IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

WRIT PETITION (STAMP) NO.16075 OF 2019

M/s.Jagannath Auto Services … Petitioner

Vs

Bharat Petroleum Corporation Limited … Respondents

Mr.Abhinav Chandrachud with Mr.Vinod Sangvikar for the Petitioner

Mr.Raghav Shekhar i/b The Law Point for the Respondent

CORAM: S.C. DHARMADHIKARI &
R.I. CHAGLA, JJ.

DATED: DECEMBER 17, 2019

P.C.:

1. By this petition under Article 226 of the Constitution of India, the petitioner prays for issuance of a writ of mandamus or any appropriate writ, order or direction in the nature thereof directing the respondent to withdraw the communication dated 17.1.2018 terminating the Dispensing Pump and Selling Licence and thereafter to allot the same to the petitioner forthwith.

2. The petitioner before us is a firm registered under the Indian Partnership Act, 1932. It carries on business from the address mentioned in the cause title. The respondent – Bharat Petroleum Corporation Limited is a Government of India enterprise. The argument is that being an instrumentality or agency of the State, it would fall within the purview of Article 12 of the Constitution of India. It is, therefore, amenable to writ jurisdiction.

3. The registered partnership firm through its partners Shri Arun Kumar Jagannath Sathe and Shri Sunil Bajrang Waghmare applied for and were issued the licence to sell Bharat Petroleum Corporation Limited's Motor Spirit and / or High Speed Diesel, Motor oils, Greases, and other Petroleum products and motor accessories. The application in that behalf was made in the year 2003. The petitioner claims to be belonging to Scheduled Caste/Scheduled Tribe and out of 144 candidates, the location and the petitioner were chosen for the allotment. The allotment was made in December, 2006.

4. The licence was granted to Jagannath Auto Services. The two partners were as above. The licence, copy of which is at exhibit A to the petition, permits carrying on the aforesaid business

of partnership under a partnership deed of 7.2.2007. Thereafter, there was a supplementary partnership agreement on 7.7.2007 to allow the partnership to carry on business of petroleum products.

5. The petitioner says that after their performance, they made an offer to the respondent in relation to another outlet situate at Lonavala in the year 2010. The petitioner states that due to insufficiency of funds, it was not able to handle both the outlets. The petitioner says that there was an outlet at Lonavala operated by them but which could not be carried on and conducted on account of insufficiency of funds. This Lonavala retail outlet was returned to the respondent.

6. In 2011-2012, the partner Shri Sunil Waghmare was diagnosed with Cancer. The treatment required spending of huge amount and, therefore, there was a financial crisis. The petitioner in paras 8 and 9 of the petition says that they had not lifted any products during that period of time. Since there was a financial crisis and shortage of funds, the other partner took a loan from the Bank of Maharashtra. The said amount of loan could not be repaid and the bank, therefore, initiated recovery proceedings by filing

Original Application No.281 of 2019 in the Debt Recovery Tribunal, Pune. That is still pending.

7. On 4.3.2017, a show-cause notice was issued to the petitioner by the respondent calling upon it to show cause as to why the dealership should not be terminated.

8. A reply was given on 10.3.2017, copy of which is at exhibit D to the petition.

9. Thereafter, the petitioner made repeated requests for reconstitution of the firm by admitting a new partner to replace Shri Sunil Waghmare. The letters were addressed in the month of April, May and June, 2017. The petitioner even made an offer to deposit the outstanding amount and Rs.12 lakhs were indeed transferred in the account of the respondent – company.

10. The amount was transferred on the assurance that they would allow the petitioner to operate the outlet. The petitioner made repeated requests to allow them to operate this outlet but despite the letters, copies of which are at exhibits G and H, as also complaint made to the National Commission for Scheduled Castes, copy of which is at exhibit I, the petitioner was informed

that there is some legal investigation which would take some time. However, on 17.1.2018, the dealership was terminated.

11. It is evident that in the ground (C) of this petition, the petitioner made a reference to a suit filed in the Court of Civil Judge, Senior Division, Pune, being Civil Suit No.1590 of 2017 and an order made in the same. The petitioner also raised grievance that the termination is without offering the petitioner a fair chance of hearing and without following principles of natural justice.

12. On a perusal of this Writ Petition and all its annexures, particularly, the communications from the petitioner and eventually the order of termination, we put to Mr.Chandrachud, the learned Counsel appearing for the petitioner as to why the petitioner is not filing a civil Suit to claim all the reliefs that are claimed in the present Writ Petition.

13. The answer given by Mr.Chandrachud is even if the suit is to be filed, it would not be possible for the petitioner to obtain a relief of restoration of the dealership or a relief directing the respondent to allow the petitioner to operate the outlet.

14. Mr.Chandrachud would submit that such reliefs can be granted only when a party like the petitioner invokes the writ jurisdiction of this Court and complains about the violation of fundamental or legal right and alleging breach of the mandate of Article 14 of the Constitution of India, particularly highlighting disregard to the principles of natural justice. It is only then a prerogative writ is issued by the High Court to grant the relief of the nature claimed by the petitioner.

15. Mr.Chandrachud would place heavy reliance on the decisions of the Hon'ble Supreme Court to which we will make a reference shortly.

16. However, on a perusal of the communications, copies of which are annexed to the petition, it is apparent that the Dispensing Pump and Selling Licence was issued on 20.11.2006. There was an agreement executed in that behalf on that date. The two partners of Jagannath Auto Services and the respondent executed such agreement. The impugned communications refer to the clauses of this agreement and then say that the petitioner had agreed to place an order orally or in writing for purchase of petroleum products from the respondent from time to time but

neither such order in the form of indent for supply nor upliftment of petroleum products for selling from the retail outlet as agreed by the petitioner from August, 2016 till the date of termination, was placed or done and the retail outlet remained dry for a period of almost 16 months.

17. An explanation was sought with regard to the non-upliftment of the petroleum products and keeping the retail outlet dry vide letters dated 12.11.2016, 28.11.2016, 7.9.2016 and another communication of 3.1.2017. The petitioner failed to provide the same. There were letters addressed seeking explanation for this alleged breach of the dealership agreement and which allegedly affected the brand image of the respondent.

18. Then, the second reason assigned for termination is poor performance by the petitioner. The third reason is unauthorised partnership agreement/MoUs and mortgaging company's assets. This was also elaborated in the termination letter. Ultimately, after paragraph 6, the breaches of the terms and conditions of the dealership agreement have been highlighted. That portion of the communication reads thus:

“From the aforesaid, it is observed that you have committed following breaches of the terms and conditions of the Dealership Agreement:

(i) You have negatively affected our branch image and efforts to develop customer loyalty.

(ii) You have unilaterally closed the retail outlet.

(iii) You have repeatedly failed to promote the sale of BPCL products to the satisfaction of BPCL and achieve sales target set by BPCL from time to time.

(iv) You have allowed the Retail Outlet site to remain dry for a period of around approximately 16 (Sixteen) months and have failed to supply petroleum products from the outfit to the public.

(v) Further, you entered into various partnership agreements/MOUs for running the retail outlet and have unauthorisedly inducted partners in the dealership without consent of the Corporation.

(vi) You have also mortgaged the retail outlet assets belonging to the Corporation

(vii) You have also failed to comply with the terms and conditions of Dealership Agreement and instructions given by BPCL from time to time.

From the foregoing, it is clear that you have miserably failed in performance of your obligation under the aforesaid Agreement entered by and between us & violated various clauses of the said DPSL agreement and thereby inter alia causing breach of trust reposed in you as Dealer. Each of such breach, independently and separately, entitles us to terminate the Dealership Agreement. Since breaches of the terms of the Dealership Agreement are of very serious nature and in the circumstances referred above, we regret that it has been decided to terminate the above said Dealership Agreement dated 20.11.2006.

As per the terms of the Dealership, upon termination of the subject Agreement, you ceased to have any right whatsoever to enter or remain on the premises or to use the facilities (i.e. MS/HSD Pump/Storage Tank/pipelines and fittings and all other facilities erected and provided by the Company at the Retail Outlet). You, your employees, agents etc. are therefore advised not to enter and/or to use the aforesaid facilities existing at the Retail Outlet henceforth.

Our team of officers consisting of Ms Monalisha Dutta, Manager Sales & Mr Suresh Alate, CG Engineer Pune will be visiting the Retail Outlet on 25.01.2018 at about 1100 hours when you and /or your authorized representative may be present at the outlet for the limited purpose of taking away your articles, if any, lying at the outlet, failing which the same will be kept by us in such place and in such manner as we may deem fit and proper at your risk and cost. The stock of the petroleum products, if any, lying at the outlet would be taken, quality tested and necessary credit for the same, if any, would be given to you in your Statement of Account.

Further, we hereby confirm that, you have cleared the outstanding amount i.e., INR 430933/-, in fact you have made payment of some excess amount which is not due from you. However, such excess amount which is calculated to INR 771069/- will be remitted to you on final settlements of account.

This letter is issued without prejudice to any other rights and remedies that this Corporation may have against you under the said Dealership Agreement dated 20.11.2006."

19. It is in the light of the above that the termination has been effected.

20. Upon hearing Mr.Chandrachud, we find that on each of these reasons assigned in the termination letter, the petitioner places its

contra version on facts. Apart from highlighting the serious ailment of the partner of the petitioner firm, what is projected is that after the discussions between the parties, the company (respondent before us) orally assured the petitioner that on payment of certain amount, the dealership would be restored. That was not done. Further, the allegation is that this termination is sudden and without compliance with the principles of natural justice.

21. Such versions, on fact, of both sides are not possible of being considered and the entire dispute resolved in our limited jurisdiction. If the petitioner impugns the termination on the ground that it violates the principles of natural justice as also is contrary to the terms and conditions of the contract or violates the mandate of Article 14 of the Constitution of India, to our mind, the petitioner is not prevented from instituting a suit in the competent civil Court and claiming all the reliefs. The understanding of Mr.Chandrachud that in a suit filed in a competent civil Court, the reliefs, that are claimed in terms of the prayers of this petition, cannot be granted, is totally fallacious, misconceived. The Specific Relief Act, 1963 is an act which enables the parties like the petitioner to claim specific performance of a contract. Now bearing in mind the nature of the

contract, whether a relief of restoration of the outlet can be obtained because of the wording of section 14 of the same, is a matter to be decided on a case to case basis. The Specific Relief Act, 1963 which contains section 14 (prior to its amendment by Act 18 of 2018 or thereafter) also contains another important section and which the argument of Mr.Chandrachud overlooks. It says that in the event, a party claims a mandatory injunction, that injunction cannot be granted to prevent the breach of a contract, the performance of which could not be specifically enforced. There is an exception carved out by section 42 and that reads as under:

> **“42. Injunction to perform negative agreement.—** Notwithstanding anything contained in clause (e) of section 41, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement:
> Provided that the plaintiff has not failed to perform the contract so far as it is binding on him.”

22. Therefore, it is not as if in every suit to prevent a breach of a contract the performance of which could not be specifically enforced, a relief of mandatory injunction cannot be granted. That

is also granted to direct performance of a duty. That injunction can be granted in cases covered by section 42 notwithstanding anything contained in clause (e) of section 41. The petitioner will have to establish and prove in the facts and circumstances peculiar to it that section 14 has no application as also in the light of the wording of section 42, the relief which is sought in the present writ petition be granted. It is fallacious to assume that a civil Court will not take a serious note of the allegations of this nature as also the complaint that principles of natural justice have not been followed or that there is serious breach and violation of mandate of Article 14 of the Constitution of India. It is a common misconception prevailing in the present day lawyers that it is only when a Writ Petition is filed and a Writ of Mandamus is claimed that the relief of restoration of petroleum dealership can be obtained.

23. The reliance, therefore, on the decisions of the Hon'ble Supreme Court is totally misplaced. In the first decision in ***Indian Oil Corporation Limited vs. Amritsar Gas Service & Others***[1], the facts were peculiar. The Indian Oil Corporation Limited appealed against the judgment of the Punjab & Haryana High

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1 (1991) 1 SCC 533

Court dismissing a Civil Revision Application which was directed against the order passed by the Additional District Judge, Amritsar. The order of the Additional District Judge affirms that of the Special Judge, First class in a suit by which the application made by the Indian Oil Corporation Limited under section 34 of the Arbitration Act, 1940 for stay of the suit was dismissed.

24. A reference is made to the Distributorship Agreement in paragraphs 2 and 3 and thereafter the notice of termination. The termination was challenged by filing a suit in which the Indian Oil Corporation Limited was arrayed as a defendant. The relief claimed in substance was for a declaration that termination of the distributorship agreement was illegal and void and that it continued notwithstanding the said termination. Thus, the suit was based entirely on the terms and conditions of the agreement of distributorship and inapplicability of clause 27 permitting forthwith termination of the agreement without any liberty being given to show cause to the distributor. The Indian Oil Corporation Limited was advised to file the application under section 34 of the Arbitration Act for staying the suit which was rejected by the trial Court. The appeal against the order of the trial Court was also

dismissed and even the revision before the High Court failed. The Special Leave was granted on a limited point. The Court made reference to that order and it appears that in that order, the disputes were referred by the Hon’ble Supreme Court to a retired Judge of the High Court of Punjab & Haryana. He was to arbitrate on the dispute between the parties raised in the Special Leave Petition and the suit before the Court of Senior Subordinate Judge, Amritsar. The arbitrator entered reference and made an award dealing with the issues which are crystallised by the Hon’ble Supreme Court in paragraph 7 of its judgment. After the award was made, objections were filed to the same. The objections were to be decided by the Hon'ble Supreme Court.

25. The arbitrator gave an award holding that Indian Oil Corporation Limited committed breach of contract. On that basis, the dealer was entitled to have the breach remedied by restoration of the distributorship and payment of compensation. The counter claim was not decided by the arbitrator on the ground that it did not come within the scope of the reference. Thereafter, this award was challenged before the Supreme Court. The arguments revolved around applicability of section 14 of the Specific Relief

Act, 1963 and interpretation of the clauses so also the terms and conditions of the dealership agreement. After making a reference to them, the Hon'ble Supreme Court held that the mandate of Article 14 of the Constitution of India would apply even to contracts of the nature under consideration. The arbitrator recorded a finding that termination was not validly made by invoking clause 27. Thereafter, the remedial directions were given for which the arbitrator assigned reasons. The reasons stated that dealership agreement was for an indefinite period till termination in accordance with the terms of the agreement and, therefore, the plaintiff/claimant was entitled to continuance of distributorship till it was terminated in accordance with the agreed terms. Such a reasoning of the arbitrator was not sustained by the Supreme Court on reaching a conclusion, with reference to the clauses 27 and 28 of the agreement relying on which the Supreme Court could take assistance of section 14(1) of the Specific Relief Act. Thus, there was an error of law apparent on the face of the award which vitiated it.

26. To our mind, firstly, a suit could be filed to challenge the termination and seek therein all the reliefs including restoration of

dealership. In the case before the Hon'ble Supreme Court, the underlying dispute was referred to arbitration. The judgment in ***Indian Oil Corporation Limited vs. Amritsar Gas Service & Others*** **(supra)** does not say that such a relief could not be granted or can never be granted in a suit or arbitral proceedings.

27. The reliance on this judgment is, therefore, entirely misplaced.

28. The other decision in the case of ***E. Venkatakrishna vs. Indian Oil Corporation & another***[2] once again refers to the peculiar facts. The contract between the dealer and Indian Oil Corporation Limited contained a clause by reason of which the distributorship would be terminated if the dealer did anything which was prejudicial to the interest or good name of the principal or its products. The dealership was terminated by relying on this clause. Thereafter, the arbitration agreement was invoked and the matter was referred to Director (Marketing) of Indian Oil Corporation Limited. The Director (Marketing) declined to act as an arbitrator but he appointed another arbitrator himself. That arbitrator, which was appointed by this Director, called upon the

2 (2000) 7 SCC 764

parties to file their claim and defence. The arbitrator was in receipt of a statement of claim by dealer which prayed for setting aside the termination, for damages and for a direction to Indian Oil Corporation Limited to restore the distributorship to the claimant.

29. The arbitrator made the award directing the restoration of that dealership. That award was challenged by the Indian Oil Corporation Limited under section 30 of the Arbitration Act, 1940 before the learned Single Judge of the Madras High Court. The learned Single Judge rejected the challenge. Indian Oil Corporation Limited preferred an appeal and that was allowed by a reasoning that what is arbitrable under clause 37 is only a dispute or difference in relation to the agreement and the question of restoration of distributorship would not arise under the agreement. That is why the award to that extent was vitiated by an error of law apparent on the face of the record. Once again, reliance on this judgment exposes the fallacy in the argument before us. The matter arose from identical proceedings, namely, arbitration. In the arbitration, one of the issues framed was pertaining to restoration of the dealership or distributorship agreement and the wrongful or illegal termination thereof. It is in that context but by relying upon

the peculiar wording of the clauses of the agreement and the jurisdiction of the arbitrator, that the decision of the Division Bench was upheld by the Hon’ble Supreme Court. We do not think that this judgment says that in all cases of this nature the remedy is not to invoke the jurisdiction of a civil Court but to approach the High Court under Article 226 of the Constitution of India.

30. In the judgment of the learned Single Judge of this Court in the case of ***Hindustan Petroleum Corporation Limited vs. Taj Petroleum, Bhandara***[3], on which reliance is placed, there was no opportunity given of hearing to the dealer and the company terminated the dealership agreement on the ground that samples drawn from dealer’s outlet were not to standard.

31. The dealer had approached the Principal District Judge, Nagpur. He had filed an appeal. That appeal was challenging the award of the arbitrator but it was dismissed. Hence, the learned Single Judge of this Court was approached by filing an arbitration appeal being Arbitration Appeal No.17 of 2017 under section 37. From the record, it appears that there was an application made under section 9 of the Arbitration and Conciliation Act, 1996. There

3 2018 (3) Mh.L.J. 784

was an order dated 27.1.2016 passed in that application permitting the appellant before this Court to run a petrol pump/retail outlet during the pendency of the proceedings before the District Judge. Now, in the light of that, the dealer gave up his right to enforce an award passed by the arbitrator. He proceeded on the footing as if he is running the petrol pump. Despite all this, M/s.Hindustan Petroleum Corporation Limited found that it could have taken the matter to this Court and the peculiar facts and circumstances of the case were noted from paragraphs 3 to 6 requiring this Court only to consider the validity and legality of the termination effected by the HPCL. Regarding that, the argument was that fair and reasonable opportunity of hearing was given before this termination. On facts, the position was otherwise. We do not think that this judgment is relevant for the proposition canvassed before us. It is entirely distinguishable. Similarly, in the case of ***Allied Motors Ltd. vs. Bharat Petroleum Corporation Limited***[4], the Hon'ble Supreme Court was concerned with an issue of termination of the dealership of the appellant in an illegal and arbitrary manner. There, the samples were collected, analysed and thereafter, the termination was effected. That came to be

4 (2012) 2 SCC 1

effected without even issuing any show-cause notice and/or giving an opportunity of hearing to the dealer. The dealer could have satisfied the Petroleum Corporation that the samples drawn and taken to have been violating the standards and norms, were collected in total violation of the mandatory procedural provisions of law. The Motor Spirit and High Speed Diesel (Regulation of Supply and Distribution and Prevention of Malpractices) Order, 1998 was wholly violated in collection of samples by conducting a raid. It is in these circumstances and when there was gross violation of the principles of natural justice that the Supreme Court found that the dealer was entitled to the relief. To our mind, this judgment is distinguishable on facts. There, the petitioner approached the writ Court complaining of gross violation of the principles of natural justice and succeeded in proving the case on facts. To our mind, therefore, even this judgment does not say that whenever there is a complaint of breach of the principles of natural justice, a Writ Petition under Article 226 of the Constitution of India is the only remedy or that a suit, in such a case, is not an alternate and equally efficacious remedy.

32. Finally, the judgment of the Hon'ble Supreme Court in the case of ***Hindustan Petroleum Corporation Ltd. & others vs. Super Highway Services and another***[5], is also distinguishable. There, the dealership was claimed to have been validly terminated by Hindustan Petroleum Corporation Ltd. The dealership agreement contained several clauses, which enabled the Corporation to carry out tests. That was claimed to have been carried out and the tests revealed that the product did not conform to the standards and norms prescribed. A notice was sent after a test was conducted. Immediately thereafter, a reply was given but that was vague. A Writ Petition was filed in the Patna High Court. The Petroleum Corporation upon consideration of the reply, terminated the dealership and prior to that, it had addressed a show-cause notice. Thereafter, the Writ Petition proceeded on the footing that termination was not valid. That Writ Petition was allowed. The order of the learned Single Judge in that behalf then came to be challenged. The matter reached the Hon'ble Supreme Court and the Petroleum Corporation sought to justify its termination. The Hon'ble Supreme Court heard both sides and thereafter arrived at a factual conclusion that the cancellation of

5 (2010) 3 SCC 321

the dealership is a serious business and cannot be done lightly. The adherence to the principles of natural justice is necessary before this drastic action is taken. We have no doubt and quarrel about these principles and they would apply and guide all Courts including a civil Court. Based on the observations in para 31 of this judgement, an argument that a Writ Petition is the only remedy to impugn the termination cannot be canvassed.

33. As a result of the above discussion, we find that there are serious factual disputes in this case and the petitioner cannot invoke writ jurisdiction of this Court. In Writ jurisdiction, this Court would have to necessarily consider, in its limited jurisdiction, all the factual matters in dispute and for which the parties would have to lead evidence. The petitioner would be required to discharge the burden by entering the witness box. The contents of the documents would also have to be proved. In such cases, therefore, ordinarily, the parties must be relegated to the common law remedy or the right inherently vesting in every suitor or litigant to bring a suit in a competent civil Court. Following that principle and on account of the disputed questions of fact, we proceed to dismiss this petition.

34. We clarify that this order does not deal with the merits of the controversy and all contentions of both sides on merits of the dispute are kept open.

(R.I. CHAGLA, J.) **(S.C. DHARMADHIKARI, J.)**