

HONOURABLE SRI JUSTICE P.NAVEEN RAO

WRIT PETITION NO.1493 OF 2019

Date: 21.02.2019

Between:

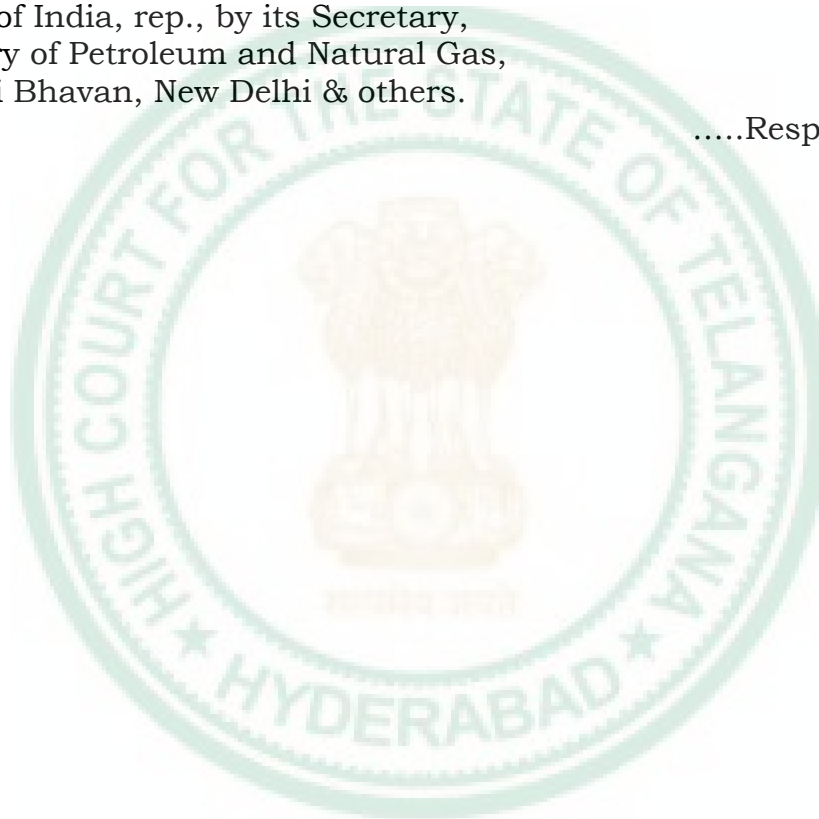
Bollu Raja Reddy S/o.B.Gopal Reddy,
Aged about 64 yrs, Occu : Business,
B.Gopal Reddy , & Sons Filling Station,
R/o.H.No.2-64, Nagireddypet,
Kamareddy District, Telangana.

....Petitioner

And

Union of India, rep., by its Secretary,
Ministry of Petroleum and Natural Gas,
Shastri Bhavan, New Delhi & others.

.....Respondents



The Court made the following:

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ORDER:

Petitioner was granted petroleum retail outlet in Gopalpet Village of Nagireddypet in Kamareddy District. The respondent-Petroleum Corporation issued notification on 14.12.2018 calling upon applications for enlistment of petroleum retail outlet dealers in various locations spread all over the State. In this Writ Petition challenge is to the said notification more specifically against locating petroleum retail outlets in Dharmareddypet (Location No.1232), Nagireddypet (Location No.1361), Gopalpet Village (Location No.799) and Raghavapalli (Location No.844).

2. Heard Smt. B.Rachna Reddy learned counsel for petitioner, Sri K.Lakshman, learned Assistant Solicitor General for respondent no.1 and Sri B.Mayur Reddy, learned standing counsel for respondents 2 and 4.

3. According to learned counsel for petitioner, the Indian Oil Corporation Limited proposed four retail outlets very nearer to petitioner's outlet and one of them is proposed in the same village and in addition, other Oil Corporations have also proposed to establish retail outlets. In such an event, it would not be viable to run the outlet of petitioner. According to learned counsel, these retail outlets are proposed in the rural areas where the vehicular movement is less. Only during the peak agricultural season the demand will be slightly higher, leaving rest of the year struggling to secure minimum sales targets, and with great difficulty, petitioner is now able to sustain himself after running retail outlet for more

than 40 years. According to learned counsel, arbitrary and discriminatory decision made by the respondent Corporation would be offending the right of petitioner to carry on his business vested in him under Article 19(1)(g) of the Constitution. The respondent Corporation cannot take such a unilateral decision without assessing the viability factor. According to learned counsel, Kerala High Court in the case of **Basheer M.M. and another v. State of Kerala, rep.by its Secretary, Food and Civil Supplies Department, Thiruvananthapuram and others** (W.A.No.741 of 2011 and batch) has laid down guidelines to locate retail outlets. According to this judgment, in the rural area, there should not be new retail outlet within 5 KMs, and existing outlet must have a turnover of 150 to 200 KLs to establish new outlet. Both parameters are violated in the instant case, and therefore impugned notification, more particularly with reference to four locations notified by the IOCL around the location of petitioner's retail outlet is illegal.

4. According to learned standing counsel Sri B.Mayur Reddy, no manner of right vests in petitioner to oppose establishment of new retail outlets. That new outlets would be viable. He would submit, consistently the High Courts have repelled the contentions of existing dealers against establishing new dealerships. Rajasthan High Court (Jodhpur Bench) Judgment dated 20.09.2011 in S.B.Civil Writ Petition No.10441 of 2010, wherein the decisions of Patna High Court, Orissa High Court, and Madras High Court were relied on to hold that no such right exists in existing dealer. In the judgement rendered on 19.04.2013 in W.P.No.10400 of 2012, Karnataka High Court also repelled the objection by existing

distributors against new outlets. Division Bench held, “Any apprehension with regard to loss in business on account of rival traders entering the field would not amount to violation of any legal right much less fundamental right” (paragraph 7).

5. Sri Mayur Reddy, learned standing counsel raised objection on maintainability of writ petition by asserting that in the agreement executed by petitioner while granting dealership to him, he has conceded to the respondent Corporation the power to establish additional retail outlets and, therefore, he is estopped from challenging that notification.

6. Confronted with this objection, Smt Rachana Reddy contended that it is an unconscionable term and such terms in a contract cannot be enforced. She placed reliance on **Central Inland Water Transport Corporation Limited and another Vs Brojo Nath Sengupta and another¹; LIC of India and another Vs Consumer Education & Research Centre and Others²; and Nabha Power Limited (NPL) Vs Punjab State Power Corporation Limited (PSPCL) and Another³.**

7. In the affidavit filed in support of the writ petition, petitioner goes on a expansive tour on the impact of establishing the large number of retail outlets all over the country, cumulatively 55,649 and 3531 in the State of Telangana. He would assert that establishment of such large volume of petroleum retail outlets would have telling effect on degradation, deforestation, fuel emission and air, water and noise pollution, and that it would

¹ (1986) 3 Supreme Court Cases 156,

² (1995) 5 Supreme Court Cases 482

³ (2018) 11 Supreme Court Casers 508

result in high risk and dangers associated with petroleum products as highly inflammable products, its exploration, transportation, offloading, storing and sale points and facilities should not be taken away for granted like any other products and therefore, adverse consequences are more severe and grave to the larger public interest. However, this is not a Public Interest Litigation. The under current of such expansive assertions is the concern against proposal to establish four new retail outlets in and around the petitioner's outlet. Apparently, petitioner is not concerned so much about societal impact if more number of retail outlets are established; he is not fighting against the desire of oil companies to make profits at the cost of public life in a probono capacity, but projecting larger picture as a camouflage to oppose competition. He wants monopoly in dispensing petroleum products.

8. Thus, larger issues stated by the petitioner are not considered and issue is confined to entitlement of petitioner to oppose establishment of new retail outlets by the impugned notification.

9. When retail outlet was granted to petitioner the viability factor was 30.05 Kl only. As per the new norms evolved by the petroleum companies viability factor of a retail outlet is sale of 25 Kl per month. According to learned Standing counsel, the sale of petroleum products in petitioner outlet crossed 100 Kl per month, also admitted by petitioner, far in excess of the target fixed. In the facts of this case and in regard to the terms of licence granted to petitioner there is no infringement to petitioner's right to carry on business in selling petroleum products.

10. In ***Jasbhai Motibhai Desai Vs Roshan Kumar, Haji Bashir Ahmed and others***⁴, the existing cinema theatre owner challenged no objection certificate issued to establish another theatre. Hon'ble Supreme Court found upon entertaining such writ petition. Hon'ble Supreme Court observed that breaking the monopoly is not wrongful in the eye of law, but a gain to the society.

11. In ***Mithilesh Garg and others Vs Union of India and others***⁵, existing stage carriage operators oppose grant of new permits. Supreme Court observed more operators mean healthy competition.

12. The notification dated 01.10.2007 issued to establish more LPG distribution outlets, some of which were overlapping/ trenching into the area of operation specified to existing dealer, was assailed in batch of writ petitions in this Court. Learned single Judge, repelled the objection to new dealerships. This Court observed as follows :

“The respondents-Public Sector Oil Companies are the best judges of their business policy choices and the managerial expertise inherent in the respondents Oil Companies, in the context of a competitive business environment.

The claims in the writ petitions underscore an assumption that the economic interests of existing distributors is the exclusive obligation of the respondents-Oil Companies. The economic benefits derived by the petitioners-distributors is a mere corollary and ancillary consequence of the respondent public sector Oil Companies discharging the fundamental and primary social obligation of ensuring efficient, timely and adequate supply of the essential

⁴ (1976) 1 Supreme Court Cases 671

⁵ (1992) 1 Supreme Court Cases 168

commodity of LPG to the consumers. Where the Oil Companies generate a novated policy for establishment of new distributorships for enabling efficient supply of LPG to the consumers, such legitimate policy choice must prevail over any incidental or collateral prejudice that the petitioners might suffer. In any event, the only demonstrate if potential grievance of the petitioners is a measure of competition. Such impact even if there be is marginal must be subordinated to the larger public concerns which are catered to by the establishment of new distributorships, qua the impugned notification.”

13. The petitioner was awarded dealership in the year 1983. On 30.09.1983 agreement was signed by petitioner and IOCL. Clause 7 of the agreement reads as under :

“Nothing contained in this agreement shall be construed to prohibit the Corporation from making direct and/or indirect sales to any person whomsoever or from appointing other dealers for the purpose of direct or indirect sales at such place or places as the Corporation may think fit. The Dealer shall not be entitled to any claim or allowance for such direct or indirect sales.”

14. This clause was not objected and in terms of the said agreement, petitioner is allowed to run the retail outlet. This clause is not under challenge in this writ petition.

15. In **Central Inland Water Transport Corporation Limited**, the Supreme Court observed that, “The Court will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract or clause in a contract, entered into between parties who are not equal in bargaining power (paragraph 89). Offending clause was in Rule 9 (i). This Rule vested power in the employer to terminate a permanent employee. By invoking this clause two employees were terminated with three months notice. This was challenged before the High Court. High Court held that

said clause as Ultra-vires of Article 14 of the Constitution of India. Same is upheld by Supreme Court.

16. In **LIC of India** challenge was on restricting Table 58 of restricting the Term Insurance Policy to a class of persons. Supreme Court observed, “Even though the rights of the citizens, therefore, are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play and natural justice” (paragraph 25). Further held “An unfair and unreasonable or irrational clause in a contract is also unjust and amenable to judicial review” (paragraph 32).

17. There is no quarrel with this settled proposition of law. However, in the case on hand the terms of contract, extracted above, which enables establishing of another retail outlet in the same location is not assailed. At this stage, two things needed to be noted. Firstly, the viability norm prescribed is 25 Kl per month. Before locating the outlets detailed procedure is prescribed to assess viability. Petitioner outlet turnover is far above 100 Kl. Thus, establishing new outlets cannot be called as made in arbitrary exercise of power. Oil company is interested in increasing its business. Therefore, it cannot be said that it would indiscriminately establish new outlets without looking into economic viability. In the facts of the case, the clause in the contract, extracted above, cannot be said as unconscionable term of contract. Secondly, in long line of precedent decisions, few of them are referred to above, it is consistently held that existing

dealers/operator of business venture cannot oppose establishment of another unit.

18. At this stage, it is also necessary to assess the conduct of petitioner. Though petitioner was eloquent in asserting the consequences of large scale establishment of retail outlets on the environment and immediate impact on his sale prospects if new outlets are established in the same vicinity, conspicuously petitioner is silent on the terms of contract and the terms of agreement entered into by the petitioner when the dealership was awarded to him in the year 1983. A copy of the dealership agreement is also not enclosed to the writ petition paper book. The copy is made available by learned Standing counsel for the respondent Corporation.

19. In Clause-7 of the terms of agreement, extracted above, petitioner has agreed that he would have no objection, if the Corporation resorts to making direct and/or indirect sales to any person or from appointing other dealers for the purpose of direct or indirect sales at such place or places as the Corporation would deem it fit and he would not be entitled to raise any claim or allowance for such sales. With eyes wide open, petitioner accepted the said terms of agreement and has been running the outlet for more than 40 years under the said agreement. The conduct of petitioner would also require strict scrutiny in as much as it is an important facet of condition of granting dealership but there is no whisper in the affidavit. In view of said term of contract, it is no more open to the petitioner to challenge the notification.

20. While learned counsel for the petitioner was asserting that if new retail outlets are established in and around the petitioner's outlet, there will be drastic fall in the sales and sales would have to be at least more than 100 Kl to earn profit from the business and that with great difficulty petitioner has now reached the target of 150-200 Kl limit, again petitioner failed to place before this Court the true facts concerning this issue. The agreement dated 30.9.1983 also incorporated Clause No.9. As per this clause, the dealer agreed to lift 30 Kl per month quantity of HSD and 0.5 Kl per month of Motor Oil. This clause also enables the Corporation to revise the targets as may be required.

21. According to learned Standing counsel, for the retail outlets in the rural areas, the minimum targeted volume for sustainability of the outlet is at 25 Kl per month. According to learned Standing counsel, as can be seen from Clause 9 of the agreement, the target fixed was at 30 Kl per month in the year 1983. The revision of limit and fixing at 25 Kl per month is based on the increased commission payable to the dealer. According to the assumption of oil companies, the dealership is sustainable in the rural areas if the dealer can sell petroleum products of 25 Kl per month. According to learned Standing counsel, the statistics available with the respondent-Corporation would show that petitioner is able to reach the target of more than 100 Kl per month.

22. Be that as it may, this issue need not be dilated further having regard to the manual published by the respondent Companies on 24.11.2018. Through this manual, detailed guidelines are formulated for selection of dealers for regular and

rural retail outlets. It deals with identification of locations, classification of markets, undertaking feasibility study, drawing up of State Retail Marketing Plan, prescribing Roster of locations, classification of land and other parameters for consideration.

23. Para-1 of the manual deals with identification of locations. Clause A (iv) deals with Rural retail outlets (E Class). According to this clause the expected combined Sales volume is 25 Kl per month. Clause 'E' of para-1 deals with Feasibility of identified locations to be submitted in form prescribed as Annexure A1 and Annexure A2.

24. A reading of Annexure-A1 would show that Field Officer should conduct feasibility study and has to assess the feasibility on the parameters listed out therein and make suggestions. Thus, the guidelines are exhaustive and deal with all aspects of establishment of retail outlets. As per the present policy a rural retail outlet is feasible if it can undertake sale of 25 Kl per month of petroleum products. The policy is not under challenge. It is not the case of petitioner that parameters set out in the policy were not observed before identifying locations. That being so, and when even according to petitioner, he has reached higher target than what is prescribed, contention of petitioner that he would sustain losses, having depended on the retail outlet for more than 40 years, also merits no consideration.

25. In the case of **Basheer M.M.**, learned single Judge of Kerala High Court rejected the challenge against establishing new outlets holding that their objection is to monopolize and oppose competition. In W.A.No.741 of 2011 and batch, Division Bench

laid down guidelines on locating retail outlet. One of them is to maintain 5 KMs distance in rural areas. In C.A.Nos.2784-2792 of 2013 preferred by **Hindustan Petroleum Corporation Ltd., Vs Liju P.Reji & others**, Supreme Court sets aside the judgment of Division Bench of Kerala High Court, affirming the decision of learned single Judge. However, the Supreme Court observed that guidelines framed by the High Court may be kept in view, if there is need to frame guidelines.

26. As noted above, new policy is put in place prescribing guidelines on location, notification selection process terms of contract and this policy is not under challenge in this writ petition.

27. The Writ Petition fails. It is accordingly dismissed. Pending miscellaneous petitions shall stand closed.

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rds/kkm

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