HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

Writ Petition No.1289 of 2008

ORDER:

The petitioner seeks Writ of Mandamus declaring the Termination Order vide Ref.No.VJR/KR/21 dt.26.11.2007 issued by the 1st respondent-corporation terminating the dealership agreement dated 16.04.2004 as illegal, arbitrary and violation of principles of natural justice and set aside the same.

2 a) The petitioner's case is that the 1st respondent entered into dealership agreement initially in the year 1968 with the father of petitioner, who was running a Proprietary concern under the name and style "M/s. S.V.B. Naidu". Subsequently, the petitioner was inducted as a partner with the consent of respondent. In the year 2004, due to financial problems constitution of a firm was changed and 2nd respondent was inducted into the partnership firm with 49% share. The father of the 1st petitioner holds 1% and petitioner holds 50% share.

b) The retail outlet of petitioner's firm was providing diesel and petrol to the police department, which fell in arrears of more than Rs.8 lakhs and thereby the firm suffered losses. At that time the 1st respondent convened a meeting on 01.02.2006 with the petitioner and 2nd respondent and during the said meeting, the 1st respondent had agreed to certain terms and conditions. One of the conditions is that the 1st respondent can terminate the dealership in case if there is a "dry-out".

c) Thereafter 2nd respondent who is the financial partner was looking after the firm business. All the letters were addressed by 1st respondent in the name of partners i.e, petitioner and 2nd respondent. The 2nd respondent started suppressing the accounts and also stopped showing the letters addressed by the 1st respondent. Hence petitioner addressed a letter dated 28.07.2007 to Postal department requesting to tender the letters which were addressed to the petitioner to him personally. As the matter stood, the petitioner suddenly came to know that the dealership has been terminated by the 1st respondent in the last week of November, 2007. On enquiry, he came to know that a show cause notice dated 13.07.2007 was issued by Registered Post in the name of both the partners and since there was no explanation, the impugned termination order dated 26.11.2007 was passed. Neither show cause notice dated 13.07.2007 nor the termination order dated 26.11.2007 had been served on the petitioner. Though show cause notice was addressed to both the partners, termination order was addressed to the firm without mentioning the names of the partners.

d) As per the agreement in the meeting dated 01.02.2006, 1st respondent had specifically agreed that it would resort to termination of agreement/dealership if there was only a "dry-out". The 1st respondent, in the said meeting never stated to terminate dealership in case the firm's outlet do not meet the minimum requirement as stipulated in the agreement dated 16.04.2004, which infers, the 1st respondent has agreed not to adhere to the said condition of minimum requirement and it had waived its right to invoke the said condition for termination of the agreement. The show cause notice or termination order do not show anywhere that the petrol bunk has been dried out. The only allegation in both the communications was that the petrol bunk failed to improve the sales performances and sales were dropped consistently. Thus the impugned order is illegal for the reasons that no prior show cause notice was personally served on the petitioner and also that the termination was made on the ground that sales have come down and petitioner's petrol bunk could not meet minimum targeted sales but not on the ground that there was dry-out situation.

Hence the writ petition.

3) The 1st respondent filed counter and opposed the writ petition *inter alia* contending that the impugned proceedings is purely a private non-statutory commercial contractual agreement against which no writ is maintainable. Further, the petitioner is provided with an alternative remedy in the form of arbitration as per the terms of dealership agreement and for that reason also, writ petition is not maintainable. The 2nd respondent, who is the other partner of the dealership firm, has already filed Writ Petition No.26022/2007 challenging the very same termination proceedings (the said Writ Petition was dismissed on 08.02.2013 for his non-appearance). Hence the present writ petition is not maintainable.

a) The subject dealership was commissioned in the year 1968 and was continued under renewed dealership agreements, the current dealership agreement being on 16.04.2004. As per the terms of the said dealership agreement, the dealer is required to meet the minimum sales targets as stipulated in the agreement. The clause No.9 of the agreement reads thus:

> *"9. The Dealer undertakes to further the sales of the Corporation's petroleum products. It is specifically agreed and declared that it is a basic condition of the grant of the Dealership rights by the Corporation to the Dealer herein that the Dealer hereby agrees, undertakes and covenants to uplift and pay for the following minimum quantities of the Corporation's petroleum products per month as specified hereunder:*

PRODUCT	*QUANTITY*
Motor Spirit	*60 KL*
HSD	*150 KL*
Motor Oil	*1.5 KL*
Grease	*1.5 KL*
Other products viz	*1.5 KL*

> *The Corporation shall have the absolute right to revise the aforesaid sales targets from time to time. It is specifically agreed that in the event of the dealer not achieving the aforesaid minimum turnover at any time during 3 out of any six consecutive months during the currency of this agreement, the Corporation shall be entitled, notwithstanding any acquiescence or waiver of this condition in respect of any one/more months and notwithstanding any other provisions herein contained, to terminate this Agreement by giving one month's notice to the Dealer."*

Hence it is not open to the petitioner to allege that the Corporation cannot have recourse to the above clause owing to the alleged minutes of meeting held on 01.02.2006. The dealership agreement alone governs the relations between the dealer and the Corporation which cannot be abrogated or amended in the manner suggested by the petitioner.

b) The show cause notice dated 13.07.2007 bearing reference No.KR/21 was issued in accordance with the procedure and dispatched to the partners of the firm individually and also to the dealership firm by registered post with acknowledgment due. The show cause notice was received at the retail outlet premises on behalf of the partnership firm by one Sri B.Phani Kumar on 26.07.2007. As there was no response from the dealer, the termination proceedings were issued vide reference No.VJR/KR/21 dated 26.11.2007 duly effecting the termination of the dealership as per the terms thereof on the ground of non-performance of the retail outlet. As the petitioner refused to receive the same as is evident from the postal endorsements dated 28.11.2007, 29.11.2007 and 30.11.2007, the officer of Corporation affixed copy of the termination proceedings at the retail outlet premises and also photographed the same.

c) The subject outlet is situated on a company owned "A" site admeasuring 800 sq.yards obtained on lease from the Government at an annual rental of Rs.48,000/-. In view of non-performance by the dealer, the Corporation not only loosing out revenue from potential sales but also put to the additional expenditure for the land without any returns. The establishment of three other retail outlets by other oil marketing companies in the vicinity clearly manifests the sales potential of this area and dealer's non-performance in terms of sales cannot be attributed to any other factors.

4) Heard arguments of Sri C.Raghu, learned counsel for petitioner and Sri Thoom Srinivas, learned counsel for 1st respondent/Corporation.

5a) Fulminating the termination order dated 26.11.2007, learned counsel for petitioner Sri C. Raghu, would firstly argue that by virtue of the agreement in the meeting dated 01.02.2006, the Corporation agreed to terminate the dealership agreement only if the outlet has dried-out. Therefore, it is not legally permissible for the Corporation to terminate the agreement on the ground that the required sales targets as mentioned in the dealership agreement dated 16.04.2004 were not met.

b) Secondly, he argued that neither the show cause notice nor the termination order was personally served on the petitioner and therefore, the petitioner lost valuable opportunity to submit his reasons for not meeting the targets and thereby the principles of natural justice was denied to him.

6 a) In oppugnation, learned counsel for 1st respondent/Corporation would argue that the writ petition is not maintainable firstly because there is an arbitration clause in the dealership agreement dated 16.04.2004. The Writ Petition is not maintainable also for the reason that the 2nd respondent has already filed W.P.No.26022/2007 challenging the very same termination order and the same was dismissed. Therefore, the second writ petition with the same cause of action is not maintainable at the instance of the petitioner. Learned counsel further argued that as per Clause 9 of the dealership agreement dated 16.04.2004, if the petitioner's outlet failed to achieve minimum turnover at any time during three out of six consecutive months during the currency of the agreement, the Corporation is entitled to terminate the agreement. In the show cause notice dated 13.07.2007, the Corporation has clearly mentioned in tabular form as to how the petitioner's outlet has woefully fell short of the targets

between December, 2006 and June, 2007. Therefore, the 1st respondent was entitled to terminate the dealership. It has never conceded its right to terminate on the said ground. Regarding the meeting dated 01.02.2006, learned counsel argued that the said meeting was convened due to dry-out situation faced by the petitioner's outlet wherein both petitioner and 2nd respondent were present and agreed that they would sit together and sort out all the differences. They further agreed to place indents on 06.02.2006 and from then onwards they agreed to do business without any complaint of dry out of whatsoever. They further agreed that in case of dry-out, the Corporation is free to take action as per dealership agreement including termination of the dealership. Referring the meeting dated 01.02.2006, learned counsel argued that merely because the partners agreed that if they again faced the dry-out situation, the Corporation was free to take action as per dealership agreement including termination of the dealership, that does not mean that the Clause No.9 in the dealership agreement dated 16.04.2004 was replaced and Corporation lost its right to take action against the firm for not meeting the required sales targets as stipulated in Clause 9. He vehemently contended that such an argument of petitioner is preposterous.

b) Learned counsel further argued that show cause notice dated 13.07.2007 was addressed to both the partners and sent by separate registered posts bearing registered Letter Receipt Nos.9996 and 9997 and they were received by one B.Phani Kumar, employee of the petitioner's outlet and to that effect, the postal department issued a letter to the 1st respondent. Hence it is far-fetching to contend that the show cause notice was not personally served on the petitioner. On the other hand, the petitioner deliberately failed to give reply to the show cause notice and hence the Corporation has rightly terminated the dealership agreement.

c) Finally he submitted that since there is no interim order in the writ petition, the dealership was entrusted to a different party. He thus prayed to dismiss the writ petition.

7) The points for determination are:

i) *Whether in the meeting dated 01.02.2006, Clause No.9 of the dealership agreement dated 16.04.2004 was substituted with a new clause i.e, "Dry-Out" clause for termination of the dealership and thereby the Corporation lost its right to terminate the dealership agreement on the ground that the petitioner's outlet failed to reach the sales targets as stipulated in Clause 9?*

ii) *If point No.1 is held negatively, whether 1st respondent/Corporation was right in terminating the dealership agreement by invoking Clause 9 of dealership agreement dated 16.04.2004?*

iii) *Whether the termination of dealership is hit by the non-serving of show cause notice personally to the petitioner?*

iv) *Whether the writ petition is not maintainable due to the existence of arbitration clause in the dealership agreement and also due to the dismissal of earlier Writ Petition No.222067/2007 filed by the 2nd respondent?*

8) **POINT Nos.1 and 2**: Admittedly, Clause 9 of the dealership agreement dated 16.04.2004 deals with the right of the Corporation to terminate the agreement. Clause 9 is already extracted supra in Para 3 of

this order. This clause would show that the Corporation shall have the absolute right to revise the sales targets mentioned in that clause from time to time. The said clause further shows that in the event of the dealer not achieved the aforesaid minimum turnover at any point of time during three out of six consecutive months during the currency of the agreement, the Corporation shall be entitled, notwithstanding any acquiescence or waiver of that condition in respect of any one/more months and notwithstanding any other provisions contained in the agreement, to terminate the dealership agreement giving one month's notice to the Dealer. It is to be noted that the 1st respondent/Corporation invoked the aforesaid Clause 9 to terminate the dealership agreement. In show cause notice dated 13.07.2007 the 1st respondent has, in tabular form, mentioned as to how the petitioner's outlet failed to meet the sales targets of different oils and lubricants between December, 2006 and June, 2007. When the sales mentioned in the aforesaid table are juxtaposed with the targets mentioned in Clause 9, they would depict that the petitioner's outlet failed to achieve the sales targets in respect of all types of oils and lubricants. For instance, the sales target for Motor Spirit for every month is 60 KLs. However, in between December, 2006 and June, 2007, the sales were far below ranging between 40 to 52 KLs. So also the target for HSD is 150 KL, whereas during December, 2006 to June, 2007, the sales were staggering between 4 to 20 KL. Therefore, there is no demur that the petitioner's outlet failed to meet the required sales targets.

9) Be that it may, the contention of petitioner is that in the meeting held on 01.02.2006, Clause 9 of dealership agreement was substituted

with "Dry-Out" clause, as per which, if petitioner's outlet faced a dry-out situation without making indent for different types of oils in advance and thereby causes monetary loss to the Corporation, then the 1st respondent has right to terminate the dealership. By virtue of the "Dry-Out" clause, the 1st respondent has agreed not to adhere to Clause 9 of meeting minimum sales targets as stipulated in the said clause. The said contention is repelled by the 1st respondent stating that termination of dealership due to dry-out situation was a voluntary undertaking given by the petitioner and 2nd respondent, in addition to Clause 9 and it should not be understood as replacing the original Clause 9. The 1st respondent never waived his right to terminate the dealership by invoking Clause 9. In the light of divergent arguments, I perused the copy of minutes of the meeting dated 01.02.2006 held at Vijayawada between 1st respondent and partners of M/s. S.V.B.Naidu firm. The copy of the minutes is filed along with the material papers. The substance of the minutes is that meeting was arranged by the 1st respondent to discuss about the "dry-out" situation faced by the petitioner's outlet and the partners were asked to explain the course of action to revive the outlet. Both the petitioner and 2nd respondent being the partners have submitted the course of action that they want to initiate and the same was mentioned point wise. Point No.5 which is germane for our discussion is to the following effect:

> *"5. Both the partners have agreed that in case of dry out, IOCL is free to take action as per Dealership Agreement including termination of the Dealership."*

Thus a careful scrutiny of the above point would show that the partners agreed that in case the outlet faced a situation of dry out, the Corporation was free to take action as per Dealership Agreement including termination of the Dealership. As rightly argued by the learned counsel for 1st respondent, the said stipulation is only a voluntary undertaking given by the partners to the effect that if their outlet faces a situation of dry-out, the Corporation can terminate their dealership. There is no specific mentioning that this clause would supplant Clause 9 of the dealership agreement dated 16.04.2004. Therefore, the undertaking given at point No.5 can at best serve as an additional ground, apart from Clause 9, to initiate termination proceedings. However, point No.5 will not denude the 1st respondent of its right to initiate termination proceedings by invoking Clause 9. Since particulars of the sales for the period December, 2006 to June, 2007 mentioned in the show cause notice are not disputed by the petitioner and 2nd respondent by giving reply to the show cause notice, it should be held that those particulars are correct and thereby the Corporation got right to terminate the dealership agreement. Hence points 1 and 2 are answered against the petitioner.

10) **POINT No.3**: It is the contention of the petitioner that show cause notice dated 16.04.2004 was not served on him personally. Repelling the said contention, the 1st respondent would argue that in fact show cause notice was sent by registered post to both the partners and they were received by one B.Phani Kumar, employee of M/s. S.V.B.Naidu outlet. Learned counsel for 1st respondent filed Postal Receipts bearing Nos.996 and 9997 dated 20.07.2007 to show that show cause notice was sent to

the petitioner by registered post through Postal Receipt No.9996 and to 2nd respondent by Postal Receipt No.9997. Learned counsel also filed copy of the letter issued by the Post Master, Machilipatnam, showing that the registered letters covered by Postal Receipts Nos.9996 and 9997 were delivered to one Sri B. Phani Kumar, with the stamp of M/s. Sunkara Veera Brahmam IOC Dealer, Tagore Road, Machilipatnam on 26.07.2007. The petitioner has not disputed this fact. It is also not contended that Sri B.Phani Kumar is not concerned with their outlet. Therefore, it should be deemed that the petitioner and 2nd respondent have received show cause notice dated 13.07.2007. However, for the reasons best known to them, they did not choose to submit their explanation. Hence the 1st respondent has rightly terminated the dealership agreement. Accordingly this point is answered.

11) **POINT No.4**: Dealership agreement dated 16.04.2004 would show that Clause 65 therein relates to arbitration. It is mentioned that any disputes and/or difference of any nature whatsoever or regarding any right, liability, act, omission on account of any of the parties hereto arising out of or in relation to the agreement shall be referred to the sole arbitration of the Director (Marketing) of the Corporation, or of some Officer of the Corporation who may be nominated by the Director (Marketing). It is further mentioned that the award of the arbitrator shall be final, conclusive and binding on all parties to the Agreement, subject to the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification of or any re-enactment thereof and the rules made

there under and for the time being in force shall apply to the arbitration proceeding under this clause.

12) Thus as contended by the 1st respondent, there is an arbitration clause in the agreement which says that in case of any dispute or difference of any nature regarding any right, liability, act or omission on account of any of the parties arising out of or in relation to this agreement shall be referred to sole arbitrator. Learned counsel for petitioner though not disputed the factum of existence of arbitration clause and availability of alternative remedy, however, would contend that since the 1st respondent/Corporation is an instrumentality of the State, it is bound to follow principles of natural justice and fair play in the course of discharging its duties and as it did not issue show cause notice personally and give personal hearing to the petitioner, he can invoke the writ jurisdiction. Learned counsel placed reliance on the decision reported in ***ABL International Ltd. and another v. Export Credit Guarantee Corporation of India Ltd. and others***[1]. I gave my anxious consideration to the above respective arguments.

a) In ***ABL International Ltd.***'s case (1 supra), the Apex Court observed thus:

> *"**Para 23**: It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the above said requirement of Article 14, then we have no hesitation in holding that*

[1] (2004) 3 SCC 553

a writ court can issue suitable directions to set right the arbitrary actions of the first respondent. x x x x ....”

Thus as per the above ruling, if the acts of fairness, just and reasonableness of the State instrumentalities are in question, though in a contractual matters, the High Court can exercise its writ jurisdiction. One of the grounds on which the writ petition is filed, is that the show cause notice was not served before passing termination order. The said aspect can be considered in the present writ petition though alternative remedy of arbitration is available to the petitioner. Therefore, following the above ratio, the writ petition can be entertained despite the availability of alternative remedy. However, on facts it is already held that petitioner was served with notice.

b) Sofaras other contention is concerned, a perusal of the copy of the order in Writ Petition No.26022/2017 filed by the 2nd respondent shows that the same was dismissed by this Court for default as the petitioner therein did not appear. Since it was only a default order, it will have no impact on the present writ petition.

13) So at the outset, the writ petition is maintainable, however, in view of my findings in points 1 to 3, the petitioner has no case on merits and therefore, the writ petition is liable to be dismissed.

14) In the result, this Writ Petition is dismissed. No costs.

As a sequel, miscellaneous petitions pending, if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 23.10.2018
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