

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

Criminal Writ Petition No.1449 of 2016

* Deepak S/o Kashinath Aher,
Age 48 years, Occu: Business,
R/o Hanuman Nagar, Manmad,
Taluka Nandgaon, District Nashik. .. **Petitioner.**

Versus

- 1) The State of Maharashtra
Through Collector, Parbhani.
- 2) Indian Oil Corporation Limited
Manmad Terminal, Manmad,
At Post Nandgaon Highway,
Village Nagapur Manmad 423 104
Taluka Nandgaon, District Nashik. .. **Respondents.**

Shri. V.R. Dhorde, Advocate, for petitioner.

Smt. S.S. Raut, Additional Public Prosecutor, for
respondent No.1.

Shri. A.P. Bhandari, Advocate, for respondent No.2.

CORAM: T.V. NALAWADE, J.

DATE : 3 FEBRUARY 2017

ORAL JUDGMENT :

- 1) Rule, rule made returnable forthwith. Heard
both sides by consent for final disposal.

2) After advancing arguments on merits of the matter in length by the learned counsel for the petitioner, when this Court expressed that the Court will not be granting any relief to the petitioner, transporter but the Court is thinking to see that proper orders are made under the provisions of the Essential Commodities Act, 1955 (hereinafter referred to as "the Act") and for that purpose, the decisions of the Collector and the Appellate Authority are corrected, learned counsel for the petitioner submitted that he would withdraw the proceeding. This Court can exercise powers not only under the provisions of Articles 226 and 227 of the Constitution of India but also under the provision of Section 482 of the Code of Criminal Procedure, 1973. In the present matter in view of the provisions of the Act and the Orders issued under the Act by the Central Government this Court is deciding the matter on merits and not allowing the petitioner to withdraw the proceeding.

3) The petitioner is a transporter and is owner of one truck-tanker bearing No. MH-18-AA-4548. The petitioner transports H.S.D. (High Speed Diesel) after

lifting it from Manmad Depot of the Indian Oil Corporation. The incident in question took place on 12-4-2014. When the tanker entered the campus of Gangakhed Depot of MSRTC, State Transport Corporation, as per the procedure, the compartments of the tanker were opened by the officers of MSRTC in the presence of driver of the present petitioner. There was invoice in respect of the H.S.D. filled in the tanker and in accordance with the procedure, verification of the stock was done. The tanker was expected to contain 12000 liters of H.S.D. Then, as per challan the density of H.S.D. from the four compartments of the tanker was tested in the presence of the driver. There were four compartments in the tanker and the density of the diesel from the compartment Nos. 2,3 and 4 was found to be correct but the density of the diesel from compartment No.1 did not tally with the expected density shown in the challan. Further, when some diesel was taken out for examination it appeared to the officer that it had blue colour, colour of kerosene which is meant for Public Distribution System. This incident was then reported to the Tahsildar, a Gazetted Officer, of Gangakhed.

4) The Gazetted Officer visited the S.T. Depot and collected samples from this compartment. There was around 3000 liters of diesel in this compartment and it was found to be adulterated by using kerosene. Value of H.S.D. per liter is four times more than the value of such kerosene sold in Public Distribution System. The officer of the S.T. Depot gave report on the same day to the Gangakhed Police and crime case to be registered for offences punishable under sections 420, 406, 34 of the Indian Penal Code and Sections 3,7 etc. of the Act. The report of the sample is received from C.A. office and it shows that the kerosene was mixed in diesel. It is specifically mentioned in the report that the kerosene found in the diesel is meant for Public Distribution System (P.D.S.).

5) During investigation, police recorded statements of the persons from the S.T. Depot Gangakhed and the persons from Manmad Depot of Indian Oil Corporation. It appears that some correspondence was made with the Indian Oil Corporation to supply the video recording of the incident of filling diesel in this tanker. But

the police papers produced before this Court do not show that such video footage was supplied by the Oil Corporation.

6) Statements of the employees of the Indian Oil Corporation are to the effect that as per procedure, H.S.D. was filled in the tanker and it was locked and the relevant record like challan etc. was handed over to the driver. It appears that during investigation the driver contended that he had mixed the kerosene and the kerosene was taken by him from the campus of the Indian Oil Corporation itself. Such possibility is denied by the employees of the Indian Oil Corporation. Further, there is no video recording of the incident of filling at present before this Court.

7) Report was given to the Collector by the Tahsildar after the seizure of the tanker and the diesel from all the compartments and the Collector started proceeding under section 6-A of the Act. Show cause notice was given to both driver and the owner of the tanker viz. present petitioner. Copy of the say, which must

have been filed before the Collector by present petitioner, is not filed on the record. After giving opportunity to the petitioner of having say, the Collector made order of confiscation of diesel. The Collector made order of sale of the remaining 9000 liters diesel through petrol pumps of the said Tahsil and credit the amount with the Government. The Collector directed the R.T.O. to ascertain the market price of the vehicle and the Collector directed the petitioner to give bank guarantee of 50% value of the tanker for getting the custody of the tanker. Submissions made show that as yet the custody of the tanker is not taken by the petitioner.

8) Criminal Appeal No.51/2016 was filed under section 6(C) of the Act by present petitioner in Sessions Court. The Sessions Court has maintained the order of confiscation of adulterated diesel but the order of confiscation of remaining diesel is set aside. A direction is given to return the diesel of 9000 liters to the present petitioner. The order of the Collector of giving direction to give bank guarantee is also set aside and the direction is given to hand over the tanker after furnishing surety of

the amount of Rs. three lakh. The owner of the tanker, transporter has challenged the order as he wants even the adulterated diesel.

9) This Court has carefully gone through the provisions of the Act. Section 3 and Section 4 show that orders issued under section 4 are to be treated as the orders issued under section 3 of the Act. Under section 3 of the Act, (The) Kerosene (Restriction on Use and Fixation of Ceiling Price) Order, 1993 (hereinafter referred to as "the Kerosene Order") is issued and under section 4 of the Act, The Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2005 (hereinafter referred to as "the Diesel Order") is issued. Clause 3 of the Kerosene Order shows that if kerosene is supplied for P.D.S., such kerosene can be used only for the purpose of cooking and illumination. The sale of such kerosene by dealer or transporter is prevented to any person other than the person to whom the supplies are meant for. Clause 8 of the Order shows that the kerosene which is to be supplied through P.D.S. needs to be made distinguishable from the

kerosene to be distributed under the parallel marketing system. It is not disputed that the kerosene having blue colour is meant for P.D.S. In the present matter, such kerosene was found mixed in the diesel and so there is contravention of the provision of cause 3 of the Kerosene Order.

10) Clause 3 of the Diesel Order and particularly sub clause (6) shows that the dealer or distributor shall not indulge in any manner in any one or more of the malpractices. The definition of malpractices given in Clause 2(f) of the Diesel Order, shows that, adulteration, pilferage, stock variation and unauthorised sale or unauthorised possession amount to malpractices. Thus, there is contravention of Clause 3 of the Diesel Order.

11) Learned counsel for the petitioner submitted that in the show cause notice issued by the Collector there is no mention of aforesaid Orders and so the show cause notice itself was illegal. In support of this contention, learned counsel placed reliance on the observations made by the Apex Court in the case reported as **(2007) 5 SCC**

769 (Kailash v. State of Jharkhand). In that case the facts were totally different. The order issued under section 3 of the Act was not covering the matter involved. Thus the facts were altogether different and in view of the facts of that case the Apex Court laid down that the order of which contravention is there needs to be mentioned in show cause notice for taking action under section 6-A of the Act. There cannot be any dispute over the proposition. In the present matter orders were there in existence and the orders covered the present contravention. Further the provision of Section 6-B (3) of the Act shows that the defect or irregularity in the notice given under this provision will not make the confiscation invalid. The provision runs as under :

"6-B. Issue of show cause notice before confiscation of essential commodity.-

(1) . . .

(2) . . .

(3) No order confiscating any essential commodity package, covering, receptacle, animal, vehicle, vessel or other conveyance shall be invalid merely by reason of any defect or irregularity in the notice given under Cause (a) of sub-section (1), if, in giving such notice, the provisions of that clause have been substantially complied with.

Thus, not mentioning the specific Order in the show cause notice issued under section 3 or 4 of the Act cannot make the confiscation order itself invalid. It is sufficient for the Collector to mention that there is contravention of the provision of section 3 of the Act which is made punishable under the Act, section 7 provided that order under section 3 or 4 of the Act is already issued. In view of this position of law, interference is not warranted in the order of confiscation made by the Collector on the aforesaid ground raised by petitioner.

12) In the present matter, the Collector directed to give custody of the transport vehicle after taking bank guarantee of the amount which would be 50% of the market value of the vehicle. This Court has carefully gone through the provision of section 6-A which gives power to the Collector of confiscation of the vehicle. The relevant portion is second proviso of section 6-A (Maharashtra Amendment of Section 6-A) and it runs as under :

"6-A Confiscation of seized commodities:- (1) Where any essential commodity is seized in pursuance of an order made under section 3 in relation thereto, a report to that effect shall, without any unreasonable

delay, be sent to the Collector within whose jurisdiction the seizure is made, and the Collector may, if he thinks it expedient so to do, inspect or cause to be inspected such essential commodity, and whether or not a prosecution is instituted for the contravention of such order, the Collector, if satisfied that there has been contravention of the Order, may order confiscation of:-

- (a) the essential commodity so seized;
- (b) any package, covering or receptacle in which such essential commodity is found; and
- (c) any animal, vehicle, vessel or other conveyance used in carrying such essential commodity;

Provided that,

Provided further that where any animal, vehicle, vessel or other conveyance is used for the carriage of goods or passengers for hire, the owner of such animal, vehicle, vessel or other conveyance shall be given an option to pay in lieu of its confiscation a fine not exceeding the market price at the date of seizure of the essential commodity sought to be carried."

This provision shows that the Collector can give an option to the owner to pay in lieu of the confiscation, fine not exceeding market price of the vehicle and the market price is to be ascertained for the date of seizure.

13) The provision of Section 6-A (1) of the Act shows that the power is vested with the Collector of confiscation whether or not the prosecution is instituted for the contravention of the order issued under section 3

of the Act. Further, subjective satisfaction of the Collector is involved for making the order of confiscation. When such order can be made even when prosecution is not launched, it is not open to the Collector to release the vehicle after taking bank guarantee. Thus, when the Collector is satisfied that action for confiscation needs to be taken, then there is no other option before him than to ask the owner to deposit the market value of the vehicle for taking the custody of the vehicle or to pass confiscation order. The provision of section 7 of the Act shows that when the prosecution is launched and the Criminal Court comes to the conclusion that there has been contravention of the order issued under section 3, the essential commodity and also the vehicle in which it was being transported can be forfeited to the Government. Provision of section 6-A (3)(c) shows that when a person is acquitted in the case, price of the essential commodity disposed of by the Collector needs to be paid to the person from whom the commodity is seized. Due to acquittal, the owner of vehicle does not become entitled to similar relief. This provision shows that the power of the Collector is independent to the power of the

Magistrate when he makes order of confiscation of the vehicle. In such circumstances, the relevant provisions with regard to the vehicle already quoted need to be followed strictly. Thus the Collector also committed error in giving relief to the petitioner of giving bank guarantee of 50% of the amount of the value of the vehicle.

14) There is other angle also to this point. The provisions of section 7(1) (b) and 7(1)(c) of the Act run as under.

"7. Penalties.-- (1) If any person contravenes any order made under section 3,---

(a)

(b) any property in respect of which the order has been contravened shall be forfeited to the Government;

(c) any package, covering or receptacle in which the property is found and any animal, vehicle, vessel or other conveyance used in carrying the commodity shall, if the Court so orders, be forfeited to the Government."

This provision of the Act shows that there is no relation to this provision with the order if any made by Collector. If the Magistrate comes to conclusion that there has been contravention of orders made under section 3 of the Act

and there is some property involved, the Magistrate has power to forfeit that property to the Government and the Magistrate has the power to forfeit even the vehicle in which the property was found to be carried. It can be said that this power is independent of the power of the Collector and even if the Collector does not confiscate the property or the vehicle, the Magistrate has the power of forfeiture. That does not mean that the Collector is not expected to use the power of confiscation given under section 6-A of the Act. If this part of provision of Section 7 is read with provision of section 6-A (Maharashtra Amendment) to the Act, it becomes clear that, there is no power with the Magistrate to order release of the vehicle even after acquittal of the accused if Collector has confiscated the vehicle and the law as quoted in section 6-A (3)(c) of the Act will take its own course. In such a case, when confiscation proceeding is started, there is only one recourse open to the owner of the vehicle and that is use of procedure given in section 6-B (2) of the Act. This provision runs as under :-

"6-B. Issue of show cause notice before confiscation of essential commodity.--

(1)

(2) Without prejudice to the provisions of sub-section (1), no order confiscating any animal, vehicle, vessel or other conveyance shall be made under section 6-A if the owner of the animal, vehicle, vessel or other conveyance proves to the satisfaction of the Collector that it was used in carrying the essential commodity without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the animal, vehicle, vessel or other conveyance and that each of them had taken all reasonable and necessary precautions against such use."

15) The order of confiscation can be challenged by filing appeal as provided in section 6-C of the Act and then this Court can consider the challenge of the owner to the orders made in confiscation proceeding.

16) The record shows that the show cause notice was given not only to the owner, present petitioner but also to the driver by District Collector. It appears that they together contested the matter before the Collector and they contended that the tanker was taken in the same condition to the depot of the MSRTC after loading of H.S.D, in the tanker at Manmad depot of the Oil Company. On the other hand, in the police statement, the driver contended that he had mixed the kerosene in H.S.D. For

the present purpose, police statement can be considered. In view of these circumstances, this Court holds that it cannot be said that the driver of the present petitioner, his agent, had no knowledge that there was adulteration of H.S.D and so there is no scope left to use the provision of Section 6-B(2) of the Act in favour of present petitioner. Thus, on merits there is no scope to interfere in the finding for confiscation given by the Collector.

17) In appeal, the appellate authority has not set aside the finding given by the Collector in respect of the tanker. Only the option given by the Collector is changed by the appellate authority. It is already observed that when the confiscation proceeding, which is independent proceeding, comes to an end, after making order by Collector and it can be challenged only as provided in the Act, it was not open to the appellate authority also to allow the owner to take the vehicle after furnishing surety. Thus the order of the appellate authority, Additional Session Judge Parbhani made in the appeal in this regard cannot sustain in law.

18) The appellate authority has confirmed the order of confiscation of 3000 liters of H.S.D as it was adulterated, but it has set aside the order in respect of remaining 9000 liters of H.S.D. by observing that it was not adulterated. This approach is not at all correct. When the offence is committed, when there is contravention of the order issued under section 3 or 4 of the Act, such segregation is not possible. If the tanker can be confiscated as adulterated essential commodity was being carried in it, the remaining essential commodity which was not found to be adulterated, can also be confiscated as the person who was doing such act tries to use such tactics. Fortunately, in this case the oil from all the compartments was tested for density and malpractice was detected. MSRTC which had paid for this oil has rejected the oil due to aforesaid circumstances. Present petitioner was certainly not the owner of the oil. In view of this circumstance, the Collector could not have made the order of release of the H.S.D. in favour of the transporter and for the same reason the learned Additional Sessions Judge could not have made order of release of 9000 liters of H.S.D in favour of the present petitioner, transporter.

In view of the provision of the Act and the aforesaid two Orders, the transporter cannot possess on his own, such oil. Thus, the order of the appellate authority, Additional Sessions Judge by which confiscation of 9000 liters of H.S.D. is set aside and the order of the Collector directing to give bank guarantee is set aside cannot sustain in law. Similarly, the order of the Collector needs to be modified to make it necessary to recover the amount equal to the market price of the vehicle if the petitioner wants custody of that vehicle.

19) In the result, the petition is allowed. The judgment and order of Criminal Appeal No.51/2016 which was pending in the Court of the learned Ad-hoc Additional Sessions Judge Parbhani is hereby set aside to the aforesaid extent. The order of the learned Collector is also modified. The Collector is expected to recover the market price of the tanker if the petitioner wants to get custody of the vehicle. Similarly, the order of the Collector directing to distribute 3000 liters of adulterated H.S.D. through Public Distribution System is set aside in view of the provisions already quoted. This diesel can be handed over

or sold to the refinery and the sale proceeds of this diesel need to be credited to the Government. The remaining part of the order of the Collector, in respect of distribution of 9000 liters of H.S.D. which was not adulterated is maintained. In aforesaid terms rule is made absolute.

Sd/-
(T.V. NALAWADE, J.)

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