

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.12.2017

CORAM

THE HONOURABLE MR.JUSTICE K.K.SASIDHARAN

AND

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

W.A.No.169 of 2014

1. The Chief Regional Manager,
Hindustan Petroleum Corporation Limited,
No.8, Gandhi Irwin Road,
Egmore, Chennai -8.
2. The General Manager,
South Zone,
Hindustan Petroleum Corporation Limited,
No.8, Gandhi Irwin Road,
Egmore, Chennai -8 .. Appellants/Respondents

Versus

M/s.Suresh Agencies,
HPC Dealer,
Rep.by Partner Mr.B.Nandakumar,
348, Waltax Road,
Chennai-79 ... Respondent/Petitioner

Appeal filed under Clause 15 of the Letters Patent to set aside the Order dated 13.11.2013 made in W.P. No.10429 of 2007, allow the Writ Appeal.

Prayer in WP.No.10429 of 2007:Petition filed under Article 226 of the Constitution of India praying for issuance of a writ of certiorarified mandamus calling for the records on the file of the 1st respondent and to quash the impugned letter dated 7/2/2007 passed by the 1st respondent and to direct the respondent to supply petroleum products to the outlet of M/s.Suresh Agencies, dealer of Hindustan petroleum Corporation Limited at no.348, Waltax Road, Chennai-79.

For Appellants : Mr. O.R.Sathanakrishnan
For Respondent : Mr. David Thiyagaraj

JUDGMENT

(Judgment of the Court made by P.VELMURUGAN,J.)

This Writ Appeal has been filed to set aside the Order dated 13.11.2013 made in W.P.No.10429 of 2007.

2. The Brief facts of the case are as follows:

The respondent herein was appointed as a dealer of the Appellants Corporation in respect of the retail outlet at No.348, Waltax Road, Chennai-600 079 in and by Dealership Agreement dated 16.09.2005 for sale and distribution of Motor Spirit, High Speed Diesel and Lubricants as per the terms and conditions contained therein. During the course of such dealership by the respondent, an inspection was carried out by the Mobile Lab/Quality Control Officer on 10.11.2006 in respect of the retail outlet which was the subject matter of Writ Petition No.10429 of 2007. When Racer 2 samples were drawn from the respondent's outlet the price of the sample drawn has been paid and duly acknowledged by the dealers representatives at the back of the Cash Memo. Thereafter samples were sent for testing to the Corporation Quality Control Lab, Chennai Terminal and on receipt of the report No.MDG(L)-219 dated 23.11.2006, it was observed that "samples failed in viscosity kinematic at 100° degree centigrade and calcium content (%)wt. Hence, a show cause Notice was issued by the Corporation to the respondent in view of the above lapses which is violative of the terms and conditions of the Dealership Agreement dated 16.09.2005 and the respondent was requested to explain the reason for the above discrepancies within seven days. A Copy of the Lab Report was also enclosed. The respondent acknowledged the receipt of the said show cause notice by his reply dated 09.01.2007 contending that "the island boy used frequently funnel for filling fuel to the vehicles that the funnel is used to restore in Racer 2 Oil stored in 5 litres can, the fuel in the funnel may slowly dry in the Oil container and that the low density product may lead to the failure in viscosity of the Racer 2 Oil" However, the respondent regretted for the error committed by the Staff. Since the explanation offered by the dealer was not acceptable to the Corporation, as per Appendix II Serial No.1 of Marketing Discipline Guidelines (MDG), a fine of Rs.1,00,000/- was imposed on the respondent in and by the letter dated 07.02.2007. The respondent sent a letter dated 14.02.2007 asking the Corporation to retest the Racer 2 sample in his presence and to pass suitable order after receiving the test report from the lab. The respondent thereafter sent another letter dated 26.02.2007 asking for a similar request. The appellant Corporation sent a letter dated 06.03.2007 expressing their inability to send the samples for a retest because it is out of time. In such circumstances, the respondent filed WP No. 10429 of 2007 before this Court praying to quash the letter dated 07.02.2007 of the corporation and to direct the appellants corporation to supply petroleum products to the respondent. This Court, by order dated 13.11.2013 allowed the writ petition No. 10429 of 2007 filed by the respondent.

3. Aggrieved against the Order of the learned Single Judge, the Corporation has filed the present writ appeal.

5. The learned counsel for the appellants would submit that the respondent is a dealer of the appellants corporation covered by the Dealership Agreement dated 26.09.2005. While the dealership was in force an inspection was carried out by the Mobile Lab/Quality Control Officer on 10.11.2006 in respect of the retail outlet which was the subject matter of Writ Petition No.10429 of 2007. After inspection, samples were drawn and sent for test as per the procedure and found that the product was adulterated. Therefore, as per the Marketing Discipline Guidelines 2005 and as per the dealership agreement, the appellant imposed a fine of Rs.1,00,000/-. Such amount was imposed after issuing a show cause notice to the respondent and after receipt of reply from the respondent. Since the reply of the respondent was not satisfactory, the fine amount was imposed by the corporation. Therefore, according to the counsel for the appellants, the imposition of fine is as per market discipline guidelines 2005 and also in terms of agreement. However, the Writ Court, without considering the aforesaid facts, has allowed the writ petition. Aggrieved against the Order, the Corporation has filed this writ appeal, there is no merit in the writ petition, hence the Order passed by writ Court is liable to be set aside.

6. The learned counsel for the respondent would submit that the test was conducted on 11.10.2006 but the test report mentioned sample was taken on 10.11.2006 and the same was received on 16.11.2006 and the lab inspection result was reported on 23.11.2006, thus there was a delay in conducting the lab test. The samples were not re-tested despite request made by the respondent. Further, lab report does not disclose the nature of the test and formula adopted and that the test should have been done in the presence of the respondent. Therefore, the learned single Judge has rightly quashed the impugned letter of the corporation. On a perusal of lab report, it shows that the samples were received on 16.11.2006 by the laboratory in-charge, the report date was mentioned as 23.11.2006. As per show cause notice, samples were taken on 11.10.2006. Therefore, the samples were not sent within the stipulated period and the report also not sent in time. Therefore, the learned single Judge has rightly allowed the writ petition and quashed the impugned order passed by the appellant. There is no infirmity in the order of the learned single Judge and there is no merits in the appeal. Hence, this writ appeal is liable to be dismissed.

7. We have considered the rival submissions made by either side and perused the materials placed on record. It is not dispute that the respondent is a dealer of the appellant corporation under the Dealership agreement dated 16.09.2005 and governed by Marketing Discipline Guidelines 2005. On 10.11.2006 an inspection was carried out by the Mobile Lab/Quality Control Officer in respect of the retails outlet

which is the subject matter of the writ petition and during the inspection samples were taken. The procedure adopted for drawal of sample is also not disputed. Therefore, only question is as to whether the appellant has followed the procedure for testing the samples within the time. In fact, a show cause notice was sent by the Corporation. After receipt of show cause notice, the respondent sent a reply indicating the reason for discrepancies which was not accepted by the corporation. Thus, the reason given by the respondent is only to escape from the fault committed by them and further sought the corporation to send the products for re-testing. The request to send sample for re-testing was made by the respondent by means of letters dated 14.02.2007 and letter dated 26.02.2007 for which the appellant sent a reply dated 06.03.2007 stating that the product has failed in the laboratory tests which was beyond the reproductivity limit, the request for re-testing cannot be complied with. The fact is that even along with the show cause notice, the corporation had sent the lab report, admittedly, even before sending the reply dated 06.03.2007. The appellants have passed the order dated 07.02.2007 imposing the punishment.

8. The order dated 07.02.2007 of the appellants corporation was challenged by the respondent in Writ Petition No. 10429 of 2007. A careful reading of the materials show that the inspection was carried out by the Mobile Lab/Quality Control Officer on 10.11.2006 (wrongly mentioned as 11.10.2006) in respect of retail outlet which is the subject matter of the writ petition. In the show cause notice sent by the appellant on 27.12.2006, with reference to conduct of the inspection and the sample taken during the inspection, the date of inspection was wrongly mentioned as 11.10.2006 instead of 10.11.2006. It is purely a typographical error. Even the letter correspondence between appellants and the respondent clearly shows that the inspection was done only on 10.11.2006 and not on 11.10.2006 and also the samples were sent for test and the same were tested by the lab on 16.11.2006. After testing, the report was prepared on 23.11.2006. The report also shows sample was taken on 10.11.2006, but the date is wrongly mentioned as 11.10.2006 in the communication dated 07.02.2007. The same is also typographical error. However, on perusal of records it shows that there is no violation in drawing of the sample and there is no violation to send the sample for test and also the sample was tested within the time and report was sent within the time but only the report was communicated to the respondent belatedly.

9. The learned counsel for the respondent would contend that the test report should be communicated to the respondent within 5 days from the date of receipt of the report whereas the same was communicated to the respondent only vide communication dated 07.02.2007. Further, he would contend that the test was not conducted in the presence of the respondent and request of re-test was rejected without any valid reason.

Therefore order passed by the learned single Judge is in order and there is no reason to interfere with the order passed by the learned single Judge.

10. The learned counsel for the appellant referred to chapter 2.10 of the Marketing Discipline Guidelines 2005 wherein it was stated that the test to be carried out for MS/HSD samples drawn from dealers premises are given in Annexure S-4

" All samples should reach the labs preferably within 10 days from the date of drawal and lab should test the samples preferably within the next 20 days. Results are to be communicated to the dealer by the concerned Oil Company preferably within the next 5 days from receipt of test reports.

While in general, above procedure should be strictly followed and the time frame as stipulated above to be adhered to however during special drives, in view of the large number of samples, the lab may accept the samples upto 15 days after drawal and the testing should be completed preferably within 30 days of the receipt of the sample".

In this case, a perusal of the records show that the inspection was conducted on 10.11.2006, samples were collected from retail outlet of respondent on the same day. The free samples - 750 ml drawn were sent to the laboratory in a sealed box. Out of the samples drawn, one sample was left with the dealer, one with the corporation and the other was sent to the lab for testing. The samples were received by the lab on 16.11.2016 well within the stipulated time of ten days and the date on which the report was prepared is mentioned as 23.11.2016 ie., within twenty days from the date of receipt. Though, the respondent's counsel stated that there is no date mentioned in the test report on a perusal of the report shows that the date was clearly indicated.

11. The learned counsel appearing on behalf of the respondent cited the Judgment of the Hon'ble Supreme Court of India in (i) Hindustan Petroleum Corporation Limited and Others Vs. Super Highway Services and another reported in [(2010) 3 Supreme Court Cases 321] (ii) Mahamaya Service Centre Vs. Indian Oil Corporation Ltd., reported in [CDJ 2010 CH HC 143] and (iii) Allied Motors Limited Vs. Bharat Petroleum Corporation Ltd., reported in [(2012) 2 Supreme Court Cases 1] to contend that the samples drawn and sent for the laboratory belatedly would vitiate the very test report.

12. There is no quarrel with the preposition laid down in the above referred decisions. The citations referred to by the learned counsel for the respondent are not applicable to the present case. In this case, the sample were received by the lab within the suggested time mentioned in the chapter 2.10 of the Marketing Discipline Guidelines 2005, test also completed,

report also made ready within the time. But, the report was belatedly communicated to the office of the respondent. The test was conducted well within the stipulated period as suggested in Chapter 2.10 of the Marketing Discipline Guidelines 2005. Further, sufficient opportunities were given to the respondent to submit their explanation. Admittedly, the appellants issued show cause notice on 09.01.2007 and after receiving the reply, the order, which was impugned in the writ petition was issued by the corporation on 07.02.2007. Though, in the show cause notice discrepancy was shown and asked to get the explanation within seven days, explanation offered by the respondent was not acceptable and the same was rejected by the appellant and imposed the fine. They have also given reason for rejection. The learned Single Judge failed to consider the records and the date on which the report was made ready in the lab and the fact that there was only delay in communicating the lab report to the respondent that too in Chapter 2-10 of the Marketing Discipline Guideline 2005, it is suggested that preferably within the next 5 days from the receipt of the report which shows that the 5 days is not mandatory it is only suggestive. It clearly shows that there is no violation of mandatory procedure or provisions. Therefore, we are inclined to interfere with the order passed by the learned single Judge.

13. In the light of above, the Writ appeal is allowed by setting aside the order of the learned single Judge. No costs.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

vv

To

1. The Chief Regional Manager,
Hindustan Petroleum Corporation Limited,
No.8, Gandhi Irwin Road,
Egmore, Chennai -8.
2. The General Manager,
South Zone,
Hindustan Petroleum Corporation Limited,
No.8, Gandhi Irwin Road,
Egmore, Chennai -8

+1cc to Mr.O.R.Santhanakrishnan, Advocate SR.No.87987/17

+2cc to Mr.David Tyagaraj, Advocate SR.No.87905/17

SJ(CO)

sm:18.1.2018