THE HON'BLE SRI JUSTICE A.V.SESHA SAI

W.P.No.11420 of 2007

ORDER:

An order of termination of petroleum outlet dealership passed by the Respondent is under challenge in the present writ petition.

2. The facts, in nutshell, leading to the filing of the writ petition are as under:

A letter of intent for petroleum outlet dealership was issued in favour of the petitioner on 14.2.2004 and an agreement was also entered into on the even date and thereafter, petitioner started running the business. The Senior Divisional Manager issued a notice bearing Ref.No.MDPM/RO/ Bahadurpura-II dated 26.2.2007, asking the petitioner to submit explanation in writing on certain observations made in the inspection report. Responding to the same, petitioner submitted explanation on 3.3.2007. Subsequently, vide Ref.No.MDPM/RO/Bahadurpura II dated 28.3.2007, a show cause notice was issued, asking the petitioner to show cause as to why action should not be taken in line with Chapter 6.1.4 and Appendix-I.3 under Marketing Discipline Guidelines 2005 i.e. termination of dealership. In response to the said show cause notice, petitioner submitted explanation and thereafter vide impugned order dated 29.5.2007, the Respondent organisation terminated the dealership of the petitioner herein under Chapter 6.1.4 and Appendix 1.3 of Marketing Discipline Guidelines, 2005.

3. Heard Sri P.Kamalakar, learned counsel for the petitioner and Sri Deeshit Bhattacharjee for the Respondent and perused the material available before the Court.

4. Submissions/contentions of the learned counsel for the petitioner

(1) The order impugned is illegal, arbitrary, unreasonable, violative of Articles 14 and 19(1)(g) of the Constitution of India and opposed to the very spirit and object of Marketing Discipline Guidelines, 2005.

(2) In the absence of any established irregularity, the Respondent authorities grossly erred in passing the impugned order on the basis of presumptions and surmises.

(3) The Respondent acted with pre-determined conclusions and filing of caveat on 12.3.2007 even before issuing the show cause notice dated 28.3.2007 discloses the same.

(4) The Respondent authorities grossly erred in noticing that there is no variation of stock nor density.

(5) The impugned action is not in accordance with Chapter 6.1.4 of Marketing Discipline Guidelines, 2005 and the said clause does not authorise the Respondent authorities to pass the impugned order, as such, the order impugned suffers from inherent lack of jurisdiction.

(6) Once the seals are intact, nothing can be attributed to the petitioner herein. The stand of the Respondent that the writ petition is not maintainable cannot be sustained in the eye of the law as the impugned action is arbitrary, offending Article 14 of the Constitution of India and the present issue is not in respect of any conditions of agreement, but only on the applicability of Marketing Discipline Guidelines, 2005.

(7) Since the petitioner herein filed the present writ petition long back, the writ petition cannot be dismissed at this stage on the ground of availability of alternative remedy.

(8) The judgments cited by the learned counsel for the Respondent are not relevant to the facts of the present case.

In support of his case, the learned counsel placed reliance on the following judgments:

1. P.Laxmikanth Rao and Sons v. Union of India, rep. by its Secretary, Ministry of Petroleum and others[1].
2. Order dated 6.2.2013 in W.P.No.12355 of 2007 as confirmed in W.A.No.517 of 2013 dated 24.4.2013 and S.L.P (Civil) No.22481 of 2013[2].
3. Indian Oil Corporation Limited, rep. by its Executive Director, A.P.S.O. and others[3].
4. Harbanslal Sahnia and another v. Indian Oil Corporation and others[4].
5. Union of India and others v. Tantia Construction Private Limited[5].
6. Dr.Balkrishna Agarwal v. State of U.P. and others[6].
7. M/s Deluxe Wines, Kachiguda, Hyderabad and others v. State of Andhra Pradesh, rep. by its Secretary, Revenue Department, Hyderabad and others[7].
8. Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others[8]

5. <u>Submissions/contentions of the learned counsel for the Respondent</u>

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[1] 2011(3) ALT 221
[2] Order in W.P.No.12355 of 2007
[3] 2014(5) ALT 405
[4] (2003) 2 SCC 107
[5] (2011) 5 SCC 697
[6] (1995) 1 SCC 614
[7] 1990(2) ALT 121 (DB)
[8] AIR 1978 SC 851

(1) The present writ petition is not maintainable since the cause of action arose out of a contract and only alternative for the petitioner is arbitration as provided under Clause 61 of the Agreement. No element of public interest is available, as such, writ petition is not maintainable.

(2) The impugned action is based on realities, but not on presumptions and surmises as alleged by the petitioner.

(3) The calibration was valid upto 9.10.2006 and inspection was done on 21.2.2007 and no calibration was got done by Weights and Measures Department though the petitioner had knowledge of the same.

In support of his case, the learned counsel for the Respondent placed reliance on the following judgments:

(1) Joshi Technologies International Inc. v. Union of India and others[9].

(2) K.K.Saksena v. International Commission on Irrigation and Drainage and others[10].

6. In the above background, now the issues that emerge for consideration of this Court are;

(1) Whether the present writ petition is maintainable under Article 226 of the Constitution of India or whether the petitioner needs to be relegated to the remedy of arbitration ?

(2) Whether the impugned order is sustainable and tenable ?

[9] (2015) 7 SCC 728
[10] (2015) 4 SCC 670

7. Issue No.1

(1) It is the specific contention of the learned counsel for the Respondent that since the cause of action arose out of a concluded contract, the present writ petition is not maintainable under Article 226 of the Constitution of India and the petitioner has to invoke the provision for arbitration as per clause 61 of the Agreement for violation of clause 8 of the agreement. On the contrary, it is contended by the learned counsel for the petitioner that since the action of the Respondent is contrary to Marketing Discipline Guidelines, 2005 and as the cause does not pertain to any conditions of the agreement and since the present writ petition was admitted by this Court in the year 2007 and has been pending since then, the writ petition cannot be dismissed on the ground of availability of alternative remedy as contended by the learned counsel for the Respondent. It is very much evident from a reading of show cause notice dated 28.3.2007 that the Respondent obviously alleged contravention of Chapter 6.1.4 and Appendix-I.3 of Marketing Discipline Guidelines, 2005. In order to adjudicate the issue as to whether the writ petition is maintainable or not, it would be appropriate to refer to the judgments cited by the learned counsel on either side.

(2) In Writ Petition No.12355 of 2007 dated 6.2.2013, this Court, relying on the judgment of the Hon'ble Apex Court in *Indian Oil Corporation Limited, rep. by its Executive Director, A.P.S.O.* (3 supra) *and Harbanslal Sahnia v. Indian Oil Corporation* (4 supra), ruled in favour of maintainability of the writ petition despite arbitration clause. In fact, the Division Bench confirmed the said judgment in W.A.No.517 of 2013 dated

24.4.2013, which was later confirmed by the Hon'ble Supreme Court in S.L.P (Civil) No.22481 of 2013.

(3) In *Harbanslal Sahnia v. Indian Oil Corporation* (4 supra), the Hon'ble Apex Court held that rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion and in an appropriate case, in spite of availability of alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies; namely (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 is challenged. In the said judgment, the Hon'ble Supreme Court also noticed that the dealership came to be terminated for an irrelevant and non-existent cause and eventually, the Hon'ble Supreme Court opined that the appellant therein would be entitled for the relief instead of driving them to arbitration proceedings.

(4) In *Union of India and others v. Tantia Construction Private Limited* (5 supra), the Hon'ble Supreme Court reiterated the said view while holding that 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.

(5) In ABL International Ltd. and another v. Export Credit Guarantee Corporation of India Ltd. and others[11], the Hon'ble Apex Court categorically ruled that in appropriate cases, a writ petition is maintainable even in contractual matters also and found that when an

[11] (2004)3 SCC 553

instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution.

(6) In *Indian Oil Corporation Limited, rep. by its Executive Director, A.P.S.O.* (3 supra), this Court took a view in favour of maintainability of the writ petition.

(7) In *Dr.Balkrishna Agarwal v. State of U.P.* (6 supra), the Hon'ble Apex Court found in favour of maintainability of the writ petition having noticed in the said case that the writ petition was admitted by the High Court in the year 1988 and further held that the High Court should not have non-suited the appellant on the ground of availability of alternative remedy.

(8) In *M/s Deluxe Wines, Kachiguda, Hyderabad v. State of Andhra Pradesh, rep. by its Secretary, Revenue Department, Hyderabad* (7 supra), the Division Bench of this Court had taken a similar view in favour of maintainability. The recent judgment of this Court in S.R.C. Company, Engineers and Contractors, Secunderabad v. Union of India and another[12] also had taken the same view in favour of maintainability of the writ petition even in the case of contract.

(9) Coming to the judgments cited by the learned Standing Counsel for the Respondent. In *Joshi Technologies International Inc. v. Union of India* (9 supra) also, the Hon'ble Apex Court categorically ruled that there is no absolute bar to the maintainability of the writ petition even in

[12] 2017(3) ALD 48

contractual matters and the discretion lies with the High Court either to refuse or to entertain. In the said judgment, the Hon'ble Supreme Court also found that the State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practise some discriminations.

(10) In *K.K.Saksena v. International Commission on Irrigation and Drainage* (10 supra), the Hon'ble Apex Court held that even if writ petition would be maintainable against an authority, which is "State" under Article 12 of the Constitution, before issuing any writ, particularly writ of Mandamus, the Court has to satisfy that action of such an authority, which is challenged, is in the domain of public law as distinguished from private law. In the instant case, the challenge is to the action of the Respondent authorities in acting contrary to the Marketing Discipline Guidelines, 2005 and the complaint is not anything with regard to terms of the agreement. Therefore, the said judgment rendered by the Hon'ble Apex Court, with great respect, would not render any assistance to the Respondent herein to sustain its action.

(11) In view of the principles laid down in the above referred judgments cited by the learned counsel for the petitioner, it cannot be said that the writ petition is not maintainable before this Court under Article 226 of the Constitution of India. Accordingly, Issue No.1 is answered in favour of the petitioner and against the Respondent herein.

8. The contention of the learned counsel for the petitioner is that very invocation of Chapter 6.1.4 of Marketing Discipline Guidelines, 2005 resorted to by the Respondent for termination of dealership of the petitioner is

untenable. On the other hand, the learned Standing Counsel seeks to sustain the action of the Respondent under the said clause. In order to consider the present issue, it would be appropriate to refer to the clause, which reads as under:

> "6.1.4 : TOTALIZER SEALS FOUND TAMPERED WITH
> If intended tampering of the Totalizer seals are established leading to manipulation of Totalizer reading, with Weights and Measures seals intact. Penal action as given in Appendix-1 to be taken".

9. The penal action as per Appendix 1.3 of the relevant Marketing Discipline Guidelines, 2005 is termination if the totalizer seals are found tampered with. In the impugned order, it is stated that at the time of inspection, it has been found that W & M sealing system in the totalizer was found manipulated. On the said aspect, it is the submission of the learned counsel for the petitioner that the said finding is baseless and unfounded and contrary to the contents of the first show cause notice dated 26.2.2007. In fact, in the said show cause notice dated 26.2.2007, the Senior Divisional Manager of the Respondent Corporation categorically stated that as can be observed from the report, though the totalizer and the metering unit W & M seals found intact in all the units. Therefore, this Court finds sufficient force in the submission of the learned counsel for the petitioner that the contention contra advanced by the learned counsel for the Respondent is untenable. It is also to be noted that the contention pertaining to the validity of calibration was never the subject matter of the show cause notice issued by the Respondent prior to passing of the impugned order. The inspection report also shows that the Weights and Measures seals were found intact so also totalizer seals. As correctly pointed out by the learned counsel for the petitioner, there is neither any complaint with regard to variation in stock nor

density. In the absence of any sort of tampering, it can be now safely concluded that the very invocation of Chapter 6.1.4 of Marketing Discipline Guidelines, 2005 read with Appendix is arbitrary and cannot be sustained. The said observations in the report are also in the form of mere presumptions and surmises. It is also significant to note that the first show cause notice was issued by the Respondent on 26.2.2007 and the petitioner offered his explanation for the same on 3.3.2007 and the Respondent authorities received the same on 5.3.2007, but before considering and taking action on the same, on 12.3.2007 itself the Respondent filed a caveat supported by an affidavit stating that they were intending to terminate the dealership. This clearly discloses the pre-determined mind of the Respondent organisation on the issue. The said attitude also cannot be sustained nor it can be approved by this Court. It is an undisputed fact that there was absolutely no complaint against the petitioner earlier and the Respondent ought to have considered this aspect also before resorting to the impugned action of termination of dealership.

10. For the aforesaid reasons, the writ petition is allowed, setting aside the Order in Ref.No.MDPM/RO/Bahadurpura-II dated 29.5.2007 issued by the Respondent herein. As a sequel, the miscellaneous petitions, if any, shall stand closed. There shall be no order as to costs.

A.V.SESHA SAI, J

Date: 12.7.2017
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THE HON'BLE SRI JUSTICE A.V.SESHA SAI

W.P.No.11420 of 2007

12.7.2017

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