

HON'BLE THE CHIEF JUSTICE
SRI THOTTATHIL B. RADHAKRISHNAN
AND
HON'BLE SRI JUSTICE S.V.BHATT

WRIT APPEAL No.1359 OF 2016

JUDGMENT: *(Per the Hon'ble Sri Justice S.V.Bhatt)*

Heard Mr.Deepak Bhattacharjee and Mr.P.Sri Raghuram,
learned senior counsel for the parties.

2. Respondents in W.P.No.40993 of 2014 are the appellants herein.
The appeal arises from the order dated 26.04.2016 in W.P.No.40993 of
2014. The parties are referred as arrayed in the writ petition.

3. The order under appeal considered undisputed and admitted
circumstances, noted violation of principles of natural justice and
the deviation of Marketing Discipline Guidelines (MDG) and therefore
has set aside termination order Ref: No.APSO/R/RR/11 dated
12.12.2014 made by the respondents. The learned senior counsel
have not disputed the narration of circumstances in the order under
appeal. In other words, the appellants/respondents in writ petition
assail the order under appeal on legal grounds. Therefore, we refer to
the circumstances in brief before considering the grounds raised
against the order under appeal. The circumstances are stated thus:

On 13.03.2013, the respondents appointed the writ petitioner,
under Kisan Seva Kendra (KSK) category, as a dealer of retail outlet
identified at Edulabad Village. On 04.04.2013, the petitioner and the
respondents entered into dealership agreement for vending the
products of respondents in the outlet established at Edulabad Village.
Within a short span from the commencement of dealership, it is

averred that the petitioner faced a few problems with dispensing units, certification by legal metrology etc. According to petitioner, the difficulties were brought to the notice of respondents and the Legal Metrology Department and they were attended by both. On 09.01.2014, the complaint of excess delivery of fuel during operations noted in dispensing units was attended by (GVR) consultant in the presence of the respondents and the officers of Weights and Measures, Legal Metrology Department. The complaint attendance certificate was given and the dispensing units at petitioner's outlet were certified to be confirming to the requirements of law. On 04.02.2014, the Deputy Manager (RS), Hyderabad RR-II conducted inspection of petitioner's outlet and recorded the following alleged irregularities:

Sr. No.	Observation	Violation as per clause No. of MDG 2012
1.	Positive Stock variation beyond limits, MS 7363 Liters and HSD 1898 Liters	5.1.11
2.	GVR DU with Sr.No.2013000812 was in use without calibration from 21.12.2014 to 06.01.2014	5.1.12 (v)
3.	Non provision of FREE AIR facility	5.1.14

The 3rd respondent, referring to inspection dated 04.02.2014, issued show cause notice dated 24.02.2014 and the operative portion of the show cause notice on which the explanation was called for and the enquiry conducted reads thus:

The irregularity detected in 2(a) is a major irregularity (Refer Chapter 8 Clause 8.3 (iv)

3. Point no.2(b) is a case of major irregularity and to be read with clause No.5.1.12(v). As per the provisions of the same, a dealer is required to maintain various records which include the following: (V) **Selling licence, Explosive**

licence and such other licenses which are needed for continued operation of the RO. Absence of Weights & Measures calibration certificate in the interim period from 21.12.2013 to 06.01.2014 is a case of major irregularity.

- 4. Irregularity mentioned in 2(c) is an instance of minor irregularity and to be read with clause no.8.4 (iii) of provisions of MDG 2012.**

The petitioner, on 17.02.2014, replied to the charges of major irregularities which caused the issuance of show cause notice dated 04.02.2014. While matter stood thus, the 3rd respondent on 04.07.2014 referred to show cause notice dated 04.02.2014 and reply dated 07.03.2014 and called upon the petitioner to attend the personal hearing scheduled on 11.07.2014 at 03.00 pm in the chambers of Executive Director, A.P State Office, Indian Oil Corporation Limited. As outcome of the enquiry, the respondents through termination order Ref: No.APSO/R/RR/11 dated 12.12.2014 terminated the dealership agreement dated 04.04.2013. The termination order dated 12.12.2014 was challenged in W.P.No.40993 of 2014.

The petitioner complains against the decision making process of the respondents pursuant to show cause notice dated 04.02.2014 and contends that show cause notice 04.02.2014 was issued by treating the three irregularities noted in the inspection conducted on 04.02.2014 as major and minor irregularities. Assuming without admitting that these irregularities are established in the enquiry conducted by 2nd and 3rd respondents, the proposed punishment under MDG is not termination of dealership agreement. The major irregularity does not conclude termination of dealership agreement executed in favour of petitioner. The show cause notice is issued with

one specified consequence and secondly though the circumstances do not warrant termination of dealership agreement, the dealership agreement is terminated by treating the irregularities as critical irregularities.

4. The respondents resisted the writ petition firstly by contending that the writ petition under Article 226 of the Constitution of India is not maintainable, for the relationship between the petitioner and the respondents, under dealership agreement, is a pure and simple commercial contract; that even assuming without admitting that the termination order dated 12.12.2014 is untenable in law and fact, the petitioner has arbitration remedy and thirdly that the petitioner ought to have availed the remedy of appeal as provided by clause 8.9 of the MDG.

5. The learned Single Judge has considered these objections raised on the maintainability of writ petition and finally held that the issue of maintainability of writ, available specified remedy of appeal or raising arbitral dispute is no more *res integra* by the decisions of the Apex Court and this Court. For brevity, these citations are once again not referred to. In the ultimate analysis, the learned Single Judge held that to exercise the jurisdiction of this Court under Article 226 of the Constitution of India, no absolute fetter is imposed by these decisions and, on the other hand, the writ Court is vested with discretion to be exercised on case to case basis, and does not refuse to entertain the jurisdiction by referring to the availability of a remedy before the Arbitral Tribunal; the appellate authority or that the consideration of a writ prayer involves disputed questions of fact etc. By holding so, the

learned Single Judge has prefaced his consideration by observing that there is no disputed question of fact but what arises for decision is the procedural illegality or denial of protection afforded by the safeguards in the MDG rendering the termination order illegal, arbitrary etc. Upon such consideration and after taking a cautious view in considering the facts of the case, followed *GORKHA SECURITY SERVICES v. GOVERNMENT (NCT OF DELHI) AND OTHERS*¹ and held as follows:

“12. In *Gorkha Security Services* case (supra 1), the Honourable Supreme Court held thus:

“21. The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show-cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is in the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained. When it comes to blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.

22. The High Court has simply stated that the purpose of show-cause notice is primarily to enable the noticee to meet the grounds on which the action is proposed against him. No doubt, the High Court is justified to this extent. However, it is equally important to mention as to what would be the consequence if the noticee does not satisfactorily meet the grounds on which an action is proposed. To put it otherwise, we are of the opinion that in order to fulfil the requirements of principles of natural

¹ (2014) 9 SCC 105

justice, a show-cause notice should meet the following two requirements viz:

- (i) The material/grounds to be stated which according to the department necessitates an action;
- (ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit.”

13. Already petitioner suffered punishment of suspension of sales from the date of termination i.e., more than the period prescribed for major irregularity under clause 8.3 of MDG. The only punishment that can be imposed under clause 8.4 of MDG for minor irregularity is warning – cum – guidance letter in the first instance, which respondent – Corporation is entitled to issue”.

Hence, the writ appeal.

6. The Corporation does not dispute the circumstances which resulted in issuing termination order dated 12.12.2014. But the very same contentions raised before the writ Court are reiterated by the counsel appearing for the parties. The respondents rely on JOSHI TECHNOLOGIES INTERNATIONAL INC. v. UNION OF INDIA AND OTHERS² case as well to contend that the writ petition is not maintainable. The Corporation prays for allowing the writ appeal.

7. On the other hand, Mr. Sri Raghuram contends that the respondents/Corporation ought to point out an illegality, infirmity or irregularity in the findings recorded in the order under appeal. By referring to the totality of admitted circumstances, he contends that petitioner was appointed as dealer under Kisan Seva Kendra category on 13.03.2013. The major irregularities are firstly not irregularities in the sense that a misconduct or an act of impropriety is committed by the petitioner, but the omissions are on account of

² (2015)7 SCC 728

inexperience of a kisan outlet dealer in maintaining the records/ accounts. The records were not updated; the positive stock variation is noticed from such omissions. He further contends that the MDG is a guideline followed in letter and spirit both by the petitioner and the respondents/Corporation. MDG classifies irregularities depending upon their intensity, nature of omission or commission in the conduct of a dealer, as critical major and minor irregularities. There is separate criteria for grouping an omission or commission as critical, major or minor irregularities. Further, separate procedure is prescribed for taking action against a dealer for one or the other irregularity. In the case on hand, the respondents/Corporation from the circumstances recorded in the inspection dated 04.02.2014 treated the alleged omissions or commissions as major irregularities. The reply/explanation of the petitioner is given for the major irregularities. The major irregularities do not result in termination of dealership even if the misconduct is proved. The punishment, in the case on hand, is issued treating the alleged commission or omission as critical irregularity. In other words, there is stepping up the irregularity from major to critical, after the reply of petitioner is issued. The change of group is not informed to petitioner till the passing of termination order. According to him, by following such procedure, the authorities have negated the procedural safeguards assured to a dealer in the MDG, thereby the action was tainted as arbitrary, contrary to principles of natural justice etc.

8. Mr. Si Raghuram does not dispute the ratio *decidendi* of the Apex Court in Joshi Technologies case, however, by referring to the

legal principles laid down in the above decision, he submits that there is no disputed fact which needs adjudication either by Appellate Authority or by the Arbitral Tribunal. He finally contends that for the past four years, a dealer appointed under Kisan Seva Kendra category is out of business and has suffered great loss and hardship and prays for dismissing the appeal.

9. We have perused the material, the judgment under appeal and noted the submissions of the learned senior counsel appearing for the parties.

10. The following point arises for consideration:

“Whether the order under appeal in the peculiar and admitted fact situation warrants interference of this Court under Clause 15 of Letters Patent?”

11. The respondents/Corporation is not disputing the obligation on the part of the Corporation as well as dealer to follow the dos and don'ts prescribed by the MDG. The issue on hand arises under Chapter 5 which deals with types of irregularities and their classification. The show cause notice refers to the following clauses:

5.1.11 STOCK VARIATION OF MS/HSD (Beyond Permissible limits) FUEL

Stock reconciliation should be carried out and variation, if any, established after taking into account the normal operational variation of 4 % of tank stock and after considering the following factors:

- i) Evaporation/handling losses in MS as follows:
 - 0.75% on quantity sold up to an annual average of 600 KLS
 - 0.60% on additional quantity beyond an annual average of 600 KLS.
- ii) Handling losses in HSD as follows :

0.25% on quantity sold up to an annual average of 600 KLs

0.20% on additional quantity beyond an annual average of 600 KLs

- iii) Shrinkage losses and Temperature variation losses on MS and HSD to be taken into account (only in those cases/locations where and when the Shrinkage Allowance/TVA is applicable) **(Annexure – 8, 9, 10)**

In case of positive stock variation beyond permissible limits, samples will be drawn and sent to laboratory for testing. Sales and supplies of all products to be suspended immediately. Study to be carried out to identify the reasons for stock variation. If the sample passes but some other irregularity like unauthorized purchase etc. is established action to be taken accordingly. However, if the sample fails, action in line with that of adulteration will be initiated.

In case of Negative stock variation and in the absence of any other irregularity the permissible limit be considered up to 4% as specified above and samples will be drawn and sent for testing. In case the negative stock variation is beyond permissible limits sales & supplies to the retail outlet will continue during the investigation period. Explanation of the dealer to be called. Supply to be immediately suspended in case explanation of the dealer not found satisfactory.

5.1.12 NON-MAINTENANCE OF SPECIFIED RECORDS

Dealers are required to maintain various records including the following. Non-maintenance of below mentioned records will be treated as an irregularity.

- i. Daily sales register of OMC & Density register for current and previous financial years.
- ii. Pump maintenance records for current and previous financial years.
- iii. Inspection record for previous five years
- iv. Purchase Invoices & sales bills for the current and previous financial years
- v. Selling license, Explosives License and such other licenses which are needed for continued operation of the RO
- vi. Any other record as specified by OMCs in writing.

12. Chapter 8 of the MDG deals with action to be taken by OMC under the Marketing Discipline Guidelines. The purpose of excerpting these clauses is to state the MDG aims at elimination of arbitrary use of discretion in classifying an omission as critical, major or minor irregularity. In other words, the moment an omission or commission falling under an illustration, that illustration immediately attracts the applicable irregularity as the case may be. The arguments addressed are on substantial deviation in adhering to applicable safeguards. We excerpt the clauses for immediate appreciation.

For our purpose, the following clauses are excerpted:

8.2 Critical Irregularities: The following irregularities are classified as critical irregularities:

- i. Adulteration of MS/HSD (5.1.1)
- ii. Seals of the metering unit found tampered in the dispensing pumps. {5.1.2 (b)}
- iii. Totalizer seal of dispensing unit tampered or deliberately making the totalizer non functional or not reporting to the company if totalizer is not working. (5.1.3 read with 5.1.2)
- iv. Additional/Unauthorized fittings and gears inside the dispensing units/tampering with dispensing units. (5.1.4)
- v. Unauthorized storage facilities (5.1.5)
- vi. Unauthorized purchase/sales of products. (5.1.6)
- vii. Tank lorry carrying unauthorized product found under decantation at the RO (5.1.7)

Action: Termination at the FIRST instance will be imposed for the above irregularities.

8.3 Major Irregularities: The following irregularities are classified as major irregularities:

- i. Refusal by the dealer to allow drawl of samples/ carry out inspections. (5.1.8)
- ii. Non availability of reference density at the time of inspection. (5.1.9)

- iii. Selling of normal MS/HSD as branded fuels. (5.1.10)
- iv. Stock variation beyond permissible limits but sample passing quality tests. (5.1.11)
- v. Non maintenance of records since last inspection. (5.1.12)
- vi. Overcharging of MS/HSD/CNG/Auto LPG (5.1.13)
- vii. Dealer operating the automated RO in manual mode without authorization (5.1.16)

Action: Except in case of (iii): Suspension of sales and supplies for 15 days for the first irregularity, 30 days for the second irregularity, and a third offence would lead to termination of the dealership.

Action in case of (iii) above would be as under:-

In the first instance OMC would impose a penalty of recovery of differential price since last inspection. Termination will be the action in case of 2nd instance.

8.4 Minor Irregularities: The following irregularities are classified as minor irregularities:

- i. Short delivery with Weights & Measures Departments' seals intact where the dealer has not informed the OMC of this defect. {5.1.2(a)}.
- ii. Non maintenance of specified records where records from last inspection are maintained but prior records are not available.(5.1.12)
- iii. Non provision of facilities like air, clean Toilet, Telephone and first aid box.(5.1.14.)
- iv. Miscellaneous.
 - a) Non display of authorized Retail Selling prices of MS / HSD / CNG / AUTO LPG. (5.1.15)
 - b) Non display of density, opening stock of the day, sticker ensuring Zero before delivery on dispensing unit, name of product on each nozzle of MPD, contact details of authorized persons to be contacted in case of Complaint / Grievance / Emergency. (5.1.17)

- c) Non maintenance of complaint book or not providing the same when demanded by the customer. (5.1.17)
- d) Poor housekeeping.(5.1.17)
- e) Driveway Salesmen at the ROs not in uniform/wearing badges (5.1.17)

(One or more irregularity under the above category a, b, c, d or e will be considered as one irregularity only for the purpose of taking action).

Action: (except in case of (i) above):- Warning-cum-guidance letter in the first instance, Rs. 10000/- per irregularity on second instance and Rs.25000/- per irregularity on third instance onwards.

First instance: warning letter to be issued.

Second instance within one year of 1st instance: Rs.10000/- per nozzle found delivering short.

Third and subsequent instances within one year of 1st instance: Rs.25000/- per nozzle found delivering short.

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8.5.6 In respect of all cases of irregularities, a show cause notice, within 30 days from the date of inspection will be issued to the dealer indicating all the irregularities. However, in case samples of MS/HSD were drawn during inspection then the show cause notice will be issued within 30 days of test results. The show cause notice should be issued along with all reports and other documents, etc. which forms the basis of the notice.

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8.6 In case of Critical irregularities leading to termination, the Head of the State office/Regional office/Zonal office of the concerned OMC or their nominee before recommending / approving the termination of dealership will provide a personal hearing to the signatories to the dealership or their nominee(s). However, if signatories to the dealership or their nominee (s) fail to attend the hearing on an appointed date, one more chance will be

given and after that the case may be processed ex parte based on available facts.

13. It can be stated that one of the main objects of MDG is to have standardize procedure for adherence both by OMCs and dealers in providing service from end to end and ensure fairness and transparency in the conduct of business between the OMCs and the dealer. MDG is nothing but a code of conducting business and a set of steps performed by the stakeholders to make sure that the fairness in action is fulfilled. MDG defines various commissions and omissions as critical, major and minor irregularities. The broad classification is only to avoid arbitrariness and ensure certainty in the conduct of business, including imposition of punishment on the dealers upon determination of alleged guilt as true. The Corporation is entitled to take action for an alleged commission or omission, as classified under one or the other irregularity. The Corporation at the same time cannot obviate the importance of safeguards provided by the MDG while action is taken under the MDG. The decision making process of respondents if tested on these lines, the jurisdiction of this Court whether is attracted in a particular fact situation or not can be decided. We may for convenience refer to a few of the orders relied on by the writ petitioner on the maintainability of writ petition.

1. Order dated 29.04.2014 in W.P.No.13928 of 2014
2. Decision of this Court reported in **UP. LAXMIKANTH RAO AND SONS v. UNION OF INDIA REP. BY ITS SECRETARY, MINISTRY OF PETROLEUM AND OTHERS** (2011 (3) ALT 221)
3. Decision of this Court reported in **K.A.K.BABU v. DEPOT MANAGER, APSRTC, MADHIRA BUS DEPOT, KHAMMAM DISTRICT AND ANOTHER** (2011 (3) ALT 226)

4. Order dated 21.07.2011 of the Division Bench In W.A.No.318 of 2011
5. Order dated 14.10.2011 in W.P.No.20350 of 2010
6. Common order dated 06.02.2013 in W.P.Nos.12355 of 2007 & W.P.No.11931 of 2009
7. Judgment dated 24.04.2013 of the Division Bench in W.A.No.517 of 2013
8. Judgment dated 25.10.2013 of the Division Bench in W.A.No.1595 of 2013
9. Order dated 25.03.2014 in W.P.No.30227 of 2013
10. Interim order dated 24.10.2014 in W.P.No.31962 of 2014
11. Judgment dated 09.12.2014 of the Division Bench in W.A.No.1506 of 2014

14. The respondent Corporation does not dispute the obligation to adhere to the path provided by the MDG. The procedural safeguard, if is ignored or violated by respondents, we are of the view that such omission amounts to arbitrary exercise of power by respondents/ Corporation. In JOSHI TECHNOLOGIES case as rightly pointed out by writ petitioner, the Apex Court has held as follows:

“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, it can refuse to exercise. It also follows that under the following circumstances, 'normally', the Court would not exercise such a discretion:

(a) the Court may not examine the issue unless the action has some public law character attached to it.

(b) 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 made of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.

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

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

Therefore, in the peculiar facts and circumstances of this case, there is no disputed question of fact or a dispute in the sense it is understood for invoking the jurisdiction of Arbitral Tribunal.

15. In the above background, we advert to the circumstances of the case on hand. The respondents/Corporation issues show cause notice dated 04.02.2014. The show cause notice specifically refers to the alleged omissions or commissions as major irregularities. The action that could be taken for major irregularities is covered by Clause 8.3 of the MDG. On 07.03.2014, the petitioner has submitted explanation for the alleged omission or commission noted in the inspection dated 04.02.2014 and the said omission or commission was treated as major irregularity. There is nothing on record to show, much less any effort is made in the appeal, to satisfy the Court that the respondents/Corporation changed the classification from major to critical irregularity, issued addendum to the show cause notice dated 04.02.2014 or put the petitioner on notice in any form. Strangely, through letter dated 04.07.2014, the respondents/Corporation called upon the petitioner to attend the personal hearing scheduled to be held on 07.03.2014. We may hasten to add that the opportunity of

hearing arises under MDG, if the proposed action comes under critical irregularity. Except calling upon the petitioner to attend the enquiry held on 07.03.2014, the record does not further show when and how the enquiry is stepped up from major irregularity to critical irregularity. This is where the element of prejudice to petitioner or lack of fairness in following the safeguard is tested. The notice dated 04.02.2014 does not inform that the respondents intend to treat the commission or omission noted in inspection dated 04.02.2014 as a critical irregularity. In this background, we are of the view that there are no disputed questions of fact and the very documents on which the respondents/ Corporation conducted enquiry, we hold by plainly reading them that the three objections raised against the maintainability of writ petition etc., are unsustainable and are accordingly rejected. The case is examined and considered purely on admitted circumstances and the effect of violation of MDG on the final order of termination. There is hardly a dispute on the denial of upgradation of irregularity from major to critical, notwithstanding the respondents resist the writ on the ground of availability of appeal, arbitration etc. In these types of cases, the Superior Courts are weary of such pleas and therefore the Superior Courts have to decide the question of availability of judicial review under Article 226 of the Constitution of India in facts and circumstances of a case.

16. We do not see error or manifest illegality in the consideration of circumstances or exercise of discretion or jurisdiction of this Court under Article 226 of the Constitution of India by the learned Single Judge. We may also note that the petitioner has done business for a

few months and the petitioner a dealer under Kisan Seva Kendra category is kept out of business for four years.

17. For the above reasons, the writ appeal fails and is, accordingly, dismissed. No order as to costs.

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

THOTTATHIL B. RADHAKRISHNAN, CJ

29th October, 2018

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S.V.BHATT, J