

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP No.11901 of 2014
Date of Decision: 04.03.2016

M/s Allied Agencies

. . . .Petitioner

Versus

Union of India and others

. . . . Respondents

CORAM: HON'BLE MR.JUSTICE RAKESH KUMAR JAIN

Present: Mr.Rajiv Anand, Advocate,
for the petitioner.

None for respondent No.1.

Mr. Raman Sharma, Advocate,
for respondents No.2 to 4.

RAKESH KUMAR JAIN, J. (ORAL)

The question involved in this writ petition is “as to whether on the expiry of the term of the contract and with the execution of another contract, without there being any change in the terms and conditions, would it be a case of ‘novation of contract’?”.

Shorn of unnecessary details, the brief facts are that the LPG Agency was allotted to the father-in-law of the petitioner in the year 1967 and after his death it devolved upon her husband and after his death, an agreement was entered into between Hindustan Petroleum Corporation Limited (for short ‘the Corporation’) and the petitioner on 3.3.2004 [Ist agreement] for a period of 10 years. Pursuant to that, the petitioner continued as a dealer of the Corporation. However, during this period, three inspections were made by the respondents. The Ist inspection was held on 17.12.2010 in which a penalty of an amount of ₹43,336.30/- was ordered to be recovered. The IInd inspection was held on 9.1.2012 in which the

petitioner was ordered to pay an amount of ₹34,90,450/- (recovery at penal tariff for 19 kg cylinder @ ₹2550/- per cylinder for 1359 cylinders + fine of ₹25000/-). The IIIrd inspection was held between 27.11.2012 to 2.12.2012. However, this time the agency of the petitioner was terminated, which came into being vide contract dated 03.03.2004 in terms of the Marketing Discipline Guidelines, 2001. Aggrieved against the said termination order, the present petition has been filed.

Learned counsel for the petitioner has submitted that the agreement dated 3.3.2004, entered into between the parties, had expired on 3.3.2014 with the efflux of time of 10 years and thereafter another agreement came into being on 15.3.2014 [2nd agreement]. It is submitted that the 2nd agreement was valid till 15.3.2019 but before that the respondents have terminated the 1st agreement dated 3.3.2004 which has no effect on the contract between the parties as that agreement had already expired with the efflux of time. He has referred to Section 62 of the Indian Contract Act, 1872 to contend that since there was 'novation of contract' because of the execution of 2nd contract on 15.3.2014, therefore, the 1st contract dated 3.3.2004 was not required to be performed. In order to substantiate his argument in regard to 'novation of contract', he has referred to Clause 30 of the 1st contract, which read as under: -

“This agreement shall remain in force for ten years from day of 199___. However, the same may be determined without assigning any reason by either party by giving one months's notice in writing to the other of its intention to terminate this Agreement, and

upon the expiration of any such notice this Agreement shall stand cancelled and revoked but without prejudice to the rights of either party against the other in respect of any matter or thing antecedent to such termination provided that nothing contained in this clause shall prejudice the rights of the Corporation to terminate this agreement earlier on the happening of the events mentioned in clause 28 of this Agreement. Upon expiry of the aforesaid period of Ten Years, the Corporation may at its option, enter into a fresh agreement with the dealer for a further period of five years on the same terms and conditions as herein contained.”

According to the learned counsel for the petitioner, it was agreed between the parties that after the expiry of 1st contract, the parties may enter into a fresh contract and that is what has happened because it has been mentioned in the 2nd contract that the parties would be bound by the terms and conditions of this dealership agreement of the 2nd contract. He supports his arguments on the basis of the word used ‘this dealership agreement’ occurring in the 2nd agreement. In support of his submission, he has relied upon a decision of the Supreme Court rendered in the case of **“Lata Construction and others Vs. Dr.Rameshchandra Ramniklal Shamand another”** (2000) 1 Supreme Court Cases 586.

Learned counsel for the respondents has submitted that it is not a case of ‘novation of contract’ because the terms and conditions of the 1st contract are incorporated *mutatis mutandis* in the 2nd contract, therefore, it is a continuation of the 1st contract

and hence, the respondents have rightly terminated the 1st contract entered into with the petitioner.

Learned counsel for the respondents has also relied upon the same judgment in the case of **Lata Construction and others (Supra)**. It is also argued by the respondents that there is an arbitration Clause No.39 in the 1st contract as per which any dispute between the parties could be resolved by the sole arbitrator of the Managing Director of the Corporation but the petitioner has not invoked the said provision and in the presence of the said arbitration clause in the 2nd contract, the writ petition is not maintainable as the petitioner has the efficacious alternate remedy of arbitration under the Arbitration and Conciliation Act, 1996 [for short 'the Act'].

I have heard learned counsel for the parties and perused the record.

The issue involved in this case has already been mentioned in the beginning of the judgment. There is no dispute that the 1st agreement was entered into between the parties in which Clause 30 specifically provides that the agreement shall remain in force for ten years from the date of its execution and may be determined without assigning any reason by either party by giving one months' notice in writing to terminate the agreement and also upon the expiration of any such notice, the agreement shall stand cancelled. It further provides that upon expiry of 10 years, the Corporation may at its option, enter into a fresh agreement with the dealer for a further period of five years on the same terms and conditions.

No action was taken against the petitioner till the expiry of 1st agreement despite the fact that the lapses noticed by the inspection team in the year 2012. The 2nd contract came into being force after the expiry of 1st contract in which the following language was used *“whereas the Corporation had entered into Dealership Agreement dated 03.03.2004 with the dealer; and whereas the said agreement was valid and for the period of ten years; and whereas the said period of 10 years have expired as on 03.03.2014 and whereas the Corporation and the dealer have voluntarily agreed to continue the dealership with the dealer for the further period of five years on the same terms and conditions as contained in the dealership Agreement dated 03.03.2004 and/or until such period this dealership agreement is terminated under the rules and regulations relevant in the behalf. Valid till 15.3.2019.”*

In order to appreciate the arguments raised by learned counsel for the petitioner, it would be relevant to refer to Section 62 of the Indian Contract Act, 1872, which read as follows: -

“62. Effect of novation, rescission, and alteration of contract -

If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.”

The question thus is *“as to whether there is any substitution or alteration in the original contract at the time of execution of 2nd contract”?*

It is an admitted fact that the terms and conditions of the 1st contract are put into place *mutatis mutandis* in the 2nd contract because the extension of period of five years was also granted in terms of Clause 30 of the 1st contract.

Since both the learned counsel for the parties have relied upon sane decision of the Supreme Court rendered in the case of **Lata Construction and others (Supra)**, it would be relevant to quote para 10 of the said judgment, which read as follows: -

“One of the essential requirements of ‘Novation’; as contemplated by Section 62, is that there should be complete substitution of a new contract in place of the old. It is in that situation that the original contract need not be performed. Substitution of a new contract in place of the old contract which would have the effect of rescinding or completely altering the terms of the original contract, has to be by agreement between the parties. A substituted contract should rescind or alter or extinguish the previous contract. But if the terms of the two contracts are inconsistent and they cannot stand together, the subsequent contract cannot be said to be in substitution of the earlier contract.”

In the present case there is no inconsistency in the terms and conditions of both the contracts i.e. 1st contract and 2nd contract and thus, there is neither any substitution of terms and conditions of the 1st contract in the 2nd contract nor there is any alteration, therefore, it does not fall within the definition of ‘novation of contract’ except for the matter that the period of 5 years have been given only on the basis of 1st contract, which was executed on 3.3.2004. Hence, the judgment in the case of **Lata Construction and others (Supra)** fully supports the case of the respondents.

Thus, the question posed in the beginning of the judgment is answered accordingly and the present petition is hereby dismissed.

04.03.2016

Vivek

**(RAKESH KUMAR JAIN)
JUDGE**