the amount of fuel dispensed from the said unit. According to the petitioner, L&T replaced the Hexagonal nuts with all rectangular nuts. In fact, at the first instance while submitting reply to the show cause notice on 14.02.2007, the petitioner did not take a categorical stand that L&T was the person, who fixed the Hexagonal nuts, but had taken a stand that Hexagonal nuts were temporarily fixed by L&T during service. Therefore, this issue is a serious disputed question of fact, which has to be gone into and the same cannot be decided in a Writ Petition. Equally so, the other allegation regarding the non-stamping of other dispensing unit 342. Admittedly, stamping was done only on 12.12.2006, the date of inspection. In terms of the agreement, the dispensing unit could not have been used without the officials stamping of the Legal Metrology Department. In reply to the show cause notice, a plea has been raised that the dispensing unit 342 was kept aside for service. Thereby, it appears, the petitioner would state that they were not dispensing fuel from the said unit. This again is a serious disputed question, which cannot be adjudicated in a Writ Petition.

18. In the light of the above discussion, this Court has no hesitation to hold that the petitioner has not made out any case to bring their matter within the contingencies, which are pointed out by the various decisions of the Hon'ble Supreme Court and this Hon'ble Court and where the Dealer would be entitled to bye-pass the remedy of Arbitration available under the contract.

19. In the result, the Writ Petition is held to be not maintainable and accordingly, the same is dismissed. However, it is open to the petitioner to invoke the Arbitration clause and in such an event, the Arbitration proceedings shall be proceeded in accordance with law, uninfluenced by any observations made in this order. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Asst. Registrar.

/true copy/

Sub Asst. Registrar.

pbn.

To

1. Hindustan Petroleum Corpn., Ltd.,
Chennai Retail Regional Office,
3rd Floor, Thalamuthu Natarajan Building,
8 Gandhi Irwin Road, Egmore,
Chennai - 600 008.
2. The Chief Regional Manager and
Duly Constituted Attorney,
Hindustan Petroleum Corporation Ltd.,
Chennai Retail Regional Office,
3rd Floor, Thalamuthu Natarajan Building,
8 Gandhi Irwin Road, Egmore,
Chennai - 600 008.
3. The Chief Regional Manager and
Duly Constituted Attorney,
Hindustan Petroleum Corporation Ltd.,
Trichy Retail Regional Office,
No.90, II Floor, MDSR Enclave,
Bharatidasan Road, Cantonment,
Trichy - 620 001.

C.C. to Mr.King, Partridge, Advocate, .Sr.No.14469

C.C. to Mr.AL.Gandhimathi, Advocate, .Sr.No.1459

Pre-Delivery O r d e r in
W.P. No.33598 of 2013

NM(CO)
RRI (31.03.2015)

सत्यमेव जयते

WEB COPY