IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.330 of 2019

Poonam Devi W/o Late Anil Sharma, resident of Ramjee Chak, Digha Meddle School Road, P.O.- Bataganj, P.S.- Digha, District- Patna, Bihar, Proprietor of M/s Om Sai Bharatgas, Opp. Bata Factory, Gandhi Road, Bataganj, Digha, District- Patna.

... ... Petitioner

Versus

1. Bharat Petroleum Corporation Ltd. through its Chairman-cum-Managing Director, Bharat Bhavan, 4 & 6 Currimbhoy Road, Ballard Estate, Mumbai – 400001.
2. The State Head (LPG) Bihar, Bharat Petroleum Corporation Ltd, Patna LPG Territory and Bottling Plant, Fatuha Industrial Area, Mouza-Raipura, P.O. & P.S. - Fatuha, District – Patna, Bihar – 803201.
3. The Territory Manager (LPG), Patna, Bharat Petroleum Corporation Ltd, Patna LPG Territory & Bottling Plant, Fatuha Industrial Area, Mouza-Raipura, P.O. & P.S. - Fatuha, District – Patna, Bihar – 803201.

... ... Respondents

Appearance :

For the Petitioner	:	Mr.P.K. Shahi, Sr. Advocate
		Mr. Sanjiv Ranjan, Advocate
For the Respondents	:	Mr. Siddhartha Prasad, Advocate

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
C.A.V. JUDGMENT

Date : 05-10-2020

Petitioner in the present case has moved this court in it’s extraordinary writ jurisdiction for the following reliefs:

> “I. To quash the order contained in letter vide Ref. LPG. ER. PATN.6.OM SAI BHARAT GAS dated 27.10.2018 issued by Respondent No. 2, by which Bharatgas (Liquefied Petroleum Gas) Distributorship (Domestic & Commercial) Agreement dated 15.03.2013, entered between the Petitioner and the Respondent Bharat Petroleum Corporation Ltd has been terminated.
>
> II. To direct the Respondent to reinstate the LPG Distributorship of the Petitioner which is running in the name & style of M/s Om Sai Bharatgas, Opp. Bata Factory, Gandhi Road, Bataganj, Digha, District – Patna, and to make the said distributorship operational.”

Case of the petitioner

2. Petitioner was appointed as a Bharat Gas Distributor by respondent Bharat Petroleum Corporation Limited (hereinafter referred to as the 'BPCL' or respondent no. 1) for sale of Liquefied Petroleum Gas (LPG) in cylinders for household consumers and commercial consumers in the territory or Distribution area of Patna Municipality in the district of Patna. The Distributorship was running in the name and style of M/s OM SAI BHARATGAS as a proprietorship firm of the petitioner. The Distributorship Agreement dated 15.03.2013 (Annexure '1' to the writ application) got executed between the parties.

3. The Government of India launched Pradhan Mantri Ujjwala Yojana (PMUY) in the month of March 2016 whereunder free LPG connections were to be provided by the Oil Manufacturing Companies (OMCs) to the women belonging to the Below Poverty Line (BPL) household. The guidelines of PMUY has been issued by the Ministry of Petroleum and Natural Gas, Government of India, a copy of the Guideline is Annexure '2' series to the writ application.

4. It is the specific case of the petitioner that under the Scheme Guideline (Annexure '2') a duty has been cast upon the

OMCs to match the application against the Socio-Economic Castes Census (SECC) which exercise has been undertaken in the year 2011. It was the duty of the OMCs to match the application against the database of SECC – 2011 and after ascertaining their BPL status, enter the details into a dedicated OMCs wave portal through a Login Password given by the OMCs. The modalities in this regard has been approved by the Ministry of Petroleum and Natural Gas, Government of India and in this regard heavy reliance has been placed by learned Senior Counsel for the petitioner on Annexure ‘2’ series which provides for the scheme for release of free connection to the BPL women. Paragraph ‘6’ thereof provides for implementation modalities of the scheme.

5. It is his submission that under the Scheme it is the OMCs who will release the connection to women of BLP families after completing the procedure detailed in the Scheme. The OMCs shall after completing the procedure submit their claims for the connections released from 01.04.2016. The claim shall be lodged on quarterly basis and it will be submitted to PPAC (Petroleum Planning & Analysis Cell) who will scrutinize and forward the claims to Ministry of Petroleum and Natural Gas which will in turn reimburse the claim of OMCs.

6. Learned Senior Counsel representing the petitioner has thus taken this court through Annexure ‘2’ series and again through Annexure ‘3’ to demonstrate that the identification of beneficiary is the work of OMCs and not of a LPG Distributor like the present petitioner.

7. It is submitted that the officials of Patna LPG Territory of respondent no. 1 instead of following the procedure/guidelines of the respondent no. 1 called upon the Distributor to do the exercise and for this purpose respondent no. 1 provided ‘SECC’ Data in Pen Drive for processing the Ujjwala KYC application form and for searching names of prospective customers from ‘SECC’ List. The beneficiary under the ‘PMUY’ Scheme could be identified through ‘SECC’ List wherein 29 Digit AHL_TIN No. (Abridge House List – Temporary Identification Number) is allotted to individual family members. Every family is started with “Head” of the family and AHL_TIN No. for “Head” of the family ends with “1”. The AHL_TIN No. of corresponding family members given in series with “.. ..... 2,3,4”.

8. It is submitted that while processing the Ujjwala KYC Form in all such cases where the Customer was having New Ration Card issued after 2011, the name of customers

(women beneficiary) and her other family members have been found with their respective AHL_TIN No. in SECC data but in several cases where customers were not having 'New Ration Card issued after 2011' the name of beneficiary, Holding No. Ward No., District etc. provided by the customer, though, fully matched with the AHL_TIN of SECC data but there were some variations with the name, title and inter-relationship of other family members with the SECC data provided to the distributor.

9. It is then submitted that during the period June, 2016 to December 2016, the petitioner basically processed only those Ujjwala KYC Application Forms where the prospective consumers were having the New Ration Card issued after 2011 but at the relevant time the number of customers not having new Ration Card was low, meanwhile in the month of December 2016, the officials of respondent no. 1 conducted a training programme in association with a technical person and after explaining how to search the name of prospective customer from 'SECC' list, the Territory Manager and Sales Officers provided a software to the petitioner and other participant in Pen-Drive. Under direction of the officials of respondent no. 1 the petitioner proceeded with the Ujjwala KYC applications on the basis of 'SECC' list contained in the software. It is the case

of the petitioner that she had processed the KYC Applications in accordance with the software provided to her and then the respondent no. 1 accepted and cleared the Ujjwala KYC Applications without any objection and the Distributor was directed to release SV against the cleared KYCs and issue New Connections (NC) against all cleared KYCs. In this regard official communications dated 08.03.2017, 09.03.2017, 22.03.2017 and 20.06.2017 have been referred to. One of the official communication dated 24.05.2017 appreciated the endeavour of Petitioner's Distributorship for attaining All India rank in terms of KYC seeding. In one of the communications dated 21.09.2017 (Annexure '8') the petitioner amongst others were informed that now PMUY SV can be released only if Aadhar Number of at least only one family members exists in KYC apart from beneficiary. The Distributors were directed to take note of the step by step process to be followed for adding family member and their Aadhar in cleared KYC, so that SV can be created against them.

10. It is stated that on 25.09.2017 and 26.09.2017 Two Member Committee of Ministry of Petroleum & Natural Gas, Government of India, visited petitioner's distributorship and conducted investigation with respect to release of PMUY

Connections. Copy of the inspection report has however not been made available to the petitioner. Subsequently the Sales Officer of BPCL/respondent no. 1 along with Ujjwala Coordinator carried out inspection of petitioner's Distributorship from 24.10.2017 to 01.11.2017 and based upon the observations made by the inspection team a show cause notice dated 09.11.2017 (Annexure '9') came to be served upon the petitioner.

11. It is stated that from the show cause notice (Annexure '9') it would appear that the inspection team had basically observed mismatch of AHL_TIN Number in 8183 cases. It was alleged that out of total 20,263 PMUY connections released since launch, mismatch of AHL_TIN No. has been found in 8183 cases, resulting in release of LPG connections in contravention of the PMUY guidelines in vogue. The AHL_TIN numbers used for releasing connections in 8183 cases actually does not belong to whom the LPG connections have been released under PMUY scheme. Thus, it is alleged that the petitioner released PMUY LPG connection to other individuals who were not covered under the scope of the PMUY and the actual beneficiaries to whom connection should have been given, were deprived of the benefit of the PMUY Scheme.

During inspection it was found that the

photograph of the NC installation done by the trained mechanic/distributor staff was not found in most of the cases which implies that PMUY protocol/guidelines was not followed by the petitioner during installation of new PMUY LPG connection at the consumer's premises.

Further in several cases documentation required to be done at the time of releasing new connection under the PMUY has been found to be properly done.

12. Thus the respondent no. 1 observed that the petitioner had released unauthorized PMUY LPG connections to other individuals and had claimed funds from the respondent no. 1 towards the cost of Suraksha Hose, DGCC, installation and administrative charges etc. for providing LPG connection to the class of customers covered under PMUY scheme. However, by providing LPG connection to those who are not covered under the PMUY scheme the distributor has misappropriated the said fund provided to her by respondent no. 1. Further the petitioner had not maintained the specific records of the customers and she had not installed new LPG connection and/or demonstrated the safe LPG connection at the customer's premises at the time of installation of the LPG connections.

13. The show cause notice therefore called upon the petitioner to explain as to why for the given irregularities action should not be taken against her including termination of her

distributorship.

14. The petitioner submits that even before submission of reply to the show cause notice the respondent no. 1 blocked 14204 PMUY connections and against those connections raised a debit note of Rs. 4,94,93,506.58 on 14.11.2017 in the statement of account of distributor under PMUY Head. In this regard petitioner is said to have raised objection and sought clarification but the respondent no. 1 had unilaterally adjusted a sum of Rs. 12 Lakhs deposited by the petitioner for supply of load. By stocking normal supply of loads the authority of the respondent corporation exerted pressure upon the petitioner to deposit the said amount. The petitioner thereafter deposited Rs. 65 Lakhs and only the supply of load was started by the respondent no. 1. In response to the show cause notice petitioner submitted her reply dated 20.12.2017 (Annexure '11' to the writ application). Petitioner controverted the allegations and submitted that there were some variations with the name, title and inter-relationship of other family members and as per PMUY guidelines variations of names of family members in SECC data would be considered to the extent of near match. Petitioner claimed that AHL_TIN Number used for releasing connections in 8183 cases is of the

same beneficiary to whom LPG connections have been released and they are covered under the scope of the PMUY scheme. On receipt of the reply to the show cause notice the respondent authorities did not pass any order rather asked the petitioner to cancel all those PMUY connections and recover the loan amount including cylinders, DPRs from such customers.

15. It is further case of the petitioner that while the process of recovery as well as regularization were going on, the respondent corporation again issued a show cause notice dated 16.01.2018 with respect to the same irregularities, however the basis for issuance of the show cause notice as has been disclosed is the earlier investigation carried out by Two Member Committee from Ministry of Petroleum & Natural Gas, between 25.09.2017 to 26.09.2017.

16. The show cause dated 16.01.2018 contained the observations of the Two Member Committee of the Ministry of Petroleum & Natural Gas.

17. It was further stated in the show cause notice that based on the recommendation of the Two Member Committee the Corporation had contracted 14413 active PMUY consumers over phone regarding extra amount charged to them and other issues, out of this 8039 customers responded and 1339

customers have confirmed that they were over charged by the distributor while releasing connections. Thus, this time the show cause alleged not only release of PMUY connections to ineligible persons rather illegal/unauthorized release of LPG connections from outside trading area, collected extra amount/over charged from the PMUY beneficiaries and opening and operation of unauthorized Grahak Seva Kendra in different area.

18. The petitioner submitted his reply dated 07.04.2018 to the show cause notice and once again controverted the allegations. The petitioner submitted that she had not committed any irregularities rather followed and acted in line with the directions of the officials of the Corporation.

19. After submission of the reply of the petitioner the respondent Corporation passed order vide letter dated 08.05.2018 (Annexure '15') holding that the petitioner has committed irregularities and imposing fine of Rs. 2,10,879/-. Petitioner was also directed to deposit the balance amount of Rs. 2,56,23,780/- out of the total amount of Rs. 4,94,93,506.58 raised against the petitioner under the PMUY head on 14.11.2017. The explanation of the petitioner was found unsatisfactory and it was held that the connections were issued

to ineligible customers and thus there was misappropriation of funds in all the above 14204 cases.

20. The submission of learned Senior Counsel for the petitioner is that though the order as contained in Annexure '15' to the writ application was not acceptable to the petitioner but in order to avoid stoppage and supply/loads and to avoid confrontation with the officials of the respondent Corporation the petitioner sold her land in the township of Patna and by taking loan from the Bank mortgaging her residential house, deposited the fine amount of Rs. 2,10,879/- on 09.07.2018 and the entire outstanding balance of Rs. 2,56,23,780/- raised under PMUY head, have been cleared by 31.08.2018. Petitioner has also come out with submissions that out of alleged 14204, 116 connection does not belongs to the petitioner's distributorship and the authority of the BPCL has wrongly included those 116 PMUY connection saying that those have been released by the petitioner. Further, the respondent Corporation had blocked all the 14204 PMUY connections and advised the petitioner to cancel all those connections and regularize them. The petitioner in compliance to instruction and advise of the authorities of BPCL regularized 6058 connections which were included under ineligible category due to non-production of KYC documents

during inspection and under the PMUY scheme itself they have been found genuine BPL category customers. It is submitted that regularization of 6058 connections under the PMUY scheme and acceptance thereof by respondent corporation itself shows that the investigation/inspection had not been carried out in objective manner and authorities concerned have arrived at conclusion without spot/physical verification of the premises of customers.

21. The bone of contention is that though in the order as contained in Annexure ‘15’ the respondent no. 1 observed that it is being issued without prejudice to any other right of the Corporation against the petitioner under the Distributorship Agreement, the petitioner was advised to manage the distributorship as per the distributorship agreement clauses and guidelines of the Corporation with a word of caution that recurrence of such or any other irregularity may attract more stringent action under the provisions of distributorship agreement and clauses of MDG 2017.

22. The petitioner thus submits that though the show cause notice called upon the petitioner to show cause as to why the Distributorship Agreement should not be terminated, vide final order contained in Annexure ‘15’ the respondent no. 1

while imposing the various conditions upon the petitioner did not think it just and proper to terminate the agreement but surprisingly when the petitioner had already complied with the directions of the respondent no. 1 a third show cause notice vide letter dated 26.09.2018 (Annexure '18') came to be issued. In Annexure '18' reference of the findings of the inspection carried out during 24.10.2017 to 01.11.2017 have been made and what was by way of observations in the earlier Annexure '9' & '13' to the writ application have been referred as findings of the inspections.

23. In the show cause notice dated 26.09.2018 (Annexure-18) respondent no. 1 observed that the following actions on the part of the distributor are very serious in nature and warrants termination of distributorship agreement. Paragraph '8' & '9' of the show cause notice dated 26.09.2018 are being reproduced hereunder:-

> "**8**. In addition to the above, it is further observed that your following actions mentioned above are very serious in nature and warrants termination of Distributorship agreement:
>
> a. Issuing connections under the PMUY scheme, which is a benevolent scheme introduced by Union of India for the benefit of public belonging to socially and economically backward class by providing considerable financial relaxations to the customers at the cost of Govt. To ineligible

persons.

b. The persons who are issued PMUY connections, as per norms are entitled to get subsidy for their subsequent refills. By issuing PMUY connections to ineligible persons, you have enabled such ineligible persons to receive subsidy, who are not eligible to get such subsidy otherwise. If the irregularity would not have been detected, huge financial loss would have been incurred to the public exchequer.

c. By issuing such connections to those who are not entitled for PMUY connections, you have allowed those ineligible persons to utilize govt. funds which are intended for the benefit of other eligible and needier and there by blocked a huge amount of public fund in this regard.

d. The action/omission from your part in releasing the above mentioned connections without proper documentation amounts to unauthorized release of connection in contravention of your obligations under the agreement under reference.

e. Non-submission of confirmation in writing with regard to the receipt of the amount from the customers who have complained about over charging, within 30 days from the date of receipt of our letter dated 08.05.2018.

f. Non-submission of confirmation in writing with regard to transfer all connections issued beyond your trading to nearby distributors, till date.

g. Overcharging customers with an intention to defraud the customers of BPCL and to there by unduly enriching yourself and thereby causing financial loss to our customers.

h. the responsibility entrusted upon you as a distributor, and thereby giving the properties of BPCL such as cylinders, regulators etc. have been breached by you by using the said properties, in a manner other than intended by this corporation with regard to the PMUY scheme, with an intention to obtain wrongful financial gain and thereby deceived this corporation.

f. The amount involved in the above mentioned irregularities/amount misused by you in your above mentioned action/omission is public money amounting to Rs. 4,94,93,506.58.

i. Your above mentioned actions/omissions are prejudicial to the interest and good name of the Corporation. It also cause irreparable damage to the brand image of the corporation and lowered its reputation amongst the public.

j. The irregularities detected in release of PMUY connections are of very high magnitude which has resulted in the large scale misuse of the pro-poor scheme, misappropriation of the Government funds, fraud and deliberate attempt on your part to conceal the KYC documents for verification to the inspection team, non-adherence to the Distributorship Agreement.

9. We take an extreme and serious view of the aforesaid breaches and in the circumstances referred above, you are hereby called upon to submit your explanation with the supporting documents, if any, to the above observation and show cause within a period of 15 (fifteen) days from the date of receipt of this letter as to why the Distributorship agreement should not be

> terminated, failing which, it would be construed that you do not have any explanation to offer and we shall be at liberty to terminate the Bharatgas (Liquefied Petroleum Gas) Distributorship (Domestic & Commercial) Agreement dated 15.03.2013."

24. The petitioner submitted her reply dated 16.10.2018 (Annexure '19' to the writ application) whereafter the respondent no. 1 issued the impugned order dated 27.10.2018 (Annexure 20 to the writ application). The respondent no. 1 held that the petitioner has violated the terms of the distributorship agreement specially clause 11, 22 and sub-clause (a), (h), (i) & (n) of clause 28. The respondent no. 1 formed an opinion that due to breaches and irregularities committed by the petitioner they had completely lost trust and faith in petitioner and were not interested in carrying on business with her by selling Bharatgas LPG cylinders through her as a distributor of the Corporation. The LPG Distributorship Agreement dated 15.03.2013 has thus been terminated with immediate effect.

Submission of the petitioner

25. Learned Senior Counsel representing the petitioner submit that although he is fully aware of the arbitration clause contained in distributorship agreement, though

after coming into force of the Arbitration and Conciliation Amendment Act w.e.f. 01.01.2016, the mode of appointment of Arbitrator may not be in accordance with arbitration clause 38 of the Distributorship Agreement, but fact remains that the parties have agreed for redressal of their disputes through the process of arbitration in accordance with the provision of the Arbitration and Conciliation Act, 1996 and the same applies with any statutory modification or re-enactment thereof and the rules made thereunder, still he is pressing the writ application on two grounds, firstly, that the impugned order (Annexure '20') suffers from violation of principles of natural justice inasmuch as the respondent no. 1 has not supplied the Two Members Inspection Report containing the observations of the inspecting team in course of the inspections held on 25.09.2017 to 26.09.2017, and secondly, once the respondent no. 1 had taken a decision as contained in Annexure '15' to the writ application and the petitioner had accepted the same that too by depositing more than Rs. 4 Crores by selling her land and by mortgaging other valuable properties, the respondent no. 1 could not have gone for a third show cause notice with a pre-concert of mind to cancel the Distributorship Agreement itself. In other words principles of 'waiver' will apply against the respondent

Corporation, learned senior counsel submits that notwithstanding the Arbitration clause the writ application may be considered on these two grounds as there are catena of decisions of the Hon'ble Apex Court to support this contention. It is on these two grounds that the learned Senior Counsel has submitted that the impugned order is fit to be interfered with by this Court sitting in it's writ jurisdiction.

Submission of the Respondents

26. On the other hand, learned counsel representing the respondent no. 1 has opposed the writ application on the reasoning and rationale provided in the impugned order itself, the same has been supported and it is submitted that in the given facts and circumstances of the case where the petitioner has failed to adhere the guidelines/policies stipulated for PMUY connections and indulged in releasing connections to the wrong beneficiaries resulting in the misuse of public money amounting to Rs. 4,94,93,506.58, in order to protect the marketing interest of the respondent no. 1 and keeping in mind the image of the corporation if Distributorship Agreement has been terminated, no fault may be found with the same.

27. The action of the respondent no. 1 firstly in issuing Annexure '15' to the writ application has been justified

saying that if any action for termination of distributorship agreement would have been taken at first instance then it would have been very difficult rather impossible for respondent no. 1 to realise the amount, therefore, to ensure the refund or adjustment of the amount which would have been otherwise a huge commercial loss to the respondent no. 1 which is a public sector company, as a first step it was decided to take action to recover the amount of the Company and while issuing Annexure '15' right was reserved to take any other actions under the agreement. There was no unequivocal waiver of right to terminate the agreement, once the respondent no. 1 was able to recover the pecuniary loss, it was decided not to allow the petitioner to go away with the same as it would have given a wrong message to other distributors, hence it was decided to issue a show cause under the Distributorship Agreement and accordingly after issuing another show cause notice (Annexure '18') the final order as contained in Annexure '20' has been passed.

28. It is submitted that no interference is required with the impugned action. Learned counsel has also referred clause 38 of the Distributorship Agreement pointing out there is an Arbitration Clause whereunder all such disputes and differences

which may arise out of the present action may be arbitrated between the parties.

29. At this stage while this Court was in the midst of the dictating the judgment, it was informed by the Bench Officer that the petitioner has filed a supplementary affidavit on 25th September, 2020. A copy thereof has been sent to the residential office and this Court finds that prior to filing of the supplementary affidavit no leave was obtained by learned counsel for the petitioner, moreover it is not clear as to whether copy of the supplementary affidavit has been served upon learned counsel for the respondent Corporation once the judgment was reserved in this case on 15th September, 2020. It is not expected that the learned counsel for the petitioner would file a supplementary affidavit without seeking leave of the Court. This Court, therefore, refuses to entertain the supplementary affidavit.

<u>Consideration</u>

30. Having heard learned senior counsel for the petitioner and learned counsel for the respondent Corporation and its authorities, this Court finds that the limited points on which the writ application is to be considered by this Court are (I) Whether the impugned order as contained in Annexure-20

suffers from violation of principles of natural justice and (ii) In the facts of the present case whether the petitioner has been able to demonstrate that principle of waiver may be applied against the Corporation and the impugned order may be held bad in law on that ground alone.

31. For purpose of deciding the aforesaid two issues, this Court need not go into the merits of the allegations made by the respondent Corporation against the petitioner and the reply of the petitioner to such allegations. All that this Court would notice that under an agreement dated 15th March, 2013 (Annexure-1) the parties have entered into a jural relationship wherein the petitioner has been appointed as distributor of the Corporation on principal to principal basis, initially for a period of ten years commencing from 15th March, 2013 and renewable every five years at the sole discretion of the Corporation. Under the agreement, the distributor has been allotted a territory which is also known as distribution area, it is within municipality limits of Patna. The distributor has to make his/her best efforts for enrolling customers and canvassing business and for developing and increasing the sale of LPG within the area allotted to him/her. The supply of LPG filled cylinders/equipment shall unless otherwise mutually agreed to

in writing be made by the Corporation against payment in DD by the distributor. This prior payment of DD is to be at the Corporation's office at Fatuha, Patna or elsewhere as may be directed by the Corporation. Under Clause 11 of the agreement the distributor shall faithfully and diligently observe and carry out all directions, orders, terms and conditions as may be issued by the Corporation from time to time and as may be contained in the Corporation's LP Gas Manual and any amendments or modification as may be made by the Corporation thereto from time to time. Under Clause '28', the Corporation shall be at liberty at its entire discretion to terminate this agreement forthwith upon or at any time after the happening of any of the given events.

32. Clause 38 is the arbitration clause wherein any dispute or difference of any nature whatsoever any claim, cross-claim, counter-claim or set off of the Corporation against the distributor or regarding any right, liability, acts, 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 or of some officer of the Corporation who may be nominated by the Director (Marketing). The same Clause 38 also shows that it is subject to

the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof and the rules made thereunder for the time being in force shall be applied to the arbitration proceedings under the said clause. Therefore, so far as Clause '38' of the agreement is concerned, in view of the amendment brought in the Arbitration and Conciliation Act, 1996 by way of ordinance on 23.10.2015 which has later been given a shape of amending Act w.e.f. 01.01.2016 now the Director (Marketing) or his nominee cannot act as an Arbitrator and to that extent the parties are bound by the statutory modification and re-enactment.

33. Even though there is an arbitration clause in the agreement, a writ application may be entertained if a challenge to the impugned order based on the violation of principles of natural justice is apparently fit to succeed. In this connection, this Court reminds itself with the judgment of the Hon'ble Apex Court in the case of **Harbansh Lal Sahnia Vs. Indian Oil Corporation Ltd. and Ors**. reported in **AIR 2003 SC 2120** and the same has been relied upon by Hon'ble Delhi High Court in the case of **Dharamchand Gupta V. India Oil Corporation Ltd. & Ors. 2006 (130) DLT 102** and **Bharat Filling Station & Anr. Vs Indian Oil Corporation Ltd. 2003 (3) AD (Del)**

394. Reliance in this connection is also placed on the judgment of the Hon'ble Apex Court in the case of **Whirlpool Corporation Vs. Registrar of Trademarks Mumbai and others** reported in **AIR 1999 SC 22** (para 15).

34. The contention of learned counsel for the Corporation that only because there is an arbitration clause, the writ application is not fit to be entertained is, thus, not accepted as an absolute proposition. This Court would consider the submissions of learned counsel for the parties keeping in view the scope of judicial review in a case of concluded contract.

35. Now coming to the contention of learned senior counsel for the petitioner that the impugned order suffers from principles of natural justice inasmuch as the inspection reports of the inspection carried out by the two members committee from Ministry of Petroleum and Natural Gas (In short 'MOPNG') from 25.09.2017 to 26.09.2017 were not made available to the petitioner and that deprived the petitioner from getting a reasonable opportunity to give a suitable explanation, this Court has found from the records that the first show cause was issued to the petitioner on 09.11.2017 (Annexure-9). It refers to the inspection carried out by PMUY between 24.10.2017 to 01.11.2017. In paragraph '3' of the show cause

notice the observations made by the sales officer along with Ujjawala Coordinator and other officers of the corporation have been noted as under:-

> “ 3. As you are aware that an inspection was carried out from the period of 24.10.2017 to 01.11.2017 by our Sales Officer along with Ujjawala Coordinator and other Officers of the corporation for PMUY connection released by your distributorship, where the following observation were made:
>
> a. Out of total 20263 PMUY connection released since launch, mismatch of AHL_ TIN no. has been found in 8183 cases, resulting in release of LPG connections in contravention of the PMUY guideline in vogue. The AHL TIN numbers used for releasing connections in above 8183 cases is actually does not belongs to whom the LPG connection is released under PMUY scheme. This implies that you have released PMUY LPG connection to the other individuals who were not covered under the scope of the PMUY and the actual beneficiaries to whom connection should have been given, were actually deprived of the benefit of PMUY scheme. The list of such PMUY Connections found during the mentioned inspection at your distributorship is attached as Annexure-I.
>
> b. As during the inspection, it is found that the photograph of the NC installation done by the trained mechanic/distributor staff was not found in most of the cases. That implies that PMUY protocol or guideline was not followed by you during installation of new PMUY LPG connection at the consumer’s premises.
>
> c. Further in several cases documentation required to be done at the time of releasing new connections under PMUY has been found to be improperly done. The lapses in documentation includes, but not limited to, the following:-
>
> I. Loan declaration form by the customer is incomplete in most of the cases.
>
> ii. Aadhar declaration form is not available in most of the cases.
>
> Iii. Stamp mentioning POA & POI verified with the

original is not available.
iv. Compete details of beneficiaries were not filled in KYC documents. That despite the explicitly been asked for, 6058 KYCs could not be produced by you to the inspection team for verification during the said inspection period. A list of this 6058 consumers is attached as Annexure 2.
4. From the above facts and circumstances we observed the following irregularities from your part:
a. You have released unauthorised PMUY LPG connection to the other individuals not covered under the scope of the PMUY. Thus the actual beneficiaries to whom connection should have been provided, were thereby deprived of the benefits of PMUY scheme.
b. That you have claimed funds from this corporation towards the cost of Suraksha Hose, DGCC, installation and administrative charges etc for providing LPG connection to the class of customer covered under PMUY scheme. However, by providing the LPG connection to those who are not covered under the said PMUY scheme you have misappropriated the said funds provide to you by this corporation.
c. You have not maintained the specific records of the customers.
d. You have not installed new LPG connection or demonstrated the safe use of the LPG connection at the customer's premises at the time of installation of the LPG connection."

36. The aforesaid show cause (Annexure-9) was replied by the petitioner vide Annexure-11. In Annexure-11 the petitioner has submitted her reply controverting the allegations made in the show cause notice.

37. The second show cause notice was issued on 16.01.2018 (Annexure-13) in which though the reference has

been made to the investigation by 'MOPNG' team on 25th and 26th September 2017 and the show cause notice dated 09.11.2017 (Annexure-9) but there is no reference to the reply dated 20.12.2017 submitted by the petitioner (Annexure-12) of the first show cause notice. In the second show cause notice the observations of the two members committee from 'MOPNG', Government of India have been provided with the observations of the Corporation, those are recorded in paragraph '3' and '4' of Annexure-13 and the same are being reproduced hereunder:-

> "3. As you are aware that 2 Member Committee from Ministry of Petroleum & Natural Gas, Govt. of India, New Delhi had visited your distributorship and carried out investigation into the matter of irregularities in release of PMUY connections w.e.f. 25.09.2017 to 26.09.2017. The team had observed the following irregularities:-
>
> (i) Gross irregularities in most of the PMUY connections released since March, 2017 as no efforts were made by you for ascertaining genuineness of the beneficiaries before release of connection.
>
> (ii) Committee has also observed that you have opened and operated many extension counters under the name of grahak sewa kendra in Buddha Colony, mirza khan gali, fakruddin plaza, langar toli, Machuatoli, Brampur-Anisabad, Kurji More, Daudpur, and Arawal and being used for serving distant customers.
>
> (iii) Extra amount charged from PMUY beneficiaries while providing PMUY LPG connection.
>
> (iv) Release of PMUY LPG connections on large scale outside your trading area. The connections have been released outside trading area i.e. in Bihta, Naubatpur, Chhapra, Masaurhi, Fatuha, etc.
>
> Based on the recommendation of two members

committee, we have contacted 14413 active PMUY customers over phone regarding extra amount charged to them and other issues. Out of this, 8039 customer responded to our telephone survey and 1339 customers have confirmed that they were over charged by the distributor while releasing connection. The list of such customers is enclosed.

As Annexure-I

4. From the above facts and circumstances we have observed the following irregularities from your part:

a. release of PMUY connections to ineligible persons.

Show cause already issued and your reply has also been received. Speaking order is to be issued hence your are not required to reply to this point now.

b. Illegally/Unauthorized release of LPG connections from outside your trading area. Your trading area as per Distributorship Agreement and LOA ref. REF.PT:2016:Patna (GP) dated 15.03.2013 is limited to "Within municipality limits of Patna"

As Annexure-II

c. collected extra amount/over charged from the PMUY beneficiaries.

As Annexure-III

d. Opening and operation of unauthorised Grahak Sewa Kendra in different areas as mentioned above."

38. In response to Annexure- '13' the petitioner submitted her reply dated 07.04.2018 (paragraph 33 of the writ application) and the points of reply have been incorporated in the writ application. Although, in the writ application a plea has been taken that the petitioner had requested the respondent Corporation to make available the report of the two members committee but the same was not made available to the petitioner, the admitted fact is that the observations of the two

members committee had been recorded in the show cause notice as contained in Annexure- '13' to the writ application. There is no pleading that non-supply of the report of the two members committee has in any way prejudiced the case of the petitioner.

39. The petitioner submitted her reply dated 07.04.2018 and the same finds mentioned in the order dated 08.05.2018 communicated to the petitioner as contained in Annexure-15 to the writ application. In Annexure-15 both the replies of the petitioner have been referred to and duly considered by the Corporation pointwise. It is in this Annexure-15 that the Corporation concluded as under and the same are being reproduced for a ready reference:-

> " (C) under the facts and circumstances as stated hereinabove and in consideration of your replies dated 20.12.2017 and 07.04.2018 and in absence of any credible explanation/clarification/justification for the alleged malpractices it can be concluded that the following irregularities (under MDG 2017) was done by your distributorship.
>
> **(a) Critical 1st instance under 2.1.12**
>
> "Misappropriation of OMC funds given to distributor towards the cost of Suraksha Hose, DGCC, installation and administrative charges etc. -more than 50 cases of LPG connections under the PMUY & such other special scheme wherein the funds have been claimed from the OMC's without providing the product/services to the eligible customer/claimed from OMC as well as recovered from the Customer."
>
> **(b) Major 1st instance under 2.2.6**
>
> "Overcharging on release of new connections/additional cylinders"
>
> **(c) Minor 1st instance under 2.3.21 & 2.3.24**

2.3.21 NON-MAINTENANCE OF SPECIFIED RECORDS;

2.3.24 "Non installation of new LPG connection at the consumer's premises and demonstration of its safe use." Of MDG 2017.

(D) The following actions as per MDG 2017 and the Distributorship agreement is to be taken by the Corporation:

ACTION:

(a) 1st instance Critical under MDG clause no. 3.1.i: Fine equivalent to 40% of average monthly distributor's commission based on sale comprising of subsidized & non-subsidized domestic LPG in 14.2 kg & 5 kg cylinders including sale to Non-domestic exempted category customers for the preceding six months from the month of detection of irregularity plus quantum of irregularity

Om Sai Month & Year	Sale of Domestic: 14.2 kg Subs+NS	Commission per cylinder	Comm
Apr-17	10260		
May-17	12279		
Jun-17	9479		
Jul-17	12542		
Aug-17	10484		
Sep-17	9656		
Total Com	64700	48.89	3163183
Average Monthly Commission on sale for the last six months from the month of detection of irregularity		527197	
Fine Equivalent to 40% of average monthly commission		**210879**	

(b) 1st instance Major under MDG clause no. 3.2.i: Fine of equivalent to 20% of average monthly distributor's commission based. The irregularity will be counted but fine will not be applicable as fine is already imposed under Critical Category.

As per MDG 2017, clause no. 34, category of irregularity established will be levied upon the distributor i.e. the order of precedence for imposition of fine will be 'Critical' over 'Major' and 'Major' over 'Minor. Accordingly, there will be **only one fine** for all irregularities established in one instance. Hence no penalty for this irregularities however instance will be counted as 1st.

However, you will have to pay compensation to the customers who were overcharged.

(c) 1st Instance Minor Irregularities under MDG clause no. 3.3.1

As per clause no. 3.5 of MDG, 2017, the instance of irregularities will counted as *1st Critical & 1st Major & 1st Minor. The cycle for calculating instances of irregularities shall be two years from the date of the report of inspection/investigation.*

(d) For trading area violations, you are hereby 'warned and cautioned' and advised you to transfer all such customers (connections released outside Municipal Limits of Patna) to nearby Distributors immediately and submit your confirmation in writing to this office in this regard. Further, please note that recurrence of such irregularity in future ay attract stringent action including termination of your Distributorship.

(e) For operating Grahak Sewa Kendra violating Distributorship Agreement's clauses, you are hereby 'warned and cautioned' for this lapses and advised you to refrain fro such practice in future, failing which stringent action including termination of your Distributorship may be initiated.

In view of the above, you are hereby directed to:

deposit DD drawn in favour of Bharat petroleum Corporation Ltd and Payable at Patna for **Rs. 2,10,879/** at our Patna LPG Territory Office, Fatuha **within 30 days** from the date of this letter failing which debit will be raised in your account for the above amount and/or appropriate action may be taken by this corporation as the applicable guidelines and the distributorship agreement.

Pay compensation to the customer as applicable to each established case of irregularity and submit their writing confirmation for receiving the refund of amount within 30 days from the receipt of this letter.

Clear your overall current outstanding as per

> SOA of Rs. 2,56,23,780/- at the earliest without making any further delay.
>
> **(E)** That this letter is being issued without prejudice to any other right this Corporation has against you under the said distributorship agreement. You are again advised to manage the distributorship as per the distributorship agreement clauses and guidelines of the corporation. Recurrence of such or any other irregularity may attract more stringent action under the provisions of Distributorship Agreement and clauses of MDG, 2017. "

40. The petitioner accepted Annexure- '15' and this is where the arguments have been advanced that once the Corporation and its authorities had and opportunity to choose as to whether the petitioner should be imposed with punishments including that of termination of agreement and the Corporation chose to impose a condition for all irregularities established in first instance and the petitioner suffered the punishment imposed upon her by the Corporation, the principle of waiver by election would apply against the Corporation. The aforesaid principle has been sought to be applied against the impugned order (Annexure-20). It appears that after Annexure-15 was issued on 08.05.2018 and the petitioner accepted the same, the respondent Corporation came out with third show cause notice dated 26.09.2018 vide Annexure- '18' to the writ application. Annexure-18 once again refers the previous two show cause notices, their replies, the statement of PMUY customers with regard to the over charges and the letter dated 08.05.2018 sent to

the petitioner by the Corporation. In it's letter dated 08.05.2018 the respondent Corporation instructed the petitioner to comply with the following directions:-

> "a. Deposit Fine Equivalent to 40% of average monthly commission on sale of 14.2 Kg refills or last six months amounting to Rs. 2,10,879/-
> b. Pay compensation to the customers who were overcharged and submit their confirmation in writing with regard to the receipt of the amount, within 30 days from the date of receipt of the said letter.
> c. Clear your overall current outstanding as per SOA of Rs. 2,49,78,780/- at the earliest, without making any further delay.
> d. Advised to transfer all connections issued beyond your trading area to nearby distributors immediately and submit your confirmation in writing to BPCL in this regard.
> It has been specifically stated in our said letter dated 08.05.2018 that the said letter is without prejudice to any other right this Corporation had against you under the said distributorship agreement."

41. Now in the third show cause notice in addition to the previous actions the Corporation made further observations and those are recorded in Annexure- '18' which are reproduced hereinbelow"-

> " 8. In addition to the above, it is further observed that your following actions mentioned above are very serious in nature and warrants termination of Distributorship agreement:
> a. Issuing connections under the PMUY scheme, which is a benevolent scheme introduced by Union of India for the benefit of public belonging to socially and economically backward class by providing considerable

financial relaxations to the customers at the cost of Govt., to ineligible persons.

b. The persons who are issued PMUY connections, as per norms are entitled to get subsidy for their subsequent refills. BY issuing PMUY connections to ineligible persons, you have enabled such ineligible persons to receive subsidy, who are not eligible to get such subsidy otherwise. If the irregularity would not have been detected, huge financial loss would have been incurred to the public exchequer.

c. BY issuing such connections to those who are not entitled for PMUY connections, you have allowed those ineligible persons to utilize govt funds which are intended for the benefit of other eligible and needier and there by blocked a huge amount of public fund in this regard.

d. The action/omission from your part in releasing the above mentioned connections without proper documentation amounts to unauthorized release of connection in contravention of your obligations under the agreement under reference.

e. Non-submission of confirmation in writing with regard to the receipt of the amount from the customers who have complained about over charging, within 30 days from the date of receipt of our letter dated 08.05.2018.

f. Non-submission of confirmation in writing with regard to transfer all connections issued beyond your trading area to nearby distributors, till date.

g. Overcharging customers with an intention to defraud the customers of BPCL and to there by unduly enriching yourself and thereby causing financial loss to our customers.

h. The responsibility entrusted upon you as a distributor , and thereby giving the properties of BPCL such as cylinders, regulators etc., have been breached by you by using the said properties, in a manner other than intended by this corporation with regard to the PMUY scheme, with an intention to obtain wrongful financial gain and thereby deceived this corporation.

> I. The amount involved in the above mentioned irregularities/amount misused by you in your above mentioned action/omission is public money amounting to Rs. 4,94,93,506.58.
> j. Your above mentioned actions/omissions are prejudicial to the interest and good name of the Corporation. It also caused irreparable damage to the brand image of the corporation and lowered its reputation amongst the public.
> k. The irregularities detected in release of PMUY connections are of very high magnitude which has resulted in the large scale misuse of the pro-poor scheme, misappropriation of the Government funds, fraud and deliberate attempt on your part to conceal the KYC documents for verification to the inspection team, non-adherence to the Distributorship Agreement.
>
> 9. We take an extreme and serious view of the aforesaid breaches and in the circumstances referred above, you are hereby called upon to submit your explanation with the supporting documents, if any, to the above observations and show cause within a period of 15 (fifteen) days from the date of receipt of this letter as to why the Distributorship agreement should not be terminated, failing which, it would be construed that you do not have any explanation to offer and we shall be at liberty to terminate the Bharatgas (Liquefied Petroleum Gas) Distributorship (Domestic & Commercial) Agreement dated 15.03.2013."

42. The petitioner then replied vide Annexure-19 dated 17.10.2018 and while reiterating the earlier stand/replies the petitioner requested the Corporation to absolve from the charges against her and the issues may be closed.

43. The respondent Corporation however came with a stand that the letter dated 08.05.2018 was issued by them

without prejudice to any other right of the Corporation. According to Corporation certain corrective actions and directions were given to the petitioner in the said letter reserving rights under the agreement and Corporation was not satisfied with the explanations offered by the petitioner to the letter dated 08.05.2018. In Annexure-20 the respondent Corporation has taken note of the explanation of the petitioner in paragraph 11 but those have been found not satisfactory for the reasons stated in paragraph 12 of the impugned order. This Court is not reproducing those replies and the reasons provided in Annexure-20 as this Court sitting in writ jurisdiction under Article 226 of the Constitution of India is not entering into the merit of the allegations and no observation in the opinion of this Court, would be desirable to be recorded in the limited scope of discussions with regard to the contentions of learned senior counsel for the petitioner on the issue of violation of principles of natural justice. A glance over Annexure-20 demonstrates that the respondent Corporation has gone through the reply of the petitioner as contained in Annexure-19 to the writ application and then by dealing with each of the points raised in the reply the respondent Corporation for its own reasons did not feel satisfied with the same and passed the impugned order.

44. From the aforementioned discussions this Court is of the considered opinion that so far as plea of violation of principles of natural justice is concerned, this Court does not find any reason to interfere with the impugned order (Annexure-20) on the ground of violation of principles of natural justice. The contention of learned senior counsel for the petitioner that non-supply of the inspection report of the two members committee would constitute violation of principles of natural justice would not appeal to this Court because on the one hand this Court finds that the observations of the two members committee in the inspection report have been duly incorporated in the show cause notice (Annexure-13) and then there is no case of the petitioner that non-supply of the copy of the report has in any way prejudiced the case of the petitioner. This should be however not taken as any opinion of this Court on the merit of the observations of the two members committee and it will be open for the petitioner to bring appropriate evidence before the appropriate forum to prove prejudice.

45. This Court is keeping in mind the distinction between a judicial review in the matter of awarding of contract in the light of Article 14 of the Constitution of India which is wide and enjoins the public authority to act fairly, reasonably,

rationally by excluding arbitrariness and power of judicial review in a concluded contract which has been held limited and is not all pervasive like matter of awarding of contract. There are judicial pronouncements saying that in exercise of judicial review court can intervene even in respect of concluded contracts if the contract is statutory contract or there is a public law element in it. In the case of **Joshi Technologies International Inc. v. Union of India, (2015) 7 SCC 728** the Hon'ble Supreme Court held that there is no absolute bar to the maintainability of the writ petition even in contractual matters where there may be disputed questions of fact or even monetary claim is raised but at the same time discretion lies with the High Court under which it can refuse to exercise the discretion. The Hon'ble Supreme Court has delineated certain circumstances in which normally the Court will exercise such a discretion. Paragraphs 69.1 to 71 of the said judgment are delineated hereunder:-

> "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, the legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to contracts entered into by the State/public authority with private parties, can be summarised 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 of the Constitution 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 the Court can direct the aggrieved party to resort to alternate remedy of civil suit, etc.
70.4. Writ jurisdiction of the High Court under Article 226 of the Constitution 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 licence if he finds it profitable to do so; and he can challenge the conditions under which he agreed to take the licence, 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 it 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 the 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 Constitution of India and invoking its extraordinary jurisdiction.

70.9. The distinction between public law and private law element in the contract with the 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. The dichotomy between public law and private law rights and remedies would depend on the factual matrix of each case and the distinction between the 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.

> 71. Keeping in mind the aforesaid principles and after considering the arguments of the respective parties, we are of the view that on the facts of the present case, it is not a fit case where the High Court should have exercised discretionary jurisdiction under Article 226 of the Constitution. First, the matter is in the realm of pure contract. It is not a case where any statutory contract is awarded."

46. Apparently this case is covered under paragraph 69.2, 69.3, 70.3 and 70.8 above.

47. For the aforesaid reasons, this Court is of the opinion that in the facts and circumstances of the present case the plenary and discretionary jurisdiction of this Court under Article 226 of the Constitution of India need not be exercised on the ground of violation of principles of natural justice. Thus, the first contention of the petitioner would not find favour with this Court.

48. Now coming to the principles of waiver and while considering this issue the Court will also deal with the effect of Clauses 27, 28 and 30 of the agreement (Annexure-1) which reads as under:-"

27. The Distributor shall settle, in the event of termination of this agreement for any reason all accounts within seven days of such termination and in the event of the distributor declining or neglecting of ailing to settle accounts within such period, an account certified by one of the Corporation's officers, shall be absolutely final and conclusive for all purposes. 28. Notwithstanding anything to the contrary herein contained, the Corporation shall also be at liberty at its entire discretion to	**Settlement of Accounts**

terminate the Agreement forthwith upon or at any time after the happening of any of the following events, namely:- (a) If the Distributor shall commit a delay, breach or default of any of the terms, conditions, covenants and stipulations contained in the Agreement and fail to remedy such as breach within four days of the receipt of a written notice from the Corporation in that regard: (b) Upon: (I) the death or adjudication as insolvent of the distributor, if he be an individual; (ii) the dissolution of the partnership of the distributor's firm or the death or adjudication as insolvent of a partner of the firm, if the Distributor be a firm; (iii) the liquidation, whether voluntary or otherwise or the passing of an effective resolution for winding up, if the Distributor be a company or co-operative society; (c) If any attachment is levied and continued to be levied for a period of seven days upon the effects of the Distributor or any individual partner for the time being of the distributor's firm or any elected member of the distributors Co-operative society; (d) If the Distributor or any partner in the distributor's firm or any whole time office bearer of the Co-operative Society appointed as Distributor hereunder shall be involved in any criminal offence relating to moral turpitude. (e) If a Receiver shall be appointed of any property or assets of the Distributor or of any partner in the distributor's firm or of the Distributor co-operative society; (f) If the licence issued to the Distributor by the relevant authorities for the storage of LPG products suplied by the Corporation is cancelled or revoked; (g) If the Distributor shall for any reason make default in payment to the Corporation in full or his outstanding as appearing in the Corporation's books of account	**Termination of Agreement**

beyond 4 days of demand by the Corporation. (h) If the Distributor does not adhere to the instructions issued from time to time by the Corporation in connection with safe practices to be followed by him in the supply and storage of the Corporation's products or otherwise; (I) If the Distributor shall give out unauthorised connections to any person without the Corporation's receipt/subscription voucher or otherwise howsoever; (j) If the Distributor shall deliberately contaminate or tamper with the quality of any of the Corporation's products; (k) If the Distributor shall sell the Corporation's products at prices higher than those fixed by the Corporation; (l) If any information given by the Distributor in his application for appointment as a Distributor shall be found to be untrue or incorrect in any material particular; (m) If the lease tenancy of the Distributor (if the Distributor holds the site as lessee or tenant) shall be terminated of purported to be terminated or comes to an end for reason whatsoever; (n) If the Distributor shall either by himself or by his servants or agents commit or suffer to be committed any act which , in the opinion of the General manager of the Corporation for the time being at MUMBAI whose decision in that behalf shall be final. Is prejudicial to the interest or good name of the Corporation or its products; the General Manager shall not be bound to give reasons for such decision. The Corporation's right to terminate this agreement under the terms of this clause shall be without prejudice to and without affecting any of its other rights and remedies against the distributor. In the event of the Corporation terminating this Agreement under the provision of this clause, it shall not be liable to pay for any loss or compensation in respect of such termination PROVIDED THAT the supply of any LPG product by the Corporation to the	

Distributor, pending expiry of any notice of termination or after any act, contravention or omission by the Distributor entitling the Corporation to terminate this Agreement shall have become known to the Corporation, shall not in any way prejudice or affect the right of the Corporation to revoke and or enforce the termination of this Agreement and the licence granted hereunder. 30. Any acquiescence or waiver by the Corporation of any delay, breach or default committed by the Distributor shall not be deemed to be or considered as estoppel against the Corporation or prevent the Corporation from effecting termination of this agreement under any of the aforesaid provisions (including clauses 27 and 28) in respect of any matter or transaction antecedent of whatsoever nature.	

”

49. In Black's Law Dictionary the term “Waiver” has been defined as the voluntary, intentional relinquishment or abandonment of a known right. It is an act of surrender of benefit or privilege. The person against whom the plea of waiver is raised is required to be fully cognizant of his rights before waiving off such rights. In the case of **Jagad Bandhu Chatterjee Vs. Nilima Rani and ors.** reported in **(1969) 3 SCC 445** their Lordships of the Hon’ble Apex Court had occasion to consider as to whether waiver may be proved by estoppel. Attention of the Hon’ble Apex Court was drawn towards the observations of Lord Russel of Killowen in **Dawson's Bank Limited v. Nippon Menkwva Kabushiki Kaisha** reported in **1959 Suppl. 2 SCR 217** to submit that (i) “waiver is contractual and may

constitute a cause of action; it is an agreement to release or not to assert a right.”. The Hon’ble Apex Court held that “In India the general principle with regard to waiver of contractual obligations is to be found in Section 63 of the Indian Contract Act. Under that section it is open to a promisee to dispense with or remit, wholly or in part, the performance of the promise made to him or he can accept instead of it any satisfaction which he thinks fit. Under the Indian law neither consideration nor an agreement would be necessary to constitute waiver. This Court has already laid down in **Waman Shriniwas Kini vs. Ratilal Bhagwandas & Com.** (1) that waiver is the abandonment of a right which normally everybody is at liberty to waive. A waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right.”

50. In the case of **M/S Motilal Padampat Sugar Mills Vs. State of Uttar Pradesh and Ors.** reported in **AIR 1979 SC 621** their Lordships held inter-alia in paragraph ‘5’ that Waiver is a question of fact and it must be properly pleaded and proved. It has been held that no plea of waiver can be allowed to be raised unless it is pleaded and the factual foundation for it is laid in the pleadings. In the said case the Hon’ble Apex Court found that the plea of waiver was not taken by the State

Government in the affidavit filed on its behalf in reply to the writ petition, nor was it indicated even vaguely in such affidavit. It was raised for the first time at the hearing of the writ petition.

51. In the present writ petition, it appears that no question of law has been framed in the writ application taking into consideration the facts of the present case. In reply dated 17.10.2018 (Annexure-19) which was in response to the third show cause notice (Annexure-18) no plea of waiver has been taken. In the writ application also a plea of waiver has not been raised. There is no pleading in the writ petition that by issuing Annexure-15 the respondent Corporation had waived its right unequivocally to terminate the agreement and that issuance of Annexure-15 and subsequent performance would amount to confirmation of the agreement and release of the petitioner from the liability of the termination of the agreement.

52. From the aforementioned discussions, this Court would reach to a conclusion that "waiver" is a question of fact and in the present case on the face of clause '30' of the agreement and presence of the words 'without prejudice' in the last paragraph of Annexure-15 a waiver by election which would release the petitioner from the consequence of termination of agreement cannot be readily inferred. It is for the petitioner to bring cogent

evidence to demonstrate that there was an unequivocal and unambiguous confirmation of agreement after issuance of Annexure ‘15’. That will be a question of fact which may be decided only on the basis of the evidences brought before the competent Court/competent forum. So far as the present writ application is concerned, there being no pleading and material before this Court on the basis of which the plea of waiver may be decided, the writ application is bound to fail on this ground as well.

53. In ultimate analysis both the grounds pleaded by learned senior counsel for the petitioner would not succeed. The writ application is, thus, disposed of with liberty to the petitioner to seek her remedy, if so advised, in terms of the arbitration clause contained in the agreement (Annexure-1) in accordance with law.

54. Let it be recorded that this Court has not at all gone into the merits of this case and no part of it shall be construed as any reflection on the case of either of the parties on merit.

(Rajeev Ranjan Prasad, J)

Rajeev/Arvind-

AFR/NAFR	AFR
CAV DATE	15.09.2020
Uploading Date	05.10.2020
Transmission Date	