

THE HON'BLE SRI JUSTICE A. RAJASHEKER REDDY

WRIT PETITION No.40993 OF 2014

ORDER:

This Writ Petition is filed seeking to call for the records relating to termination order, dated 12.12.2014, passed by respondent No.1 and to quash the same as illegal and arbitrary.

2. The case of the petitioner is that the respondent – Corporation appointed him as a dealer of retail outlet situated at Edulabad Village under Kisan Seva Kendra (KSK) category as per the Letter of Appointment issued on 13.03.2013. In pursuance of the same, he entered into a Dealership Agreement with the respondent – Corporation on 04.04.2013. Thereafter, the retail vending machines and other equipments were got erected at the KSK outlet station on 03.05.2013 by Gilbarco-Veeder-Root (GVR). However, as there was problem of excess delivery of fuel, a complaint was made to the Weights and Measurements Department, the respondent - Corporation and also to the GVR. The same was recalibrated on 17.06.2013 and thereafter, as MS Nozzle problem had arisen due to leakage, the same was replaced with new one on 16.09.2013. Thereafter, as there was defect in the control card in reading the numbers for MS and HSD, on intimation of the petitioner, the said defect was attended to by GVR and control card was replaced on 01.11.2013. Again, as there was a problem with keypad, a complaint was given on 19.12.2013 to L & T Gilbarco and the problem was

resolved on the same day by the respondent – Corporation as well as GVR. Thereafter, the petitioner carried on business up to 09.01.2014. Subsequently, as the pump has been delivering excess fuel during operation, the same was attended to by GVR, the respondent – Corporation along with Weights and Measurements Legal Metrology Department and the same was certified by the Legal Metrology, Hyderabad, who issued a Certificate, dated 19.01.2014. As things stood thus, on 04.02.2014, one person claiming to be a Deputy Manager (RS), Hyderabad, RR-II, visited the plant and on conducting inspection, observed certain irregularities in the petitioner's retail outlet, which are as follows:

Sr.No.	Observation	Violation as per clause No. of MDG 2012
1.	Positive Stock variation beyond limits, MS 7363 Liters and HSD 1898 Liters.	5.1.11
2.	GVR DU with Sr.No.2013000812 was in use without calibration from 21.12.2014 to 06.01.2014	5.1.12 (v)
3.	Non provision of FREE AIR facility	5.1.14

The said Deputy Manager also collected samples of MS as well as HSD from the retail outlet for sending the same to the lab testing and during that time, as the petitioner was not present, the office boy was forced to affix his signatures on the Report. Later, the samples were proved to be genuine and the copy of the Report was received by the petitioner along with show-cause notice. The petitioner has offered his explanation to the said notice on 12.02.2014 and 17.02.2014,

but the respondents, without considering the explanation, issued another show-cause notice, dated 24.02.2014, along with enclosures. As there was no action or any intimation on the explanation offered, the petitioner filed W.P.No.13928 of 2014, which was disposed of by this Court directing the respondents therein to consider the explanation of the petitioner, dated 12.02.2014, and pass appropriate orders preferably within a period of four weeks from the date of receipt of a copy of the order. Thereafter, hearing notice, dated 04.07.2014, was issued and the respondent – Corporation conducted personal hearing on 11.07.2014. While so, petitioner was issued letter, dated 16.12.2014, along with impugned termination order, dated 12.12.2014, whereby his dealership is stated to have been terminated. Aggrieved by the same, the present Writ Petition is filed.

3. Counter affidavit is filed on behalf of the respondents admitting about the grant of dealership by way of Dealership Agreement, dated 04.04.2013, in favour of the petitioner. It is stated that the cause of action arises out of the contract settled between the parties and hence the termination order was within the four corners of the contract settled under the Dealership Agreement, dated 04.04.2013, and also in terms of the Marketing Discipline Guidelines, 2012 (MDG) and as such, the Writ Petition cannot be entertained exercising the jurisdiction under Article 226 of the Constitution of India. It is also stated that there is no violation of statutory Rules or Regulations and the contract between the petitioner and respondent – Corporation is a private contract and is not

within the domain of public law. It is also stated that any dispute between the petitioner and respondent – Corporation under the Dealership Agreement shall be adjudicated by way of arbitration only, which is covered under Clause 62 of the Dealership Agreement and on that ground also the Writ Petition is liable to be dismissed for not exhausting the remedy available under the agreement. It is also admitted that the Weights and Measurement Department has recalibrated the dispensing units on 17.06.2013, but it is stated that when the officer of respondent – Corporation inspected the petitioner's retail outlet on 04.02.2014, he found that there was positive stock variation beyond the limits i.e., in case of petrol 7363 liters and in case of diesel 1898 liters; that one of the dispensing unit was used without calibration from 21.12.2013 to 06.01.2014 and that compulsory free air facility was not made available to the general public, which were in violation of Clause Nos.5.1.11, 5.1.12 (v) and 5.1.14 of MDG. The respondents denied that the petitioner filed detailed explanation on 12.02.2014 in response to the show-cause notice and that the signature of the petitioner or his employee was obtained on the blank letter head of the outlet. It is stated that the explanation was filed on 18.02.2014 and a detailed show-cause notice was issued on 24.02.2014 enclosing Inspection Report, dated 04.02.2014, and giving 15 days time to the petitioner to submit his explanation and pursuant to the same, petitioner submitted his reply on 07.03.2014. It is also admitted that as per Clause 8.5.8, hearing shall take place within 45 days from

the date of show-cause notice, but as the matter could not be disposed of within 45 days, petitioner filed W.P.No.13928 of 2014, which was disposed of directing the respondent – Corporation to consider the explanation of the petitioner, dated 12.02.2014, and pursuant to the same, further proceedings were initiated and the petitioner was provided personal hearing on 11.07.2014 and after appreciating the evidence produced by the petitioner, the impugned order was passed.

4. Learned counsel for the petitioner submits that, admittedly, inspection took place on 04.02.2014 and violations of MDG were noted, which, according to the respondents, are major and minor irregularities falling under Clause 8.3 and Clause 8.4 of the MDG, but the impugned order was passed terminating the dealership on the ground that the first and second irregularities are critical irregularities under Clause 8.2 (vi). When the show-cause notice was issued stating that the petitioner has violated the MDG, which fall under major and minor irregularities, the respondent – Corporation ought not to have passed the impugned order terminating the dealership of the petitioner stating that two of the irregularities found were critical irregularities and the same is in violation of principles of natural justice. He also submits that the respondents cannot go beyond the allegations made in the show-cause notice. He further submits that the petitioner was asked to submit explanation to the show-cause notices, dated 04.02.2014 and 24.02.2014,

wherein the irregularities were shown as major and minor irregularities, which do not entail in termination of dealership at first instance. He further submits that even the Weights and Measurement Department inspected the petitioner's outlet on 19.01.2014 and issued a Certificate. He also submits that personal hearing has to be conducted within 45 days from the date of issuing show-cause notice, but the personal hearing notice was issued on 04.07.2014, which is in violation of MDG. In support of his submissions, the learned counsel has placed reliance on **Gorkha Security Services v. Government (NCT of Delhi) and others**^[1], **Comptroller and Auditor-General of India, Gian Prakash, New Delhi and another v. K.S. Jagannathan and another**^[2] and **Ram Lal Agarwal v. Indian Oil Corporation Ltd., New Delhi and others**^[3].

5. On the other hand, learned Standing Counsel, while reiterating the submissions made in the counter, stated that the Writ Petition cannot be entertained because the dispute is under a contract and since the submission of reply, dated 17.02.2014, and the respondents taking signatures on blank papers are denied, which are disputed questions of facts, the same cannot be decided by exercising the power under Article 226 of the Constitution of India. In support of his contentions, he relied on the decisions of the Honourable Supreme Court in **Ms/. Titagarh Paper Mills Ltd. v. Orissa State Electricity Board and another**^[4], **Rajasthan State**

Industrial Development and Investment Corporation and another v. Diamond and Gem Development Corporation Limited and another^[5] and Empire Jute Company Limited and others v. Jute Corporation of India Limited and another^[6].

6. Basing on the rival contentions, it is to be seen whether the Writ Petition is maintainable in respect of the disputes have arisen under the Dealership Agreement, dated 04.04.2013, and whether the impugned order of termination of dealership of the petitioner is liable to be set aside?

Maintainability of the Writ Petition:

7. It is not in dispute that the dealership granted to the petitioner is governed by the terms of contract and Clause 62 of the Dealership Agreement provides for resolution of disputes by way of arbitration. The various clauses of the contract specifically deal with misconduct and the consequential action, which is also found in MDG. As far as maintainability of writ petition is concerned, the issue is no longer *res integra* since this Court while considering the similar issue in **Ram Lal Agarwal's** case (supra 3), by relying on several judgments of the Honourable Supreme Court and this Court held thus:

“12. The dealership granted to petitioner is governed by terms of contract. Clause 65 of the contract provides for resolution of disputes through medium of arbitration.

13. Though various clauses of the contract are

referred to in the operative portion of the impugned order, all those clauses deal with the generality of obligations of parties, but do not deal specifically with reference to misconduct and consequential action. The misconduct and the consequential action is codified in MDG.

14. Arbitration clause is provided in dealership agreement. Whereas termination is based on violation of clauses in MDG. MDG is not part of dealership contract. It is independent.

15. In *Union of India's* case (supra), Supreme Court held as under:

“Apart from the above, even on the question of maintainability of the writ petition on account of the arbitration clause included in the agreement between the parties, it is now well established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The various decisions cited by Mr. *Chakraborty* would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution.”

16. On the question of maintainability of writ petition against termination of a petroleum retail outlet notwithstanding an arbitration clause was considered by a Bench of two Judges of this Court in WA No.318 of 2011. This Court held that writ petition is maintainable.

17. In WP Nos.12355 of 2007 and 11931 of 2009, learned Single Judge of this Court, following the decision in WA No.318 of 2011, similar objection of maintainability of writ petition in view of

availability of alternative remedy by way of arbitration was rejected. Decision of learned Single Judge was upheld by Bench of two learned Judges in WA No.517 of 2013. SLP No.22481 of 2013 against WA No.517 of 2013 was dismissed by Supreme Court by order dated 25.7.2013. Following the decision in WA No.318 of 2011, WP No.20350 of 2010 was entertained rejecting the contention of alternative remedy. These writ petitions dealt with termination of petroleum outlets.

18. In M.D., H.S.I.D.C.'s case (supra), Supreme Court held as under:

"It may be true that ordinarily in a matter of enforcement of a contract *qua* contract, a writ Court shall not exercise its jurisdiction under Article 226 of the Constitution of India. But, it is also trite that where the action of a State is violative of Article 14 of the Constitution of India as being wholly unfair and unreasonable, the writ Court would not hesitate to grant relief in favour of a person, where both law and equity demands that such relief should be granted."

19. On review of case law including decisions in *ABL International Ltd.'s* case (supra), and *M/s. Karnataka State Forest Industries Corporation's* case (supra), Supreme Court held as under:

"However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the Court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power (See *Whirlpool Corpn. v. Registrar of Trade Marks*, (1998) 8 SCC 1 = 1998 (6) ALD (S.C.S.N.) 20). And this plenary right of the High Court to issue a prerogative writ will not

normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise and the said jurisdiction.”

20. The principle deduceable from the decisions cited by learned Standing Counsel are, that if an arbitration clause is incorporated in contract the same should be treated as an effective alternative remedy; that in matters which do not involve public law element, writ petition should not be entertained; and that when there are some disputed question of fact involved, writ petition under Article 226 of the Constitution of India is not the effective remedy as writ Court cannot go into disputed question of fact. However, in all those decisions it is also held that there are no fetters imposed on a writ Court under Article 226 of the Constitution of India and writ Court is vested with wide discretion and entertaining the writ petition even on disputed questions of act, in contract matters and even when alternative remedy is available depends on facts in each case. In the facts of this case, the decisions relied on by the learned Standing Counsel do not come to his aid through the writ petition at the threshold on the ground of maintainability.

21. The petitioner challenges the termination of dealership on the grounds of violation of procedural safeguards and relevancy of the existence of double gear in the dispensing unit. The contentions urged are based on settled principles of law. Consideration of facts of the case are only to analyse the contentions. There are no serious disputed questions of fact requiring consideration of the contentions.

22. Thus, in the facts of this case, petitioner cannot be non-suited on the ground of availability of

alternative remedy of arbitration and that there are disputed questions of fact. Following the principles enunciated in the precedents referred to above, the objection on maintainability of writ petition is rejected and the point is answered in favour of petitioner.”

Whether the impugned order is liable to be set aside:

8. It is true that this Court cannot adjudicate upon the disputed questions of fact, but in the present case, the main contention of the learned counsel for petitioner is that the notices, dated 04.02.2014 and 24.02.2014, are issued describing the irregularities committed by the petitioner as major and minor irregularities, whereas the termination order was passed stating that the irregularities committed by the petitioner were critical irregularities, which appears to be beyond the show-cause notices, which is in violation of principles of natural justice. This Court is not considering other disputed questions of fact except to the above said fact, which is admitted position.

9. Notice, dated 04.02.2014, reads thus:

“ During the RO inspection the following irregularities are observed.

Sr. No.	Observation	Violation as per clause No. of MDG 2012
1	Positive Stock variation beyond limits, MS 7363 Litres and HSD 1898 Litres.	5.1.11

2	GVR DU with Sr.No.2013000812 was in use without calibration from 21.12.2014 to 06.01.2014.	5.1.12(v)
3	Non Provision of FREE AIR facility	5.1.14

In view of Sr No.1, you are advised to stop sales of MS and HSD till further communication. DU totaliser readings (MS:24770 HSD: 43435).

Also you are advised to give explanation for the above irregularities within 15 days from the date of receipt of this letter.”

10. Notice, dated 24.02.2014, reads thus:

“1. We refer to the Dealership Agreement 04.04.2013 executed by yourself with the Corporation for the Retail Outlet Dealership at Edulabad, Ranga Reddy district as a sole proprietorship under the name and style of M/S Edulabad Filling Station. You are also aware of the Marketing Discipline Guidelines effective 08.01.2013 applicable to dealers of the oil Industry.

2. Please refer to the inspection carried out at your retail outlet on 04.02.2014 by Dy. Manager (Retail-Sales)/ Hyd/RR-II wherein the following irregularities were observed:

- a) Positive stock variation beyond permissible limits, MS 7363 litres and HSD 1898 liters.
- b) GVR Du with Sr. No. 2013000812 was in use without calibration from 21.12.2013 to 06.01.2014.
- c) Non-provision of Free air facility.

The inspection report dated 04.02.2014 is enclosed as Annexure-I. In view of the irregularity detected by the Field Officer as per Sr. no 2(a), sales and supplies were suspended from all the DUs in line with provisions of MDG 2012 (refer chapter 5 under clause 5.1.11). Samples were drawn from MS and HSD tanks and sent for testing.

Tank Lorry samples of last load drawn by you were collected for onward submission to lab for 3 TIER SAMPLING.

Tank Lorry samples of second last load could not be collected as the same were not available.

All the above samples were submitted to Laboratory and it was found the RO nozzle samples meets specifications – MS Clinical and RON, HSD Clinical. MS tank Lorry Sample of Last load meets specifications of clinical test. HSD tank lorry sample of last load was rejected as the container though labelled HSD, actual content was that of MS. Also MS tank lorry sample for RON test was rejected as the container though labeled MS contains HSD.

Copies of Test reports are enclosed as Annexure-II.

The irregularity detected in 2 (a) is a major irregularity (Refer chapter 8 Clause 8.3(iv))

3. Point no 2 (b) is a case of major irregularity and to be read with clause no.5.1.12(v). As per the provisions of the same, a dealer is required to maintain various records which include the following: (V): Selling license, Explosive license and such other licenses which are needed for continued operation of the RO. Absence of Weights & Measures calibration certificate in the interim period from 21.12.2013 to 06.01.2014 is a case of major irregularity.

4. Irregularity mentioned in 2 (c) is an instance of minor irregularity and to be read with clause no.8.4. (iii) of provisions of MDG 2012.

Therefore, you are hereby given fifteen days time from the date of receipt of this show cause notice, to submit your reply along with all documents available, in support of the reply, to state why you are not liable for appropriate action for breach of the terms and conditions of the Dealership agreement and the Marketing Discipline

Guidelines, failing which it will be deemed that you have no reply to be submitted and appropriate orders shall be passed.”

11. A reading of the aforesaid two notices goes to show that the irregularities mentioned at Sl.Nos.1 and 2 in show-cause notice, dated 04.02.2014, and clauses ‘a’ and ‘b’ of show-cause notice, dated 24.02.2014, fall under major irregularities in terms of chapter 8 clauses 8.3 (iv) and 8.3 (v) of MDG and so far as the irregularity mentioned at Sl.No.3 of show-cause notice, dated 04.02.2014, and clause ‘c’ of show-cause notice, dated 24.02.2014, is concerned, the same falls under minor irregularity in terms of clause 8.4 (iii) of MDG. When that is an admitted position, the impugned order was passed on the ground that petitioner committed critical irregularities as per clauses 8.2 (ii) and 8.2 (vi) without putting the petitioner on notice stating that the alleged irregularities stated to have been committed by him fall under critical irregularities, which is beyond the show-cause notices issued by respondent - Corporation. Further, in chapter 8 of the MDG, the irregularities are specifically categorized under clauses 8.2, 8.3 and 8.4. and the punishment thereof is also provided under the said clauses. As per chapter 8 of MDG, in respect of the major irregularities, termination is not the punishment if the irregularity is committed for the first time. In this case, admittedly, it is first irregularity committed. As such, termination of dealership is not envisaged. Only for the critical irregularities specified in clause 8.2 of MDG, termination of dealership can be imposed at first instance. In the counter it

is mentioned that during the personal hearing petitioner was made aware that the irregularity committed by him falls under critical irregularity, which is in violation of principles of natural justice as the same is beyond the show – cause notice. Thus, on this ground, the impugned order is liable to be set aside.

12. In **Gorkha Security Services** case (supra 1), the Honourable Supreme Court held thus:

“21. The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show-cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is in the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained. When it comes to blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.

22. The High Court has simply stated that the purpose of show-cause notice is primarily to enable the noticee to meet the grounds on which the action is proposed against him. No doubt, the High Court is justified to this extent. However, it is equally important to mention as to what would be the consequence if the noticee does not satisfactorily meet the grounds on which an action is proposed. To put it otherwise, we are of the

opinion that in order to fulfil the requirements of principles of natural justice, a show-cause notice should meet the following two requirements viz:

(i) The material/grounds to be stated which according to the department necessitates an action;

(ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit.”

13. Already petitioner suffered punishment of suspension of sales from the date of termination i.e., more than the period prescribed for major irregularity under clause 8.3 of MDG. The only punishment that can be imposed under clause 8.4 of MDG for minor irregularity is warning – cum – guidance letter in the first instance, which respondent – Corporation is entitled to issue.

14. In view of above facts and circumstances of the case, the Writ Petition is allowed setting aside the impugned order, dated 12.12.2014 by taking into account the punishment already suffered.

15. Miscellaneous Petitions, if any, pending in this Writ Petition, shall stand closed. No costs.

REDDY, J

April 26, 2016
MD

A. RAJASHEKER

[\[1\]](#) (2014) 9 SCC 105

[\[2\]](#) (1986) 2 SCC 679

[\[3\]](#) 2014 (4) ALD 139

[\[4\]](#) (1975) 2 SCC 436

[\[5\]](#) (2013) 5 SCC 470

[\[6\]](#) (2007) 14 SCC 680