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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ LPA 603/2015 and CM Nos. 18508/2015, 20642/2016 &
47072/2016

Date of decision: 12th July, 2018

INDIAN OIL CORPORATION LTD. Appellant
Through Mr. Raat Navet, Adv.

versus

BHATIA SERVICE STATION Respondent
Through Mr. Dhruv Dwivedi, Adv.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL):

CM No. 47072/2016

This is an application for deletion of ground (J) and question No. (ii) from the substantial questions of law mentioned in the grounds of appeal.

Counsel for the respondent does not oppose the application.

The application is allowed. Necessary corrections have been carried out by the counsel for the petitioner and initialled in today's date.

LPA 603/2015

Indian Oil Corporation (Appellant Corporation, for short) has filed the present intra court appeal impugning judgment

dated 21st August, 2015 passed by the learned single Judge in Writ Petition (C) No. 5983 of 2012 whereby letter of termination of dealership dated 14th September 2012 issued to M/s Bhatia Service Station (Respondent, for short) has been quashed and set aside. Direction has been issued to the appellant corporation to remove seals from the delivery units in order to enable the respondent to resume operations within one week.

2. By order dated 7th September, 2015 in this appeal, a Division Bench, while issuing notice, had stayed operation of the impugned judgment till further orders.

3. Respondent was operating a retail outlet for petrol and diesel from property bearing No. 4 Factory Road, Ring Road, Near Trauma Centre, Safdarjung Hospital, New Delhi under dealership agreement with the appellant corporation, dated 11th November, 2009. The respondent states that the dealership could be traced to the year 1960.

4. On 27th October, 2011, a team from the Anti Adulteration Cell, Northern Region had inspected the retail outlet and had recorded abnormal short delivery of 660 ML, 290 ML and 230 ML in every 05 ltrs in three dispensing units. Outlet inspection report was prepared recording short delivery. The report also records observations of the inspection team on electronic manipulation in the dispensing unit components i.e. control Card/pulse unit etc. Components of the three dispensing unit were taken out in the presence of dealer representatives and handed over to the Deputy General Manager (Engineering).

Marketing division was asked to arrange for testing of mentioned components at the original equipment manufacturer laboratory.

5. By letter dated 21st April, 2012 appellant corporation terminated dealership of the respondent.

6. Aggrieved, the respondent had filed W.P.(C). No. 2406 of 2012, in which by order dated 24th April, 2012 notice was issued and direction for maintenance of *status quo* was passed. W.P.(C) No. 2406/2012 was disposed of, vide order dated 5th July, 2012. This order refers to the contentions raised, albeit did not decide the lis finally as with the consent of the parties the matter was remitted to the appellant corporation for re-examination after issue of supplementary show-cause notice. Relevant portion of the order dated 5th July, 2012 reads as under:-

“Mr. Nigam has assailed the document dated 21.04.2012 on various grounds. Principally, his contention is that the order dated 21.04.2012 reviewed the earlier order dated 05.01.2012. According to Mr. Nigam, since the function performed by the concerned officer on 05.01.2012 was a quasi judicial in nature, without being conferred the power of review, the said order could not have been reviewed on 21.04.2012 and that too by an officer who was junior in rank to the GM.

On the other hand, Mr. Sethi contends, firstly, that the document generated on 05.01.2012 is not an order, in the sense that, it adjudicates upon the show cause notice which was issued to the petitioner. Secondly, Mr. Sethi submits that the exercise carried out, which culminated in the

generation of the order dated 21.04.2012 was, a case of exercise of administrative power and not a quasi judicial power as contended by Mr. Nigam.

Having heard the learned counsels for parties, I have put to both sides, as to whether the respondent corporation could consider reexamination of the case of the petitioner in the light of material which is presently available with the respondent corporation. Mr. Sethi says dehors his contentions in the writ petition and his stand taken in court, he would be agreeable to a de-novo exercise, whereby the petitioner would be given a fresh opportunity to agitate his case as to why the dealership ought not to be terminated, on the grounds set out in the show cause notice.

In these circumstances, with the consent of the counsels of both sides, the impugned communication dated 21.04.2012 is set aside.

The respondent corporation will designate an officer sufficiently senior, in rank not below the rank of a GM, who would hear the petitioner in response to the show cause notice dated 28.10.2011. In case the Respondent corporation wishes to issue a supplementary show cause notice it will be free to do so. However, any such exercise undertaken shall be completed within two weeks from today. Any fresh material which the respondent corporation seeks to place reliance on, will also be supplied to the petitioner. The petitioner shall also be entitled to file a supplementary reply, if it so desires within three weeks from today.

The respondent corporation shall intimate the name and designation of the officer, the venue as also the time and date when, the petitioner should appear before the officer concerned for a personal hearing in the matter.

Needless to say on according personal

hearing to the petitioner, the concerned officer shall pass a reasoned order. The concerned officer is directed to complete the exercise within a maximum period of three months from today.

It is made clear that the interim direction issued by this court vide order dated 27.04.2012 shall continue to operate in the interregnum.

With the aforesaid directions, the writ petition is disposed of.”

7. Appellant-Corporation had thereupon issued supplementary show cause notice dated 16th July, 2012, to which reply was filed. Personal hearing was given. By letter/order dated 14th September, 2012 dealership of the respondent was terminated.

8. Respondent had challenged termination order dated 14th September, 2012 in Writ Petition (C) No. 5983 of 2012, which has been allowed by the learned Single Judge vide impugned judgment with the directions noted above.

9. Impugned judgment had repelled submission of the appellant corporation that the writ petition should not be entertained in view of the arbitration clause in the dealership agreement, observing that the High Court in exceptional cases could always issue writ(s), regardless and notwithstanding statutory or alternative remedies that had not been exhausted. Reliance was placed on '**Harbanslal Sahnia and Anr. v. Indian Oil Corpn. Ltd. and Ors.**' (2003) 2 SCC 107. Learned single Judge was of the view that termination of the dealership agreement was in violation of the principles of natural justice,

as appellant corporation had terminated the dealership of the respondent vide letter dated 21st April, 2012 without issue of show cause notice or opportunity of hearing. Further the appellant corporation had departed from the standard norms laid down in the Marketing Discipline Guidelines, which departure was unreasonable and discriminatory. Thereafter, reverting to the merits of the case, reference was made to earlier inspections of the retail outlet, to observe that in three inspections on 22nd September, 2011, 26th September, 2011 and 13th October, 2011 no discrepancy was noticed. Fourth inspection on 27th October, 2011 was carried out in the absence of representative of the respondent. Reference was made to the report dated 9th November, 2011, of L&T (Gilbarco) that the electronic circuitry was original and no alteration /tampering /changes were observed to alter the pump delivery. Similarly, report dated 10th November, 2011 of MIDCO limited had concluded that MEB control card, power card and pulser assembly had passed functional testing procedure and there was no deviation in standard performance. Observations of the Deputy General Manager (Engineering) dated 20th December, 2011 that since there was a joint in the cable connecting the standard design control card, and hence possibility of manipulation within the delivery system could not be ruled out was rejected, holding that the General Manager in his note/letter dated 5th January 2012 had cleared the respondent of all allegations of manipulation. Learned single Judge was of the view that the

finding of the General Manager prevail over the findings of the Deputy General Manager (Engineering).

10. Appellant corporation has submitted that several findings in the impugned judgment on the question of compliance of principles of natural justice i.e. issue of notice, hearing etc. are factually incorrect and ignore and over-ride consent order dated 5th July, 2012 in W.P.(C) No. 2406/2012, by which the matter was remanded to the appellant corporation for re-examination and fresh decision.

11. To decide this aspect we would like to first reproduce relevant paragraph of the impugned decision striking and setting aside the termination order for violation of principles of natural justice. Paragraph reads :-

“21. In the instant case, the respondent has departed from the standard norms laid down in the Marketing Discipline Guidelines and the standard norms of natural justice and fair play and such departure was clearly unreasonable and discriminatory. Further the respondent corporation terminated the dealership of the petitioner vide its letter of termination dated 21.04.2012 without even issuing show-cause notice and/or providing any opportunity of hearing. It was only when this Court set aside the impugned termination and with the consent of both the parties referred the matter back to the respondent for re-examination that the respondent agreed to reexamine the issue in hand after affording an opportunity of hearing to the petitioner. However, after according due opportunity to the petitioner the respondent again served a letter of termination dated 14.09.2012 under reference: DDO/R/BHATIA terminating the

dealership of the petitioner on the same very grounds as done in the termination letter dated 21.04.2012. It is therefore, hard for this court to establish that whether the said termination was done with proper consideration to the contentions of the petitioner or in a mechanical manner. This Court, therefore, is of the view that the termination of the dealership agreement is in violation of the principles of natural justice.”

It is an accepted and not disputed that the appellant corporation had issued notice dated 28th October, 2011 calling upon the respondent to show cause why action should not be taken in view of the inspection report. The respondent had replied to the said show cause notice on 1st November, 2011. Thereafter, termination order dated 21st April, 2012 was passed. Moreover, after the consent order dated 5th July, 2012 in W.P.(C) No.2406/2012, appellant corporation had issued supplementary show cause notice dated 16th July, 2012, to which reply was filed by the respondent and even personal hearing was given. Thereafter by letter/order dated 14th September, 2012, the dealership was terminated. In these circumstances, we fail to appreciate the justification and reasoning given in paragraph 21 of the impugned judgment. Findings ignore and negate the consent order dated 5th July, 2012 that there would be denovo and fresh consideration on the question of termination of dealership.

12. At this stage, we would record the stand of the appellant corporation with reference to the noting of the General Manager

dated 5th January, 2012. It is submitted that the noting dated 5th January, 2012 were observations of an officer and would not in any manner confer a legal right on the respondent. This noting was never communicated and forwarded to the respondent. Reliance was placed on *Bachhittar Singh vs. The State of Punjab*, AIR 1963 SC 395 and *Sethi Auto Service Station & Ors. vs. DDA & Ors.*, (2009)1 SCC 180.

13. On the other hand, counsel for the respondent has submitted that on the basis of noting dated 5th July, 2012, appellant corporation vide letter dated 10th January, 2010 had informed the respondent about approval obtained from the Competent Authority for resuming sales from three delivery units after calibration. Our attention was also drawn by the counsel for the respondent to Clause 6.13 of Marketing Discipline Guidelines, 2005, which is reproduced below:-

“6.1.3 SHORT DELIVERY OF PRODUCTS

- a) With Weights & Measures Seals intact Sales through the concerned dispensing unit to be suspended forthwith, in case the explanation offered is satisfactory, recalibration/re-stamping to be done in the presence of an Oil Company officer before recommencement of sales. In case the explanation is found satisfactory, the offence will be treated as if this is a case of seal tampering and action taken accordingly.*
- b) With Weights & Measures Seals tampered
If it is established that the W&M seal is tampered. Penal action as given in Appendix-1*

to be taken, even if the delivery is found to be correct or excess.”

Communication dated 10th January, 2010 was written after the explanation given by the respondent was found to be satisfactory and thereupon right of the appellant corporation to issue termination/cancellation order dated 21st April, 2013 or the subsequent termination order dated 14th September, 2012 was foreclosed.

14. Counsel for the appellant corporation has contested the submissions and drawn our attention to notes to the Marketing Discipline Guidelines and decision of the Delhi High Court in ***Indian Oil Corporation Ltd. vs. Bharat Filling station***, 2012 (132) DRJ 314(DB), relevant portion of which is reproduced hereunder:-

"22. Similarly, reliance by the learned Single Judge on the Marketing Discipline Guidelines is without noticing the non binding nature thereof. In the present case, the respondents were being prosecuted by the Department of Weights and Measures. Record of the criminal proceedings also shows that the respondent No. 2, after his arrest was given judicial custody of 12 days. In these circumstances, the action of the appellant of terminating the dealership falls in the category of exceptional circumstances in which the Guidelines also permit the appellant Company to effect termination even in the case of first default."

15. Counsel for the appellant corporation has submitted that the inspection report dated 27th October, 2011 was detailed one

and specific. Quantity and quantum of short fall in the three dispensing units was substantial. MIDCO report dated 10th November, 2011, accepts, *"The Plastic sheath on the Pulsar assembly cable towards the connector end was found removed and the individual wires of the cable were found connected using joints and were sealed with insulation Tape. This is not as per MIDCO standard design:"*

16. Be that as it may, question of short supply/ dispensation is a question of fact and an issue in dispute.

17. Dealership agreement dated 11th November, 2009 has an arbitration clause. The said arbitration clause reads :-

“61 (a) Any dispute or difference of any nature whatsoever, any claim, cross-claim, counter claim or set off or regarding right, liability, act, omission or account of any of the parties hereto arising out of or in relation to this agreement shall be referred to the sole arbitration of the Director (Marketing) of the Corporation who may either himself act as the arbitrator or nominate some other affair of the corporation to act as the arbitrator. The Dealer will not be entitled to raise any objection to any such Arbitrator on the ground that the Arbitrator is an officer of the Corporation.”

18. Supreme Court in **Joshi Technologies International INC. vs. Union of India and Ors.** (2015) 7 SCC 728 after referring to earlier case law on the subject, had summarized the legal position against exercise of extraordinary writ jurisdiction in commercial matters, observing :-

"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."

19. In some cases High Courts do interfere while exercising writ jurisdiction but these are cases in nature of exception and not routine matters pertaining to commercial disputes. The present case certainly does not fall within any exception. We are of the opinion that this was not a fit case in which the writ petition should be entertained, bypassing or foregoing the normal procedure of arbitration as mutually agreed between the parties.

20. Additional facts which are of relevance may be noticed. Landlord of the premises/ land on which the retail outlet was located, pursuant to decree of eviction has taken possession of the retail outlet. The landlord is closely related to the sole proprietor of the respondent. Thus, there is no question and it is not pleaded or urged by the respondent that the retail outlet can

be set up at the same location. Retail outlet has not been operating since September, 2015.

21. We have only recorded facts and highlighted the disputes, and have not pronounced and given firm opinion on what order or direction can be given by the arbitrator in case the respondent is to invoke the arbitration clause. We have not commented on the merits of the termination order, except with reference to issue of show cause notice, reply and grant of hearing. We have noted the different contentions of both parties and stated that this is not a matter and dispute that should be resolved and adjudicated both on the facts and law in writ jurisdiction, in light of efficacious alternative remedy available in law.

22. Recording the aforesaid, we allow the present appeal and set aside the impugned order dated 21st August, 2015. W.P.(C) 5983/2012, *M/s Bhatia Service Station vs. Indian Oil Corporation Ltd.* will be treated as dismissed. Respondent is at liberty to invoke the arbitration clause. In the facts of the case, there will be no order as to costs.

SANJIV KHANNA, J

CHANDER SHEKHAR, J

JULY 12, 2018

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