

HON'BLE SRI JUSTICE P. KESHAVA RAO

WRIT PETITION No.3517 of 2006

ORDER:

Heard the learned counsel for the petitioner as well as the learned Standing Counsel for the respondent-Corporation.

The present writ petition is filed challenging the orders passed in VR/459, dated 20.02.2006 of the Senior Divisional Retail Sales Manager, Indian Oil Corporation Limited, Visakhapatnam (hereinafter referred to as “ the Corporation”), terminating the retail outlet dealership at Keshavaraopet of the petitioner, as arbitrary and illegal and consequently to direct the respondent to get the dispensing pumps of the petitioner’s retail outlet recalculated by the weights and measures department by permitting the petitioner to carry on the business.

The facts in brief are that the petitioner is a dealer of respondent Corporation since 1993. The agreement was entered into on 11.04.1993 between the Corporation and the petitioner and another partner Smt.B.Bharathi. Since inception, the petitioner has been carrying on the business of retail outlet without any complaint of whatsoever either from the Corporation or from the general public. On 31.12.2005 the petitioner outlet was inspected by the Senior Manager (RS) of the respondent-Corporation and issued a notice pointing out the irregularities and directed the petitioner to stop the sales. In the said notice, they have pointed out the

short delivery in various pumps and also mentioned that the seals of weights and measures for all four pumps are intact. In the said notice, the petitioner was asked as to why action should not be taken for the said lapses within (7) days. In pursuance of the said notice, the petitioner submitted an explanation dated 07.01.2006 stating that the seals of weights and measures department are intact after due verification and as such, there is no scope for any irregularity. However, the petitioner categorically mentioned that he will get them verified by the concerned officials and rectify the same if necessary with the permission of the concerned authority. As far as density is concerned, there is no statutory requirement except recording the density. Therefore, requested to drop the proceedings initiated against the petitioner. After submitting the explanation, a show cause notice has been issued in reference VR/541, dated 16.01.2006 calling upon the petitioner to show cause within seven days from the date of receipt of the notice as to why the dealership agreement dated 11.02.1993 entered between the petitioner and the Corporation should not be terminated in exercise of the rights available to the Corporation under the agreement. If no explanation is submitted within the stipulated period, the dealership is liable to be terminated forthwith. In reply to the said show cause notice, the petitioner submitted the explanation on 21.01.2006. In the said explanation, he stated that they are the dealers of the

respondent-Corporation for the last 25 years without any blemish on their part. There was no intention at all on the part of the petitioner to breach or violate the procedure contemplated under the clauses of the dealership agreement entered into. As far as Clause 25 is concerned, the seals of all the four pumps are intact and no tampering of the same is noticed by the inspecting officials and as such, there is no possibility of short delivery. Even if any such short delivery is there, it is due to erratic pumps deliveries. As far as Clause 27 is concerned, the petitioner has stated that they sold/delivered products of MS & MSD including lubricants received from the Corporation with utmost precaution against the contamination. They are selling only the permitted products in the retail outlet and no other products are sold. In relation to Clause 58, the petitioner has stated that they never deliberately or intentionally contaminate or tamper with the quality of the corporation products. They personally monitor the things by themselves. As far as variation in HSD density in tank No.II is concerned, due to his father's demise, he is not paying full attention from the last month at the retail outlet. However, his staff are maintaining the records of density and even if any such error is pointed out, it could be only human error and not intentional at all nor any selfish motive. As far as the short delivery of the HSD/MS, is concerned, the pumps are giving erratic delivery and the same has been brought to the notice of the concerned Sales

Officer on 30.12.2005 itself and there is no stock variation found by the inspecting officials. If really, there is any short delivery and variation in density, it should reflect in stock variation. However, there is no such stock variation. Therefore, requested the Corporation to take a lenient view and permit the petitioner to resume the sales at the outlet without any further delay. In spite of submitting the explanation, the respondent-Corporation in proceedings No. VR/451 dated 20.02.2006 terminated the agreement of the petitioner as retail outlet dealership at Keshavaraopet, Srikakulam and called upon the petitioner to settle the accounts with immediate effect and pay all the amounts due to the Corporation. Aggrieved by the same, the present writ petition is filed.

The respondent-Corporation filed its counter denying the material allegations made in the affidavit filed in support of the writ petition and contended, *inter alia*, that the writ petition as filed is not maintainable either in law or on facts. The writ petitioner has approached this Court with unclean hands suppressing several material facts. The dealership agreement provides an alternative and efficacious remedy in the form of Arbitration under Clause 67(a) for resolution of any disputes or differences arising out of or in relation to the dealership agreement. The Marketing Discipline Guidelines, 2005 provide for an appeal against the order of termination of a dealership duly specifying a time frame for the filing and

disposal of such appeal. In the light of the above, it is not open to the petitioner to directly approach this Court and file a writ petition. The issues raised in the present writ petition require evaluation of disputed questions of fact which cannot be undertaken by this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India. Therefore, the writ petition is liable to be dismissed on these two grounds. Even on merits also, as per the Marketing Discipline Guidelines, 2005, there is a three tier sampling procedure under Chapter-II to ensure that MS and HSD sold by retail outlets is the same product, which has been supplied to them by their respective Oil Companies. If the variation in density is beyond the permissible limits, immediately it should be brought to the notice of the sales manager/supply location. This caution is advised to the dealer at the time of receipt of the product to ensure that the supplier/transporter does not indulge in any irregularity in transit so as to cause a variation in the density of the product. The petitioner also failed to keep a retention sample of the product as required under the Rules. In view of the facts stated above, the petitioner alone is responsible for the irregularity committed and the failure of the sample to meet the basic specifications in respect of the density. In fact, one of the partners by name Smt.Bharathi is also a dealer for retail outlet viz. M/s. R.K. Highway Service Station at Yetturallapadu, Srikakulam District and the same was

terminated by the Corporation on 27.02.2006 on account of poor performance. Even as per the dealership agreement and norms of Corporation, only one person per family unit is eligible for dealership. Accordingly, a show cause notice was also issued to both the partners in view of the dealership agreement by induction of Smt.Bharathi by way of unauthorized reconstitution who was already dealer for another retail outlet. However, the respondent Corporation though received a reply, to the show cause notice, in view of the interim orders passed in this writ petition, the Corporation has not initiated any action against the petitioner. In these circumstances, the Corporation sought for dismissal of the writ petition.

Learned counsel appearing for the petitioner, contended that in the test report on the sample, there was no contravention of the requirements specified thereunder. Therefore, the allegation that HSD was being sold at the retail outlet was not meeting the required specifications is not sustainable. Merely because there is variation in the density between supply location sample and HSD taken out from the underground tank, it cannot be said that there was adulteration, especially when the sample was within the required statutory specifications. The variation in density of the sample collected from the retail outlet was found to be 12.5 kg/m³ at 15 C, against the permissible limit of +/- 3.0Kg/m³, compared to the density at 15 C (834.9) recorded

in density register at retail outlet. Therefore, it cannot be said that there is any adulteration. As per the statutory order that governs the parties is the Motor Spirit and High Speed Diesel (Regulation of supply and Distribution and Prevention of Malpractices) Order, 1998. IS 1460-2005 does not contain the colour requirement and merely because there is variation in the colour by visual appearance, it cannot be said that the product violated the requirement of IS 1460-2005. In fact, the procedure contemplated under Clauses 4, 27, 28, 58(h), (i) & (m) of the Dealership Agreement, there is no violation. The learned counsel for the petitioner also brought to the notice of the Court by reading the clauses 4, 27, 28, 58(h), (i) & (m) of the Dealership Agreement and submitted that there is no violation. As far as short delivery of product is concerned, when the seals of the pumps are intact, it cannot be said that there is any manipulation for the short delivery.

Learned counsel for the petitioner in order to support his contentions relied on the following judgments:

Premodaya, Bharat Petroleum Dealers, Buchiredy Palem, Nellore vs. Bharat Petroleum Corporation Ltd., Lobbipet, Vijayawada¹, Mrs. Sanjana M. Wig vs. Hindustan Petro Corporation Ltd.², P. Laxmikanth Rao and Sons vs. Union of India, rep., by its Secretary, Ministry of Petroleum³, The Hindustan Petroleum Corporation Ltd.

¹ 2008 (6) ALD 670

² (2005) 8 SCC 242

³ 2011 (3) ALT 221

Vs. M/s. Laxmikant Rao and Sons and others⁴, K.Harinath vs. Hindustan Petroleum Corporation Ltd.,⁵ P.T. Gopalachari & Sons, Bharat Petroleum Corporation Ltd., vs. Bharat Petroleum Corporation Ltd.,⁶ and M/s. Chotamala Bhayya Filling Station vs. Indian Oil Corporation Ltd (IBP Division)⁷.

Per contra, the learned Standing Counsel for the respondent Corporation supported the impugned proceedings and emphasized on the aspect of maintainability of the writ petition on the ground of availability of an efficacious alternative remedy in the form of Arbitration as well as filing of an appeal against the order of termination of dealership as per the Marketing Discipline Guidelines, 2005. Learned Standing counsel relied on the following judgments:

K.K. Saksena vs. International Commission on Irrigation and Drainage⁸, Joshi Technologies International Inc. vs. Union of India and others⁹, Olympus Superstructures Ptv., Ltd. vs. Meena Vijay Khetan¹⁰.

Having heard both the counsel and on a perusal of the material on record, the points that emerge for consideration are:

1. Whether the writ petition is maintainable in the light of the alternative remedy available to the petitioner in the form of arbitration

⁴ W.A.No.318 of 2011, dated 21.07.2011

⁵ 2013 (4) ALT 651 (D.B.)

⁶ W.P.No.23479 of 2002 dated 23.06.2009

⁷ W.P.No.11420 of 2007 dated 12.07.2007

⁸ (2015) 4 SCC 670

⁹ (2015) 7 SCC 728

¹⁰ (1999) 5 SCC 651

under clause 67(a) of the dealership agreement and an appeal against the order of termination of a dealership under the Marketing Discipline Guidelines, 2005 (for short, "the Guidelines, 2005")?

2. If so, whether the impugned order of termination of retail outlet dealership of the petitioner is sustainable and valid in law?

POINT No.1:

It is the specific case of the learned Standing counsel for the respondent Corporation that since the cause of action shown out of a concluded norms/statutory contract, the present writ petition is not maintainable under Article 226 of the Constitution of India and the petitioner has to invoke the provisions of arbitration under clause 67(a) of the Dealership Agreement entered into between the petitioner and the respondent Corporation. Apart from the same, the learned Standing counsel also submitted that an appeal shall lie against the order of termination of dealership under the Guidelines, 2005.

On the contrary, learned counsel appearing for the petitioner contended that the cause for termination of the dealership does not pertain to violation of any of the conditions of the agreement and since the writ petition has already been admitted and pending consideration since 2006, the same cannot be dismissed on the ground of availability of alternative remedy. Learned counsel also submitted that the petitioner has not violated any of the clauses, more

particularly, clause Nos.27, 28, 58H, 58I and 58M of the dealership agreement.

From a perusal of the impugned proceedings the violation alleged is density variation in High Speed Diesel drawn from tank No.2 and there is shortage of delivery of every five liters of Motor Spirit (MS) and High Speed Diesel (HSD) in pump Nos.1 and 2 each respectively. Basing on the notice dated 31.12.2015, an explanation has been submitted. Thereafter, show cause notice dated 06.01.2006 has been issued pointing out the said irregularities and calling for an explanation. The petitioner submitted his detailed explanation dated 21.01.2016. The respondent Corporation not satisfying with the said explanation passed the impugned order dated 20.02.2006 terminating the retail outlet dealership of the petitioner by observing that there is a variation with regard to density parameter as well as the short delivery of MS and HSD.

Learned counsel appearing for the petitioner submitted that in the impugned order it is not mentioned that there is any adulteration resulting in density variation. If the respondent Corporation proves that any foreign substance is introduced and it is proved that such foreign substance is responsible for variation in density, it is understandable. But, in the case on hand, except making an allegation that there is a density variation, nothing has been stated. In the absence of any foreign substance and an allegation of

adulteration, the retail outlet dealership of the petitioner cannot be terminated. To substantiate his contention he relied on the judgment of this Court in **Premodaya, Bharat Petroleum Dealers, Buchireddy Palem, Nellore (1 supra)**.

The relevant paras are as under:

“There is no clause warranting an inference that whenever the requirements/specifications failed to conform to the standards of petroleum products in Schedule I, that product is adulterated. A petroleum product can be said to be adulterated only when there is introduction of any foreign substance into petroleum product, which again results in the product not conforming to the requirements and specifications in Schedule I. The definition contains the word "means". The definition has to be interpreted strictly and it is not possible to expand the purport or scope of the definition. It is not the case of the petroleum company that the petitioner by introducing foreign substance offered petrol for sale, which does not conform to the requirements and specifications. It is only inferentially based on the value of RON (when the specification is 88, RON was found 71.7) that the Territory Manager came to the conclusion that MS is adulterated. In that view of the matter the sampling and testing assume great importance.

Clause 5 of the Control Order contains safeguards for the dealer or DPSL licensee. The safeguards contained therein, in the considered opinion of the Court, are mandatory because as per DPSL any breach of covenants by the licensee would entail in the cancellation of licence itself. Clause 5(2) of the Control Order requires six samples of one liter each to be taken either in clean glass or aluminum containers. This is understandable because even by common sense one understands that petroleum products have sensitive chemical properties, which tend to change on coming into contact with any other material than glass or aluminum. Next, out of six sample bottles two samples are to be given to dealer or transporter under an acknowledgement, two samples would be kept by the concerned oil company, and the remaining two samples would be used for laboratory analysis. The Inspection Report mentions that two samples out of three samples drawn were not handed over to the dealer for safe custody. This is a very serious lapse because if the dealer challenges the values of the test report he can always seek a further test. If the sample bottles are not given to the dealer such an opportunity would not be available. Admittedly, only three sample bottles were taken, and this is certainly contravention of Clause 5(2) of the Control Order. Furthermore, the test report of QC laboratory, Tondiarpet, shows that when the sample was taken on 19.01.2001 at 5:00 p.m, the same was received at the laboratory on 01.02.2001. As per Clause 5(5) of the Control Order, the Authorized Officer shall send the sample of the product within ten days to any of the laboratories mentioned in

Schedule III. In their wisdom, rule making authority thought it fit that proper values can be obtained if the sample is tested within ten days. Therefore, sending the sample within ten days is mandatory, which is flouted in this case.

After receiving the test report dated 03.02.2001, the Territory Manager addressed a communication, dated 21.03.2001, to the petitioner informing the variation in RON as per the Test Report. Thereafter, there was no show cause notice issued to the petitioner proposing either to stop supplies or impose penalty. This is certainly a serious violation, as any such penalty would result in civil consequences. Even DPSL does not prohibit issue of notice before taking penal action under Clause 13 of DPSL.

Table 1 in Schedule I of the Control Order gives requirements for Petrol. There are twelve characteristics of petroleum products, which are standard. Density at 15 degrees centigrade, Kg/m³ is one such characteristic in Table 1 of Schedule I of the Control Order. Clause 3 of the Control Order does not require licensee/dealer to maintain record of these. Clause 3(iii)(b) of the Control Order requires the dealer to maintain record of density alone. This leads to an inference that essentially it is the duty of the oil marketing company to supply the petroleum products conforming to 12 characteristics in Schedule I. If any foreign substance is introduced, and it is proved that such foreign substance is responsible for adulteration, the petroleum company might be considered to have been relieved of the duty to maintain standards in the petroleum products supplied.

This observation is being made that in every case where there are variations or values in the characteristics in the Test Report it cannot readily be inferred that there is adulteration. As noticed supra, there is no allegation of adulteration, except the allegation that there is a deviation in the value of RON. In that view of the matter the action of the respondent company is arbitrary and unreasonable. Having regard to the language employed in Clause 13(a)(viii) of DPSL this Court is not able to countenance the submission of the learned Senior Counsel that Territory Manager has no power or jurisdiction. Clause 13(a)(viii) of DPSL operates altogether in a different context and when there is a case of proven adulteration it is not necessarily the Marketing Manager, and any person nominated for the purpose can take action.”

In fact, adulteration of product has been dealt with in

MDG 2012 under clause 5.1.1., which is reproduced below:

“Adulteration” means the introduction of any foreign substance into Motor Spirit/High Speed Diesel illegally or unauthorizedly with the result that the product does not conform to the requirements of the Bureau of Indian Standards specifications number, IS:2796 and IS:1460 for Motor Spirit and High Speed Diesel respectively and

amendments thereon, and/or if the observations on the sample under scrutiny and the reference sample do not fall within reproducibility/permissible limits of the test method for which the samples are examined, and/or

Any other requirement for the purpose to identify adulteration, issued by the competent authority from time to time.”

In view of the above, when there is no allegation of adulteration except that there is a density variation, the respondent Corporation cannot terminate the retail outlet dealership of the petitioner and the same is arbitrary and unreasonable.

As far as the shortage of delivery in MS and HSD is concerned, as mentioned in the impugned order, learned counsel brought to the notice of this Court the relevant portion in notice dated 31.12.2005 that the seals of W and M of all four pumps are intact and submitted that when the seals of petroleum units are found to be intact, the malfunctioning of petroleum unit cannot be alleged and the dealer cannot be held liable for the same. In the case on hand, when it is mentioned that the seals are intact and when there is no allegation that the petitioner has access to any parts of the machinery by-passing the seals of the units, it cannot be said that he is responsible for the shortage of delivery.

In fact, in **P. Laxmikanth Rao and Sons (3 supra)**, this Court had an occasion to deal with the similar situation and observed as under:

“Once the manufacturer of the unit calibrates the equipment ensuring proper delivery of the product, the relevant part of the machinery is sealed by the department of legal metrology, after verification of the accuracy. The very purpose of the sealing of the equipment by the department of legal metrology is to ensure that the dealer does not tamper with the same. In case a seal is found to have been removed or tampered with, there does not exist any occasion for this Court to decide whether the allegation is true or not. Tampering with the seal, by itself, is a serious dereliction and would constitute a ground for proceeding against the dealer. In such cases, accuracy or otherwise of measurement becomes secondary. If however the seal is found to be intact, the dealer cannot be held liable for the malfunctioning of the unit. If at all any one, it is manufacturer or the oil company, that have to explain such discrepancy.

In case the Petitioner had access to any parts of the machinery bypassing the seal of the unit also, it would have been liable to be proceeded notwithstanding the fact that the seal is intact. It is not even alleged that the Petitioner had access to the gears mentioned in the show cause notice, without removing the seals.

The Petitioner made an elaborate reference to the previous inspections, the condition of seals etc. In the impugned order, it is stated that a duplicate gear was implanted by the Petitioner. Not a word is said about the seal being intact. Therefore, it is a case of non-application of mind. Things would have been different had the Respondent said that the Petitioner, or for that matter any individual, can have access to the gear even while the seal was intact. Further, it is stated that the opinion tendered by the manufacturer of the unit i.e. Larson and Tubro, was not made available to the Petitioner. Failure to supply the same, results in violation of principles of natural justice. The Petitioner cannot be expected to answer certain issues regarding which he has no information. Viewed from any angle, the impugned order cannot be sustained in law.”

With regard to the maintainability of the writ petition is concerned, in the light of the alternative remedy of arbitration as well as an appeal, learned counsel for the petitioner submitted that the impugned order passed by the respondent Corporation is arbitrary and unreasonable apart from termination of the dealership on an irrelevant and non-existent clause. Even otherwise, he also submitted that when an alternative remedy is available, the petitioner is not

precluded from invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India by way of judicial review. He relied on **Harbanslal Sahnia and another vs. Indian Oil Corporation Ltd.**¹¹. The relevant paragraph is as under:

“So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (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. (See *Whirlpool Corporation vs. Registrar of Trade Marks* (1998) 8 SCC 1). The Present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners’ dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings.”

Learned counsel also relied on the orders dated 21.07.2011 of this Court in W.A.No.318 of 2011. In the said judgment, this Court while dealing with the maintainability of the writ petition in the light of availability of an alternative remedy, observed as under:

“Several judgments were cited in support of the contention that a writ petition against violation of terms of a non-statutory contract and requiring the examination of breach of clauses of a non-statutory contract, was not maintainable. These include judgment of this Court in **S.Suresh V. Indian Oil Corporation Ltd., Southern Region, Madras** (2007 (3) ALD 243); order of a learned single Judge of this Court in W.P.No.26180 of 2005, dated 10.07.2009; another order of a learned single Judge of this Court in W.P.No.76 of 2005, dated 11.01.2005; judgment of

¹¹ (2003) 2 SCC 107

a Division Bench of this Court in W.A.No.261 of 2005, dated 17.02.2005; another judgment of a Division Bench of this Court in **Sri Lalitha Devi Gas Agencies V. Hindustan Petroleum Corpn. Ltd** (2002 (5) ALD 389 (DB); judgment of a learned single Judge of this Court in **K.Srinivas Rao V. State of A.P.** (2002 (5) ALD 393) and in **M.A.Salam V. Prl.Secy. to Govt. of A.P., BCW Dept., Hyderabad** (2003 (1) ALD 699), **P.Rajagopal Reddy Vs. A.P. State Road Transport Corporation, Hyderabad** (2010 (6) ALD 521); judgment of a Division Bench of this Court in **HPC Ltd., Sec'bad V. Margadarsi Service Centre** 2010 (6) ALD 517 (DB); and the judgment, dated 14.03.2011 in W.A.No.1051 of 2009.

The several judgments of this Court referred to above and cited on behalf of the appellants used the expressions jurisdiction, maintainability and discretion as though those are synonymous, which they are not. In case of tribunals created by Statute, the legislature may invest the tribunal with substantive jurisdiction to decide specified matters consecrated by the legislation and also to decide the jurisdictional facts on which the exercise of substantive jurisdiction depends, as observed by the Supreme Court in **Desika Charyuttu V. State of Andhra Pradesh** (AIR 1964 SC 807).

When it comes to a Tribunal with plenary jurisdiction, as this Court is constituted under Article 226 of the Constitution of India, normatively this Court has the jurisdiction not only to decide the subjects consecrated to its adjudicatory domain as an expressly or a compelling implication of the nature of the adjudicatory enterprise but also has the jurisdiction to decide on the jurisdictional facts.

The obligation as a corollary of the judicial review power consecrated on this Court it is axiomatic that no legislation can denude this Court of its constitutional jurisdiction, including provisions of the Arbitration and Conciliation Act, 1996. No provision of the Arbitration and Conciliation Act, 1996 endeavours either expressly or by compelling implication to exclude the jurisdiction of this Court. No authority has been cited before us to legitimize a conclusion that the jurisdiction of this Court has been or could be excluded by an agreement to the contrary. In the circumstances, if the jurisdiction of this Court extends to examining the vitality of a conduct under a contract entered into by a public authority, such jurisdiction cannot be excluded either by legislation or by a contract including by an arbitration clause. No binding authority has been cited before us which unequivocally elucidates a principle that examination of non-statutory contracts involving disputes arising between the parties to a contract, where the State or an instrumentality of the State is a party, is beyond the jurisdiction of this Court and entertainment of such disputes is excluded from the ambit of the power of judicial review, under Article 226 of the Constitution of India.

In fact, after a fairly comprehensive analysis of several precedents including the judgment in **ABL International Ltd and Anr. V. Export Credit Guarantee**

Corporation of India Ltd. And Ors ((2004) 3 SCC 553), the Supreme Court in **Noble Resources Ltd V. State of Orissa** (AIR 2007 SC 119) concluded that the contractual matters are not beyond the realm of judicial review. Its application may however be limited and this statement of principle was recorded in the context of non-statutory contracts of public authorities; since a statutory contract in any case and beyond the disputation is within the public law domain, of judicial scrutiny. The several precedents of the Supreme Court on the area of availability of judicial review on contracts of public authorities, while employing different phraseology reiterating the established principles are *ad idem* on the issue that even disputes arising out of non-statutory contracts are amenable to the jurisdiction of the High Court as a matter of inherence of jurisdiction under Article 226 of the Constitution. What are spelt out however, are guidelines or advisories as to the appropriate exercise of discretion in entertaining such matters. The Supreme Court in **ABL International Ltd and Anr's case** (8th cited supra) states the relevant principles thus:

“From the above discussion of ours, following legal principles emerge as to the maintainability of a writ petition:-

- (a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.
- (b) Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.
- (c) A writ petition involving a consequential relief of monetary claim is also maintainable.”

As a result of the above analysis of precedents binding and persuasive, we are of the considered view that the order under appeal is not unsustainable on account of an overreach of jurisdiction by this Court. With regard to the exercise of discretion, not only do we find that the discretion has been exercised by the learned single Judge and therefore, it is normally not a case for second guess in an intra court appeal, for the exercise of a discretion and scrutiny of the order impugned in the writ petition, no elaborate examination of the evidence was required on the patent facts on record.

The conclusion as to the dealer's malfeasance was arrived at by the appellants on the singular fact that there was short supply of HSD and on the opening of the seal of the unit after breaking it, the spurious gear was found. The basis of these two facts found is inadequate and is flawed for the reason that the fact that a spurious gear was introduced by the dealer was not legitimately inferred and the fact of the external seals of the unit being intact was not adverted to nor explained in the order of termination. No elaborate recording or analysis of oral and documentary evidence was involved in the enterprise and therefore, we

are of the considered view that the exercise of discretion by the learned single Judge is not flawed.

On the aforesaid analysis, we are of the considered view that the order under appeal is impeccable and is not liable to be interfered with.”

Per contra, the learned senior counsel appearing for the respondent Corporation submitted that the writ petition is not maintainable since the petitioner has not availed the alternative remedy of arbitration under Clause 67(a) of the Dealership Agreement or an appeal under the Guidelines, 2005. To support his contention, he relied on **K.K. Saksena (8 supra)**. The relevant paras are as under:

“What follows from a minute and careful reading of the aforesaid judgments of this Court is that if a person or authority is “State” within the meaning of Article 12 of the Constitution, admittedly a writ petition under Article 226 would lie against such a person or body. However, we may add that even in such cases writ would not lie to enforce private law rights. There are a catena of judgments on this aspect and it is not necessary to refer to those judgments as that is the basic principle of judicial review of an action under the administrative law. The reason is obvious. A private law is that part of a legal system which is a part of common law that involves relationships between individuals, such as law of contract or torts. Therefore, 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.

Within a couple of years of the framing of the Constitution, this Court remarked in *Election Commission of India v. Saka Venkata Rao* (AIR 1953 SC 210) that administrative law in India has been shaped in the English mould. Power to issue writ or any order of direction for “any other purpose” has been held to be included in Article 226 of the Constitution with a view apparently to place all the High Courts in this country in somewhat the same position as the Court of the King’s Bench in England. It is for this reason ordinary “private law remedies” are not enforceable through extraordinary writ jurisdiction, even though brought against public authorities (see *Administrative Law*, 8th Edn., H.W.R. Wade and C.F. Forsyth, p.656). In a number of decisions, this Court has held that contractual and commercial obligations are enforceable only by ordinary action and not by judicial review.”

and **Joshi Technologies International Inc. (9 supra)**. The relevant paras are as under:

“68. The Court thereafter summarized the legal position in the following manner: (*ABL International Ltd., v. Export Credit Guarantee Corpn., of India Ltd. (2004) 3 SCC 553*) SCC Public Prosecutor.572, paras 27-28)

“27. From the above discussion of ours, following legal principles emerge as to the maintainability of a writ petition:

- (a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.
- (b) Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.
- (c) A writ petition involving a consequential relief of monetary claim is also maintainable.

28. 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*). 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 the said jurisdiction.”

69. The position thus summarized in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, can refuse to exercise. It also follows that under the following circumstances, 'normally', the Court would not exercise such a discretion:

69.1 The Court may not examine the issue unless the action has some public law character attached to it.

69.2 Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion Under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.

69.3 If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

69.4 Money claims *per se* particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.

70. Further legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to the contracts entered into by the State/public Authority with private parties, can be summarized as under:

70.1 At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

70.2 State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practice some discriminations.

70.3 Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings Under Article 226 of the Constitution. In such cases court can direct the aggrieved party to resort to alternate remedy of civil suit etc.

70.4 Writ jurisdiction of High Court under Article 226 was not intended to facilitate avoidance of obligation voluntarily incurred.

70.5 Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the license if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business.

70.6 Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable

of being specifically performed. Otherwise, the party may sue for damages.

70.7 Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

70.8 If the contract between private party and the State/instrumentality and/or agency of State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court Under Article 226 of the Constitutional of India and invoking its extraordinary jurisdiction.

70.9 The distinction between public law and private law element in the contract with State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract. This Court has maintained the position that writ petition is not maintainable. Dichotomy between public law and private law, rights and remedies would depend on the factual matrix of each case and the distinction between public law remedies and private law, field cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision making process or that the decision is not arbitrary.

70.10 Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

70.11 The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes.”

In the case on hand, the reason for termination of the retail outlet dealership is on the basis of short delivery of

HSD/MS and variation in HSD density in tank No.2. However, it is an admitted fact that even as per the respondents' Corporation that the seals of four pumps are intact and there is no allegation of tampering of pump-sets. It is also not the case of the Corporation that any foreign substance is mixed leading to change in density of HSD/MS.

Now coming to the aspect of maintainability of the writ petition, though the Corporation alleged irregularities in the form of short delivery and variation in density in HSD/MS, the reasons therefor are not forthcoming from the Corporation. In fact, as per the version of the respondents' Corporation itself, there is no tampering of seals and mixing of any foreign substance so as to change the density in HSD/MS. When the said irregularity is not substantiated, the respondents' Corporation cannot terminate the retail outlet dealership of the petitioner in an arbitrary manner. Even if the alternative remedy is available, still this Court can entertain the writ petition. It is settled law that the contractual matters are not beyond the realm of judicial review. However, applicability of judicial review is limited in case of non-statutory contracts of public authorities. In fact, judicial review in case of statutory contract, there is no dispute and is within the public law domain of judicial scrutiny.

This Court and the Apex Court in catena of judgments, considered the aspect of judicial review in contractual matters

and held that even the disputes arising out of non-statutory contracts are amenable to the jurisdiction of this Court under Article 226 of the Constitution of India. However, guidelines have been issued for appropriate exercise of discretion in entertaining such matters. In fact, in ABL International Ltd. and another's case (8th cited supra) held as under:

“From the above discussion of ours, following legal principles emerge as to the maintainability of a writ petition:-

- a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.
- b) Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.
- c) A writ petition involving a consequential relief of monetary claim is also maintainable.”

In the present case, the proceedings for termination of the retail outlet dealership were commenced in the year 2005. The termination proceedings issued in the month of February, 2006 have been challenged in the present writ petition. In the peculiar facts and circumstances of this case relating to non-establishment of reasons for short delivery of HSD/MS and variation in HSD density in tank No.2 by the respondent-Corporation and merely because the impugned order is appealable or amenable to arbitration, this Court is not inclined to accept the same and relegate the petitioner to file an appeal, more particularly, after a gap of 12 long years.

In view of the principles laid down in the above referred judgments by both the counsel, it cannot be said that the writ

petition is not maintainable before this Court under Article 226 of the Constitution of India.

Accordingly, point No.1 is answered in favour of the petitioner and against the respondent Corporation.

POINT No.2

Now coming to the contention with regard to the validity of the impugned proceedings is concerned, when the respondent Corporation miserably failed to prove that any foreign substance is mixed in MS and HSD and thereby there is adulteration resulting in density variation, this ground is not available for termination of the dealership.

As far as the shortage of MS and HSD in four pumps is concerned, when the respondent Corporation itself observed in notice dated 31.12.2005 that the seals of W and M of all the four pumps are intact and in the absence of an allegation that the petitioner had an access to any parts of the machinery bypassing the seal of the unit, this ground is also not available to the respondent Corporation for termination of the retail outlet dealership.

For the above said reasons, the writ petition is allowed setting aside the impugned order dated 20.02.2006 passed by the respondent Corporation.

Miscellaneous petitions, if any, shall stand closed.

P. KESHAVA RAO, J

Date: 16.07.2018.
Ccm/ES