NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

WA No. 319 of 2019

(Arising out of order dated 25.6.2019 passed by learned Single Judge in WPC No.2060/19)

Judgment Reserved on 12/9/2019

Judgment Delivered on 4/10/2019

1. Mrs. Ratnakashyap W/o Shri Gyaneshwar Kashyap, aged about 46 years, resident of Village-Unkari, Post-Charbhatha (Charama) Tahsil-Charama, District-Kanker (CG)

---- Appellant

Versus

1. Bharat Petroleum Corporation Limited, Through Head Retailer (West), Western Regional Office, Plot No. 6, Sector-2, Kharghar, Nav Mumbai 410210, District - Mumbai (Maharashtra).
2. Territory Manager (Retail Raipur), Bharat Petroleum Corporation Limited, 4 And 6 Shahid Veer Narayan Bhawan Nagar, Gandhi Chowk, Raipur, District - Raipur Chhattisgarh.

---- Respondents

For Appellant	:	Shri Goutam Khetrapal, Advocate
For Respondents	:	Shri Saurabh Sharma, Advocate.

Hon'ble Shri P. R. Ramchandra Menon, CJ
Hon'ble Shri Parth Prateem Sahu, J

C A V Order

Per Parth Prateem Sahu, J.

1. Dissatisfied with the order dated 25.6.2019 passed by the learned Single Judge in WPC No.2060/2019, the appellant has preferred the present writ appeal.

2. Factual matrix of the case is that on 10.9.2014 an agreement was entered between appellant and respondent Corporation in respect of appointment of appellant as a 'dealer' for retail sale of petroleum products for a period of 15 years. Under the said

agreement, the appellant was permitted to enter upon the premises owned by respondent Corporation and to use pumps, storage tanks, pipes, fittings and all other facilities erected and provided by respondent company at the said premises. On 1.2.2017 a joint inspection was conducted by the officers of respondent Corporation in presence of the employees of appellant engaged for operation of retail petroleum outlet and it was found that out of total 08 nozzles of dispensing units, 03 were delivering short supply beyond permissible limit and in 04 nozzles, 'K' Factor was not matching with the certificate issued by Weight & Measure Department after stamping. The Inspection Team also recorded many other irregularities like not maintaining register recording density, sale register incomplete, selling price stock & density of MS/HSD not displayed etc. Finding many irregularities/breaches in running of petrol pump by appellant, the respondent Corporation issued a show-cause notice to the appellant on 3.10.2018 calling upon her to explain within a period of 15 days as to why action should not be taken against her including termination of dealership. Appellant filed reply to show-cause notice and pleaded that on 26.12.2016 the Weight & Measure Inspector done stamping of machines and issued certificate regarding 'K Factor'. However, after few days due to some electronic defect in dispensing unit, three nozzles started delivering short/excess supply of motor spirit & high speed diesel. Said defect was immediately brought to the notice of the Weight & Measure Inspector vide letter dated 30.1.2017.

Personal hearing was also afforded to appellant and on being dissatisfied with explanation given by appellant, the respondent Corporation terminated retail outlet dealership agreement dated 10.9.2014 vide letter dated 30.5.2019 and also took back possession of said premises from appellant.

3. Feeling aggrieved therewith, the appellant preferred a writ petition bearing No.2060/2019 before the High Court. Learned Single Judge after considering the pleadings made in writ petition as well as reply filed by respondent Corporation to the application for grant of interim relief and document annexed thereto, dismissed writ petition observing that agreement itself contains an arbitration clause.

4. Learned counsel representing appellant submits that the learned Single Judge committed an error in holding that the reliefs, as sought by appellant in writ petition, can also be considered and granted by the Arbitrator. He submits that the Arbitrator is not having jurisdiction to revive terminated agreement and as such, the relief claimed by appellant in writ petition can only be granted by the High Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India. He further submits that short supply of petroleum products was due to some electronic defect occurred in the nozzles of dispensing units, which was promptly intimated to the Weight & Measure Inspector, who had issued certificate after setting 'K Factor' in all 8 nozzles of dispensing units. He further submits that after coming to know

about the said defect, the appellant immediately informed the concerned authority for taking necessary steps to cure said defect. In alternate, he submits that even if it is accepted that there was some mistake on the part of appellant, then also as it is the first mistake on her part, the respondent Corporation instead of terminating the agreement itself, could have imposed penalty of Rs.25,000/- against her, as provided under the Marketing Guidelines dated 8.1.2013. He submits that action taken by respondent Corporation is arbitrary and contrary to the Marketing Guidelines dated 8.1.2013. He also submits that action taken by the respondent authority concerned not only suffers from vice of malafides but also in violation of the principles of natural justice. He places his reliance on the judgment delivered in the matter of **HPCL & ors v. Super Highway Services & anr** reported in **(2010) 3 SCC 321**.

5. Per contra, learned counsel appearing on behalf of respondent Corporation supported the order passed by learned Single Judge and submits that the appointment of appellant as 'dealer' was under the terms of agreement and Clause-19 provides for referring the dispute between the parties to the sole Arbitrator and all the reliefs for which petitioner/appellant will be entitled in accordance with law can be granted by Arbitrator and therefore learned Single Judge was correct in dismissing writ petition on that count. He further submits that the Members of Quality Control Cell of respondent Corporation, whose duty is to carry out surprise inspection to check adulteration and mal-practices

at the petroleum outlets, visited retail outlet of appellant at 11.30 a.m. on 1.2.2017 and noticed in presence of employees engaged by appellant for running of petrol pump, that out of 8 nozzles, 03 were delivering short supply of petroleum products. It was found that the said nozzles were supplying 70ml, 80ml & 60 ml respectively in every 5 liters. He also submits that 'K Factor' was also found to be changed/mis-matched with the certificate issued by Weight & Measure Department on 26.12.2016 after caliberation test, which is suggestive of the fact that tampering has been done with 'K Factor'. Appellant has not offered any explanation with respect to short delivery of petroleum products to the customers/public at large, whereas under the agreement entered between appellant and respondent Corporation, it was the duty of dealer not only to immediately inform the company about short supply but also to stop sale and supply from such defective nozzles at once till the defect is not rectified. He submits that by not bringing the said defect in nozzles to the notice of respondent Corporation, the appellant has not only violated the terms and conditions of agreement, but also cheated the public at large by supplying short petroleum products. He submits that even in the reply to the show-cause notice the appellant has not stated that there was some electronic defect which could not be detected prior to examination and testing of nozzles by inspecting team. He submits that as the appellant failed to comply with the conditions of agreement as well as Marketing Discipline Guidelines wherein it has been specifically mentioned that if a pump is delivering short or excess petroleum product, the same shall be intimated immediately to the appropriate department of the Corporation, who, in turn, will immediately arrange for recalibration with the help of W&M Inspector in the presence of an officer of respondent Corporation. However, in the case at hand, the appellant herself has not taken any pain to inform respondent Corporation about erratic delivery from nozzles, till it was detected by the team of Quality Control Cell. He further submits that inspection was carried out in presence of representative of appellant, show-cause notice was issued to appellant, reply to which was filed by appellant, personal hearing was also provided and as the reply was not found to be satisfactory, the agreement was terminated in accordance with terms and conditions of agreement itself. There is no violation of principles of natural justice because proper opportunity was afforded to the appellant to put-forth her version, however, she failed to offer any plausible and justifiable explanation with respect to irregularities noticed by the inspection team during inspection. Lastly he submits that contents of letter dated 30.10.2017 (Annexure P-3) are afterthought, which is also evident from the contents of reply given by the Weight & Measure Inspector on 13.4.2017.

6. We have heard learned counsel for the parties and perused the records.

7. Annexure P-2 is the agreement entered between the appellant and respondent Corporation thereby permitting appellant to enter the scheduled premises and use the facilities erected and provided thereon for a period of 15 years. This agreement clearly reveals that scheduled premises is owned by respondent Corporation and appellant has been permitted to use the same as a dealer under the license. Clause 7(a) of the agreement cast a duty upon the licensee to see that full and proper measure is delivered from the pumps installed by the company and in case any defect is developed in the pump, the same shall be immediately reported in writing to the Corporation and the licensee shall not operate defective pump further until the defect is cured. Clause 7 (a) reads as under:-

> "7(a). The licensee shall be responsible to see that full and proper measure is delivered from the pumps installed by the company on the said premises and shall have no recourse against the company for any loss, damages, cost, charge or expenses which the Licensees may at any time suffer by reason of the pumps delivering wrong measure or by reason of the Motor Spirit or HSD or any other petroleum products becoming contaminated in any way. If at any time the pumps shall be delivering wrong measure or shall develop any other defect the Licensees shall forthwith with report such defect in writing to the Company and subject to sub-clause (b) hereunder shall not operate the defective pump or pumps further untill the defect shall have been remedied."

Clause 12 of agreement provides for termination of license without assigning reasons with a notice of 90 days and Clause 13 provides for termination of agreement forthwith upon or at any time on the happening of any of events mentioned therein. Relevant events of Clause-13 are re-produced herein below:-

> “vii) If the Licensees shall be guilty of a breach of any of the covenants and stipulations on their part contained in this agreement.
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> viii) If the Licensees shall commit or suffer to be committed any act which in the opinion of the Marketing Director of the Company for the time being in Mumbai or any other person nominated for this purpose by the Company is prejudicial to the interest of good name of the Company or its products. The decision of such officer or person shall be final and binding on the Licensees.”

Clause 15 of the agreement provides that upon termination of license, the licensee shall cease to have any right whatsoever to enter or remain on the premises or to use the said facilities. The mode of resolution of dispute, if any, between the parties to agreement is provided under Clause 19 of agreement, according to which, any dispute or difference of any nature whatsoever arising out of agreement shall be referred to the Sole Arbitrator. Relevant portion of Clause 19 of agreement is extracted below:-

> “19.a)Any dispute or difference of any nature whatsoever, any claim, cross-claim, counter-claim or set off of the Company against the Licensee or regarding any 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 Company or of some Officer of the Company who may be nominated by the Director (Marketing)........”

8. A bare perusal of the order of termination of agreement makes it clear that in the course of surprise inspection, the Members of Quality Control Cell of respondent Corporation have found that some nozzles are delivering short supply of petroleum products; 'K-Factor' in the dispensing nozzles/machines was not matching with W&M Certificate. Some other irregularities like sale register was incomplete from 25.1.2017 for MS & HSD; density register for 20 kl tank of HSD was not written for the month of December, 2017; in density register for MS & HSD, density after decantation not recorded for 1.1.2017 till date and receipt not recorded from 11.1.2014 till date etc., were also noticed. The respondent thereafter issued show cause notice as to why action may not be taken against the appellant.

9. Pursuant to show-cause notice, petitioner/appellant submitted detailed reply and personal hearing was also afforded to her and then only the order Annexure P-1 terminating the agreement was passed.

10. Perusal of Annexure P-1 to writ petition by which the agreement has been terminated shows following irregularities;-

> “8.On the basis of aforesaid observations, few irregularities were observed and accordingly show-cause notice dated 03.10.2008 was issued to you for submitting your explanation against following irregularities;-
>
> > i. You have electronically tampered the nozzle no HSD-A2 Rear & HSD-B1- Front of MPDs DW Sr No.WSP0013213 and nozzle no MS-A2-Rear & MS-B2-Front of DW Sr No.WSP13209 of said retail outlet as K factor mismatch was observed in both MPDs.

ii. The accuracy of the product delivered to customers has been manipulated due to which there is short delivery of product.

iii. You have tarnished BPCL brand image by adopting wrong practice such as tampering with K factor.

iv. You are not complying with the terms and conditions of Dealership Agreement and instructions given by BPCL for sale of BPCL's petroleum product from BPCL's Retail Outlet from time to time.

a) The sales register incomplete from 25.01.2017 for MS & HSD i.e. no receipt/no meter reading/ closing sale/ receipts/ dip stock recorded.

b) The density register not written for 20 kl tank of HSD for the month of December 2016. In density register for MS & HSD, density after decantation not recorded for 01.01.2017 till date and receipt not recorded from 11.1.2017 till date and morning density at 15 deg C not recorded after 11.1.2017 till date. Density verification was done with reference to the last receipt of load.

c) Selling price, stock and density of MS/HSD not displayed.

d)Aluminum buckets available is without bonding wire, staff to be educated for its usage.

e) Tank lorry retention sample for last two load received for MS & HSD not maintained as per MDG 2012.

f) Valid explosives license copy not available at the time of inspection hence actual tankage against CCOE approved tankage could not be verified.

g) Free air service facility is not available at the RO

h) First aid box facility is not available at the RO

i) Complaint register is not available at the RO.

j) Automation not available, no ATG available."

11. The question which arises for consideration of this Court is whether the learned Single Judge was justified in refusing to entertain writ petition in view of arbitration clause available in the agreement?

12. Looking to the contents of Annexure P-1 and also argument raised by learned counsel for the petitioner/appellant, referring to reply to show-cause notice submitted by petitioner/appellant, the disputed facts are involved in this case and the same can only be decided by recording of evidence of the respective parties. If a dispute arises between the parties for violating terms and conditions of the agreement, then the mode provided in the agreement for resolution of such dispute will have to be invoked at the first instance. Though, the availability of alternative remedy is not an absolute bar for entertaining writ petition but it is a self-restriction and can be invoked only in special circumstances, such as, the order has been passed in violation of the principles of natural justice or by adopting a procedure which is foreign to law. In the instant case, after the surprise check and finding some irregularities, a show-cause notice was issued to the petitioner/appellant herein, which was replied by her and was also afforded personal hearing. Thus, in the opinion of this Court, there is no violation of the principles of natural justice.

13. So far as the argument raised by learned counsel for the petitioner / appellant that the Arbitrator is not having jurisdiction to set aside the order of termination of agreement, relying on the decision of Hon'ble Supreme Court in the matter of Hindustan Petroleum Corporation Limited & ors v. Super Highway Services & another reported in (2010) 3 SCC 321, is concerned, the said judgment is distinguishable on facts. In the aforesaid judgment,

there was no admissible evidence to prove service or refusal of notice by respondent dealer. Hon'ble Supreme Court has also arrived at a conclusion that as objection with respect to availability of alternative remedy of arbitration under Clause 68 of the agreement therein has not been raised at the first instance, now it is too late to raise such objection. Para-35 of the said judgment is reproduced herein below;-

> "35. Although Clause 68 of the Dealership Agreement refers to arbitration, it is unfortunate that the said question was not raised before the High Court. It is now too late in the day for the petitioner Corporation to contend that in view of Clause 68 of the Dealership Agreement, the Respondent 1 was not entitled to seek its remedy before the writ Court. In any event, by filing appeal against the order of the learned Single Judge, the petitioner herein also submitted to the jurisdiction of the writ Court, without objecting to the same."

14. In the case at hand, the respondent Corporation has, at the first instance, before the learned Single Judge raised the objection with regard to availability of alternative remedy and therefore the learned Single Judge has declined to entertain writ petition against the order of termination of agreement.

15. In the case of Super Highway Services (supra), learned counsel appearing on behalf of Hindustan Petroleum Corporation Ltd. has made submission, relying on decisions of Supreme Court in the matter of State of HP v. Gujarat Ambuja Cement reported in (2005) 6 SCC 499 and also decision dated 12.5.2009 passed in SLP (C) No.11193/2009, parties being M/s Ankur Filling Station

v. Hindustan Petroleum Corpn. Ltd., that looking to the decision of two Benches on the aspect of alternative remedy, the case of M/s Ankur Filling (supra) was referred to a larger Bench and the same is still pending.

16. The SLP (C) No.11193/09 was heard by a Bench of three Hon'ble Judges and leave was granted. Thereupon, Civil Appeal No.10855/18 was registered.

A Bench of three Hon'ble Judges of Supreme Court in Civil Appeal No.10855/2018, parties being M/s Ankur Filling Station v. Hindustan Petroleum Corpn. Ltd. while considering the issue of alternative remedy of initiating arbitration proceeding under the agreement has observed as under:-

> "5. On the arguments advanced on behalf of the respondents that there may not be an absolute bar for the learned Arbitrator to grant restoration in the given facts of a case and the relief to be afforded in the award would depend on the surrounding circumstances, we do not consider it necessary to proceed to answer the larger question of law arising which can only be done by a larger bench of five Hon'ble Judges in view of the decisions rendered in Indian Oil Corporation Ltd. vs. Amritsar Gas Service and others[1] and E. Venkatakrishna vs. Indian Oil Corporation and aothers[2]
>
> 6. So far as the present case is concerned, we leave it open for the appellant to invoke the arbitration clause even at this stage. In such an event, it will be open for the learned Arbitrator to take a decision in the matter in accordance with law. It will, naturally, be open for both the parties to raise all legal issues and contentions as may be available to them in law."

In M/s Ankur Filling Station's case (supra) the Hon'ble Supreme Court, after considering the arguments raised by counsel appearing for Hindustan Petroleum Corporation Ltd. has relegated the petitioner therein to approach the Arbitrator even for grant of restoration of agreement.

17. In view of the above verdict passed by Hon'ble Supreme Court in the matters of Super Highway Services (supra), M/s Ankul Filling Station (supra) and submission of learned counsel for respondent Corporation, the arguments raised by learned counsel for petitioner/appellant herein that relief of restoration of agreement cannot be granted by the Arbitrator is not sustainable.

18. For the foregoing reasons and in the given facts and circumstances of the case, we do not find any infirmity in the order impugned passed by learned Single Judge. The writ appeal fails. It is accordingly dismissed.

19. However, if the appellant files a dispute before the Arbitrator, then it will be open for the Arbitrator to take a decision in the matter in accordance with law. Both the parties will be at liberty to raise all legal issues and grounds, as may be available to them in law.

Sd/-	Sd/-
(PR Ramchandra Menon)	(Parth Prateem Sahu)
Chief Justice	Judge

roshan/-