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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgement reserved on 22.05.2019

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Judgement pronounced on 18.03.2020

+ **W.P.(C) 10334/2017 & CM No.27853/2018**

**ALL INDIA PETROLEUM DEALERS
ASSOCIATION (REGD.) AND ANR.**

..... Petitioners

Through: Mr. Pushkar Sood with Mr. Virendra
Kumar Tiwari, Advocates.

versus

UNION OF INDIA THROUGH ITS SECRETARY AND ORS.

..... Respondents

Through: Mr. Tushar Mehta, SG with Ms. Mala
Narayan, Ms. Neha Dawar, Mr. Rahul
Narayan, Mr. Shashwat Goel, Ms.
Neha Dawar, Mr. Kanu Aggarwal,
and Mr. Manan Popli, Advocates for
IOCL.

Mr. Anil Kumar Batra, Mr. Praveen
Kumar, Ms. Shashi Bala, Mr. Parijat
Sinha, and Mr. Rudra Dutta
Advocates for BPCL.

Mr. Rajesh Kumar with Ms.
Santwana, Advocates for HPCL.

Mr. Soumya Chakraborty, Senior
Advocate with Mr. Pabitra Pal
Chowdhury, Advocates for the
applicant in CM No.47111/2017.

Mr. Siva Bala Murugan, Mr. Vivek
Bharathi, and Mr. T. Dinesh,
Advocates for the applicant in CM
3870/2018.

Mr. Rakesh Tikku, Senior Advocate
with Mr. Gaurav Kohli, and Mr.
Shanth Kumar Mahale, Advocates for

the applicant in CM 1695/2018.

+ **W.P.(C) 10746/2017 & CM No. 44012/2017**

ALL HARYANA PETROLEUM DEALERS ASSOCIATION
(REGD) AND ANR. Petitioners

Through Mr. Pushkar Sood with Mr. Virendra
Kumar Tiwari, Advocates.

versus

UNION OF INDIA AND ORS. Respondents

Through: Mr. Tushar Mehta, SG with Ms. Mala
Narayan, Ms. Neha Dawar, Mr. Rahul
Narayan, Mr. Shashwat Goel, Ms.
Neha Dawar, Mr. Kanu Aggarwal,
and
Mr. Manan Popli, Advocates for
IOCL.
Mr. Anil Kumar Batra, Mr. PRaveen
Kumar, Ms. Shashi Bala, Mr. Parijat
Sinha, and Mr. Rudra Dutta
Advocates for BPCL.

+ **W.P.(C) 11246/2017**

BIHAR PETROLEUM DEALERS ASSOCIATION (REGD.)

..... Petitioner

Through: Mr. Praveen Kumar Rai, Advocate.

versus

UNION OF INDIA & ORS Respondents

Through: Mr. Tushar Mehta, SG with Ms. Mala
Narayan, Ms. Neha Dawar, Mr. Rahul
Narayan, Mr. Shashwat Goel, Ms.
Neha Dawar, Mr. Kanu Aggarwal,
and
Mr. Manan Popli, Advocates for
IOCL.

Mr. Ripu Daman Bhardwaj, CGSC
with Mr. T.P. Singh, Advocate for
Respondent No.1/UOI.

Mr. Anil Kumar Batra, Mr. Praveen
Kumar, Ms. Shashi Bala, Mr. Parijat
Sinha, and Mr. Rudra Dutta
Advocates for BPCL.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.:

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Preface: -

1. I have before me 3 writ petitions and 6 intervention applications filed in W.P. (C) 10334/2017. All three writ petitions were filed in this Court. However, 4 out of 6 intervention applications pertain to those petitioners who instituted writ petitions in High Courts other than this Court. These applications were filed pursuant to order dated 27.11.2017, passed by the Supreme Court in TRANSFER PETITION (CIVIL) No.2206-2017, 2227/2017, and 2230-2234/2017, 2273-2276/2017 titled ***Bharat Petroleum Corporation Ltd. &Ors. vs. Andhra Pradesh Federation of Petroleum Dealer & Anr.*** These 4 intervention applications [CM No. 47111/2017, CM No. 54/2018, CM No.1695/2018, and CM No.3870/2018] were allowed on various dates.

1.1. The remaining two intervention applications which were numbered as CM No. 3870/2018 and CM No. 15005/2018 were also moved pursuant to the aforementioned order of the Supreme Court. The record shows that CM No. 3870/2018 was allowed. Although no formal order was passed *qua* CM No. 15005/2018, the intervenor was heard.

1.2. The aforementioned information is given in a synoptic form in the table set forth hereafter.

S. No.	Particulars of the writ petition	Concerned High Court	Particulars of the intervention application filed in this Court
1.	W.P. No. 26749 (W) of 2017	Calcutta High Court	CM No. 47111/2017 allowed <i>vide</i> order dated 22.12.2017
2.	W.P. (Civil) No.24410 of 2017	High Court of Orissa at Cuttack	CM No. 54/2018 allowed <i>vide</i> order dated 16.01.2018

3.	W.P. Nos. 52077-80/2017	High Court of Karnataka at Bengaluru	CM No.1695/2018 allowed <i>vide</i> order dated 16.01.2018
4.	W.P. No. 28564/2017	High Court of Judicature at Madras	CM No.3870/2018 allowed <i>vide</i> order dated 02.02.2018
5.	N/A	N/A	CM No.15005/2018 allowed <i>vide</i> order dated 18.04.2018
6.	N/A	N/A	CM No.27853/2018

2. The principal grievance of the petitioners veers around various provisions incorporated in the Marketing Discipline Guidelines (MDG) 2012 as amended on 02.10.2017[hereinafter referred to as “amended MDG 2012”] issued by the Oil Marketing Companies (in short “OMC’s”). Notably, the amendment which was brought about *qua* MDG 2012 was intimated by the OMCs to their Retail Outlet dealers (in short "R.O. dealers") separately on the following dates: Indian Oil Corporation Limited [in short “IOCL”], on 03.10.2017; Hindustan Petroleum Corporation Limited [in short "HPCL"], on 06.10.2017; and Bharat Petroleum Corporation Limited [in short "BPCL"], on 11.10.2017.

3. It is the amendments brought about on 02.10.2017 which are challenged by the petitioners who have the support of the intervenors. A perusal of the writ petitions and intervention applications would show that the trigger for instituting the petitions is the amendment carried out to the MDG 2012 and the consequent penal action taken for alleged violation of the amended MDG 2012 against some of the R.O. dealers.

4. Thus, before I proceed further it may be relevant in this case to set out the backdrop in which the amendments to MDG 2012 came about at least from the standpoint of the OMCs.

Backdrop: -

5. It appears that the first time around when MDGs were framed was in 1981-1982. The avowed purpose of framing the MDG was to maintain discipline in the operation of retail networks of the OMCs which, *inter alia*, sold Motor Spirit (i.e. petrol) and High-Speed Diesel (i.e. diesel) at R.O.s spread across the country.

5.1. The OMCs, it appears, reviewed the MDGs framed, in this behalf, from time to time, to align them with changed circumstances and market scenario and to meet the service benchmark set by them *vis-à-vis* its customers. It is in this context that the MDG were framed in 1995 and revised in 1998. Likewise, they were framed in 2012 and revised/amended in October 2017.

5.2. Notably, the MDG 1995 and the revised MDG 1998 were challenged before this Court. This Court, *vide* judgement dated 18.08.1999, passed in ***Delhi Petrol Dealer Association & Anr. vs. Union of India & Ors.*** repelled the challenge to the said guidelines and sustained the power of the OMCs to frame guidelines under Clause 43 of the dealership agreement/license agreement [hereafter referred to as "dealership agreement"].

5.3. It is pertinent to note at this stage itself that the dealership agreements, although executed separately with each R.O. dealer are format agreements and, therefore, contain terms and conditions which are uniform in content and largely in form as well.

5.4. The record shows that contemporaneously, a challenge was laid to the MDGs [framed in 1982 and revised/amended in 1998, 2001 and 2005] by some R.O. dealers before the Karnataka High Court. The Single Judge of the Karnataka High Court had allowed the writ petitions *vide* judgement dated

13.01.2010, passed in W.P. No. 37175/1999 and other connected writ petitions.

5.5. Being aggrieved, the OMCs preferred appeals to the Division Bench against the judgement of the Single Judge.

5.6. Pertinently, the Division Bench of the Karnataka High Court, in that case, was considering the impact of Clause 42 of the model agreement which, in substance, replicates the contents of Clause 43 of the dealership agreements placed before me.

5.7. Interestingly, the Division Bench, *vide* judgement dated 22.01.2015, passed in Writ Appeal Nos. 582-597/2010, titled ***M/S. IBP Company Ltd. and Anr. vs. Sri. T.A. Jayaprabhu and Ors.***, ruled that in cases where Clause 42 of the model agreement stood incorporated in the agreements executed between the R.O. dealer and the concerned OMC, such R.O. dealer could not be heard to contend that the OMC had no power to issue guidelines concerning safe practices, marketing disciplines and/or for properly carrying out their roles as dealers.

5.8. The Division Bench, however, went on to say that in cases where Clause 42 of the model agreement was not incorporated in the dealership agreement, they could not be bound down by the MDGs. The Division Bench went on to add that it was always open to the OMCs to include such a clause in the dealership agreement at the time of its renewal.

5.9. It is in this context that the OMCs framed MDG 2012 which was amended in October 2017.

6. It must be pointed out that, in the interregnum, in a public interest petition [i.e. PIL Civil No. 10652/2017], the High Court of Allahabad (Lucknow Bench), *vide* order dated 30.05.2017, made observations, to the

effect, that the OMCs should take action against the errant R.O. dealers who, apparently, had indulged in cheating by supplying fuel less than the quantity for which customers had been billed. The OMCs aver that it was this and other malpractices which were brought to light *vis-a-vis* R.O. dealers located in the State of Uttar Pradesh and State of Maharashtra which led to the amendment of MDG 2012.

6.1. Besides this, the OMCs have also referred to the following communications addressed to the R.O. dealers to lend context to the amendments made in MDG 2012.

- i. Communication dated 31.07.2017 pertaining to revision in dealers margin;
- ii. Communication dated 01.08.2017 which clarified that slab-based margins had been introduced in respect of business return and manpower and that non-slab based margins had two components comprising fixed margins and variable margins;
- iii. Communication dated 24/26.08.2018 requiring R.O. dealers to comply with the four requirements set out in the said communication and communication dated 19.09.2017 whereby apart from replying to queries raised by R.O. dealers they were also advised to pay their employees minimum wages as notified by OMCs or the State Governments whichever was higher and to meet other statutory obligations as notified under the Minimum Wages Act, 1948 [in short "MW Act"] of the concerned State. This apart, the R.O. dealers were also directed, *via* this communication, to pay wages from August 2017 through e-payment modes such as RTGS/NEFT. In this behalf, the R.O. dealers were advised that they should ensure that necessary

steps are taken immediately. Furthermore, R.O. dealers were advised that wage register and e-payment details should be made available for verification by officials of the OMCs; and

- iv. Lastly, all employees of R.O. dealers should be covered under Pradhan Mantri Suraksha Beema Yojna (PMSBY) and Pradhan Mantri Jeevan Jyoti Beema Yojna (PMJJBY).

6.2. At this juncture, it may also be important to advert to the fact that after MDG 2012 was amended on 02.10.2017, the OMCs appear to have issued a Standard Operating Procedure (in short “SOP”) to put in place a protocol for measure-check of nozzles at R.O.s. Clause 14 and 15 of this SOP being relevant are extracted hereafter.

“14. If two consecutive variations are beyond +/- 10 ml, action to be initiated as per MDG against [the] short delivery of [the] product.

15. Variation of +/- 25 ml being the maximum permissible error as per Legal Metrology Act and 10 ml being the least count in the LCD display of DU, if variation in two consecutive measure checks are [is] beyond +/- 10 ml, action to be initiated as per MDG against short delivery of product.”

7. As would be evident, the OMCs have brought down the variation level below the maximum permissible limit as fixed under the Legal Metrology Act, 2009 [in short “LM Act”] and have provided for action for short delivery under the amended MDG, if two consecutive variations are beyond - 10 millilitres.

7.1. In this behalf, reliance is also placed on the notification dated 12.03.2010 issued by the Ministry of Consumer Affairs and Public Distribution and the amended provisions of the Standards of Weights and Measures (General) Rules, 1987 which are indicative of the fact that the

maximum permissible error for a 5 litre quantity of petrol or diesel delivered by Dispensing Units (in short “DUs”) is 25 millilitre.

7.2. The amendments made to the 2012 MDG, thus, led to unrest among various R.O. dealers spread across the country. Consequently, a call for strike was given by R.O. dealers on 07.10.2017. As a matter of fact, the strike was observed by R.O. dealers on 13.10.2017. It is averred by the R.O. dealers that, in the interregnum, OMCs, initially, began with stopping supplies of petroleum products to only those R.O.s which were owned by office bearers of various associations.

7.3. The petitioners also aver that wholly “motivated” inspections were conducted on 10.10.2017. There is a specific averment to that effect in W.P. (C) 10334/2017. It is asserted that the R.O. belonging to petitioner No. 2 [in that writ petition] was subjected to an inspection which commenced on 10.10.2017 at 6:00 A.M. and ended on 11.10.2017 at 1:45 A.M. It is further contended that this led to the issuance of show cause notice dated 11.10.2017 (in short “SCN”) to petitioner No. 2 in W.P. (C) 10334/2017. *Qua* the SCN, the said petitioner filed a reply on 20.10.2017. IOCL passed an adjudication order dated 14.11.2017. *Via* order dated 14.11.2017, IOCL imposed a penalty of Rs. 14.47 lakhs on petitioner No. 2 in W.P. (C) 10334/2017.

7.4. It is averred in the said writ petition [i.e. W.P. (C) 10334/2017] that similar inspections were carried out *vis-à-vis* other office bearers of petitioner No. 1 association.

7.5. I may also indicate that the petitioners claim that the coercive inspections carried out by the OMCs led to the strike being called off on 12.10.2017.

8. It is in this backdrop that writ actions were filed not only in this Court but in other High Courts of the country as well. As indicated hereinabove, since the OMCs moved the Supreme Court *via* transfer petitions, the Supreme Court directed, *vide* order dated 27.11.2017, that W.P. (C) 10334/2017 should be decided in the first instance and that other High Courts will proceed in the matter after the said petition is decided.

9. The Court, however, gave liberty to the affected parties to intervene in the writ petition pending adjudication in this Court. Apart from W.P. (C) 10334/2017, as noted above, the other two petitions being W.P.(C) 10746/2017 and W.P. (C) 11246/2017 were filed in this Court on 30.11.2017 and 12.12.2017 respectively, *albeit*, after the issuance of the order of the Supreme Court dated 27.11.2017.

10. Since the Supreme Court had permitted intervention, the number of parties who wanted to intervene and make submissions was large. Time had to be allocated to hear all parties given the fact that any order issued by this Court would have all India ramifications.

Submissions of Counsel: -

11. The submissions advanced on behalf of the R.O. dealers i.e. the petitioners and the intervenors have a common thread and, therefore, to avoid prolixity, I would not be referring to the submissions made on their behalf separately. Insofar as the OMCs are concerned; submissions were made were common and thus adopted by all OMCs.

11.1. Insofar as R.O. dealers/petitioners and intervenors were concerned, they were represented various advocates whose appearances have been marked hereinabove. The OMCs, on the other hand, was represented by Mr. Tushar Mehta, learned Solicitor General.

Submissions on behalf of R.O. dealers/petitioners and intervenors: -

12. On behalf of R.O. dealers/petitioners and intervenors, the following broad submissions were made.

(i) The amendments to the MGD 2012 have a legislative flavour. The OMCs have no legal authority to impose the impugned prescriptions by amending MDG 2012.

(ii) The impugned amendments, particularly those, which empower the OMCs to impose penalties, are irrational, contrary to the terms of the contracts obtaining between OMCs and R.O. dealers, and opposed to statutory provisions governing the field and, thus, violative of Article 14 and 19(1)(g) of the Constitution. In particular, provision for imposition of penalties smacks of unilateralism and is contrary to the provisions of Sections 73 & 74 of the Indian Contract Act, 1872 (in short "Contract Act").

(iii) There are provisions in various statutes such as the MW Act, the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 [in short "EPF Act"], The Payment of Bonus Act, 1965 [in short "PB Act"], and the LM Act which cover the field *qua* which prescriptions have been made *via* amendments brought about in MDG 2012.

(iv) The amendment, though, while relating to the same field which is covered by the statutes go beyond the provisions made in the statute and, thus, are illegal, burdensome and are liable to be struck down based on the *Wednesbury* principle of reasonableness.

(v) The OMCs have vested upon themselves powers which can be exercised only by statutory authorities and thus, in effect, expose the R.O. dealers to the possibility of being punished by the statutory authorities as

well as OMCs for the same infraction and, therefore, as a necessary corollary, leading to violation of Article 20(2) of the Constitution.

(vi) While the relation between the R.O. dealers and OMCs is contractual, the contract executed between them is a standard format agreement. Under the contract, the concerned OMC must install and maintain apparatus and equipment which is referred to as “outfit”. In other words, the DUs and Automated Gauge Tanks (AGTs) are equipment which are installed by the concerned OMC. R.O. dealers are bound to sell petroleum products at the price fixed by the OMCs. Since the pricing of petroleum products is de-regulated, the margins of R.O. dealers also vary. It is the responsibility and/or the obligation of the R.O. dealers to bear all costs and expenses involved in running their respective outlets which includes payment of wages to their employees/staff.

(vii) The R.O. dealers are, thus, not only required to comply with statutory provisions concerning payment of wages to their employees/staff but also with regard to storage/sale of petroleum products. All dimensions and aspects of the business of sale of petroleum products are governed by various standing orders, statutes and regulations such as Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution, and Prevention of Malpractices) Order, 2005; MW Act; EPF Act; and PB Act.

(viii) To emphasise the unreasonableness and illegality of the amendments, the following submissions were also advanced.

(viii)(a) Insofar as the amendment to Clause 5.12 of MDG 2012 was concerned, it was stated that prior to the amendment, the obligation of the R.O. dealers was only to carry out checks in terms of Clause 1.4.2 (a) and (d). In case, it was noticed that there was short delivery of the product by the

DUs despite seals being intact, the R.O. dealer was required to suspend the sales till recalibration was done. However, after the amendment, the R.O. dealer is required to suspend the sales and recalibrate the DU even when it is found that the error is within the permissible limits. What constitutes permissible limit is not that which is provided under the LM Act instead is one which is contained in the amended MDG 2012. Thus, the OMCs in providing a higher bar *qua* permissible error (which is contrary to the statutory provision), has lost sight of the fact that DUs are mechanical devices that do not ensure 100% accuracy.

(viii)(a)(i) The fact that DUs cannot achieve 100% accuracy was sought to be supported by referring to the answers given on behalf of the Ministry of Petroleum and Natural gas [in short “MOPNG”] by its Minister to an unstarred question No. 3592 on 12.12.2012, to the effect, that even imported machines do not have 100% accuracy in delivering the product.

(viii)(a)(ii) Therefore, the provisions in the amended MDG 2012 of suspending the sales till recalibration is done even when the error is within the permissible limit or imposing a penalty when seals are found intact, although, the short delivery of petroleum product is beyond the permissible limits infuse the guidelines with the error bordering on manifest arbitrariness as the R.O. dealer is declared guilty without adjudication.

(viii)(b) Clause 43 of the dealership agreement which, purportedly, forms the source of power for issuing the amendments to MDG 2012 is a case of overreach as, while the R.O. dealers have agreed to abide by directions and instructions issued by the OMCs from time to time for the safety, security and benefit of the customers so that she or he is rendered

services which is of highest quality and standard, the R.O. dealers have not bound themselves down to imposition of penal action.

(viii)(b)(i) The OMCs, in the garb of public interest, have introduced the amendments to MDG 2012 whereby they seek to exercise legislative power and that too in a manner which has brought about, in effect, unilateral variation in contractual terms, *albeit*, to the detriment of R.O. dealers.

(viii)(c) ATGs are devices that are installed by the OMCs. These devices enable OMCs to monitor the quantity and quality of petroleum products in the underground tanks on a real-time basis through data transmitted *via* the internet. Since the device is installed and maintained by OMCs, *albeit*, through other agencies, R.O. dealers cannot be held responsible if, they, malfunction. The imposition of penalties for their malfunctioning cannot, thus, be laid at the doorstep of the R.O. dealers.

(viii)(d) The provision in the amended MDG 2012 that the toilets obtaining in the R.O.s for the benefit of their customers, be declared "public toilets" for use by persons at large, is fraught with many difficulties. First, the responsibility placed on R.O. dealers to maintain the cleanliness of toilets located in their premises will become burdensome if the public at large has access to them given the wherewithal available to R.O. dealers in terms of money and manpower. Therefore, the imposition of a penalty for unclean toilets is harsh and excessive and has no relation to the loss suffered by the OMCs. Second, giving access to R.O. toilets to one and all will endanger the safety and security of the R.O. itself, its employees and

customers. In this behalf, the following rules are referred to: Rule 10(6), Explosives Rules, 2008¹; and Rule 117, The Petroleum Rules, 2002².

(viii)(d)(i) Besides this, reference is also made to Subrule (2) and (3) of Rule 121 of The Petroleum Rules, 2002³ to draw attention to the fact that unauthorized persons are to be excluded from service stations by building a

¹ **10. General Restrictions:**

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(6) Restriction on smoking and articles likely to cause fire or dangerous substance—No person shall smoke, and no fires, lights or articles or substances of a flammable nature or liable to spontaneous ignition, or act to cause or communicate fire or explosion such as acids, petroleum, carbide of calcium, compressed gases or such other hazardous substances, or radio or cell phone or radio frequency operated device or any such communication system or devices shall be allowed at any time within fifteen metres from the place where an explosive is stored or at any place where an explosive is handled during transport one hour before and during such handling.

² **117. Precautions against fire.—**

(1) No person shall smoke in any installation, storage shed or service station save in places specifically authorized by the licensing authority for the purpose.

(2) No person shall carry matches, fuses or other appliances capable of producing ignition or explosion in any installation or storage shed which is used for storage of petroleum.

(3) No fire, furnace or other source of heat or light capable of igniting inflammable vapour shall be allowed in any installation, storage shed or service station save in places specially authorised by the licensing authority for the purpose.

(4) (i) An adequate number of portable dry chemical powder or any other fire extinguisher capable of extinguishing oil fires shall always be kept in every storage shed and small Class B or C installations at strategic points and all persons employed at such locations shall be conversant with the use of such fire extinguishers.

(ii) Scale of fire fighting provided in other areas of installation should be as per the requirement given to OISD Standard-117 for all installations approved by the Chief Controller after publication of the original standard OISD-117. For installations existing prior to the publication of the standard the fire fighting facilities shall be improved to the extent feasible (keeping this standard in mind) and approved by the Chief Controller.

³ **121. Exclusion of unauthorized persons.—**

(1) The protected area surrounding every installation and storage shed shall be surrounded by a wall or fence of at least 1.8 metres in height.

(2) In case of service station 1.2 metre high boundary wall or fence on sides other than the drive way shall be provided.

(3) Precautions shall be taken to prevent unauthorised persons from having access to any storage shed or installation.

boundary wall or fence and by taking other measures to prevent access to storage shed or installation.

(viii)(d)(ii) It was sought to be emphasized that the use of toilets by persons other than R.O. dealers' customers is fraught with grave danger as there is a possibility of persons lighting cigarettes or matches in the toilets or using cell phones while easing themselves. The lighting of cigarettes or matches in the toilets is not only dangerous but also prohibited under Rule 11 of The Petroleum Rules, 2002⁴.

(viii)(e) Insofar as payment of wages to employees of R.O. dealers are concerned, the OMCs have no right to fix their service conditions. The relationship between the R.O. dealers and OMCs are on a principal to principal basis. The OMCs have no privity of contract with the employees of R.O. dealers. Provisions in amended MDG 2012 to pay wages/salaries higher than those which are fixed by various State Governments under the relevant statutory provisions are both illegal and burdensome. The rationale provided by OMCs that increase in margins concerning R.O. dealers was carried out by factoring in an increase in the wages which, if not paid, would result in unjust enrichment by the R.O. dealers is a false assertion. The OMCs are not reimbursing the entire increase in the costs incurred by R.O. dealers which includes cost under the head wages. Self-serving calculations presented made by OMCs cannot be used to justify making amendments to MDG 2012 concerning aspects related to payment of wages. Similar

⁴ **11. Prohibition of smoking, fires, lights, etc.**— Unless expressly provided in these rules, no person shall smoke and no matches, fires, lights or articles or substances capable of causing ignition of petroleum shall be allowed, at any time in proximity to a place where petroleum is refined, stored or handled or in a vehicle's carriage or vessel in

arguments were made *qua* payment of provident fund, insurance cover and bonus as well.

(viii)(e)(i) It was submitted that even where the statutory provisions were inapplicable, on account of a particular R.O. dealer not having employed a minimum number of persons as prescribed under the statutes such as the EPF Act and the PB Act - to hold the R.O. dealers to a higher standard, is also a case of overreach.

(viii)(f) The PMSBY and PMJJBY are schemes that are optional and, therefore, cannot be made compulsory *qua* R.O. dealers. The penalties proposed for failure on the part of employees of R.O. dealers to join the aforementioned schemes were illegal and cannot be sustained in law.

(viii)(g) There has been no consultation with any representative body/association of the R.O. dealers as was indicated by MOPNG in its letter dated 19.08.2014. The impugned amendments to MDG 2012 were made, unilaterally, without inviting views and/or objections of any of the R.O. dealers' associations/bodies.

(viii)(h) The reliance placed on the recommendations of the Apurva Chandra Committee to justify the amendments made in MDG 2012 concerning salary and wages and other benefits to employees and staff is erroneous as it overlooks the fact that the increase in margins is based on an expectation that the "throughput" of an R.O. would be 170 Kilolitres (KL) per month. It overlooks the fact that there are R.O.s that have throughputs of 50 KL, 100 KL and 120 KL. Thus, it is given that expenses have been factored in while increasing the dealers' margin (*albeit* based on the assumption that the throughput would be 17 KL per month) for justifying

which petroleum is transported.

the amendments made in MDG 2012 concerning a mandatory hike of payment in wages of employees of R.O. dealers, is flawed. Expenses incurred by R.O.s have both fixed and variable components. The fixed expenses component does not vary with a decrease in throughput. Besides this, the OMCs have cherry-picked the recommendations of the Apurva Chandra Committee which were generated on 14.01.2011 implementing only those recommendations which enure to their benefit. By way of example, reference was made to the following recommendations which were not heeded to.

(viii)(h)(i) Recommendations made *qua* state-level dealers commissions.

(viii)(h)(ii) Recommendations to make the facilities concerning water, toilet, and air at R.O.s to be made chargeable.

(viii)(h)(iii) Dealership commission to be restructured keeping in mind its location and circumstances i.e. as to whether it is an urban R.O. or R.O. located at a highway or a high-selling R.O.

(viii)(h)(iv) Lastly, the recommendation made that License Fee Recoveries (LFRs) for B site R.O.s (i.e. dealer-owned R.O.s) should be discontinued.

(viii)(i) The OMCs assertion in their counter-affidavit that R.O. dealers will be enriching themselves to the extent of nearly Rs. 5,500 crores by way of dealership commission if they do not pass on the benefits as envisaged under the amended MDG 2012 to their employees, staff and customers is, to say the least, a half-truth.

(viii)(i) The unilateral and arbitrary increase in LFR both for A site R.O.s (i.e. sites owned by OMCs) and B site R.O.s have not been addressed while making this assertion. Insofar as A site R.O.s are concerned, LFR *qua* petrol has been increased by Rs. 758.96 %, whereas *vis-à-vis* diesel there is

an increase in LFR by 754.97 %. Likewise, for B site R.O.s, LFR *qua* petrol has been enhanced by 832.31%, whereas for diesel the increase is 822.82 %. Therefore, while there is an increase in the commission paid to R.O. dealers, on one hand, the OMCs have taken away nearly Rs. 3,000 crores by resorting to an arbitrary increase in LFR.

(viii)(j) Since OMCs have taken the position that revision in dealers' margin is based on the recommendations made by the Apurv Chandra Committee, it was incumbent on the OMCs to disclose the basis on which reimbursable expenditure and consequently dealers' margin was enhanced since the justification provided for amending MDG 2012 are the recommendations made by the Apurv Chandra Committee.

(viii)(j)(i) In this behalf, reference was made to letters dated 23.08.2016 and 18.09.2017. Based on these communications, it was submitted that while the link between revision in dealers' margin and the recommendations of the Apurv Chandra Committee is sought to be established, what is not disclosed is the yardstick used for revising the dealers' margin, on the ground, that it comprises sensitive information which impacts commercial aspects.

(viii)(j)(ii) The contention was that the profit earned by any R.O. dealer can only be ascertained if expenses are adjusted against dealership margin and reimbursable expenditure.

Submissions on behalf of OMCs: -

13. On the other hand, on behalf of the OMCs, the submissions made by Mr. Tushar Mehta learned Solicitor General can be, broadly, paraphrased as follows.

(i) Based on the stand taken in the counter-affidavit filed on behalf of the OMCs, to which I have referred above, it was stressed that the MDGs were in vogue since 1981-1982. The challenge to the earlier MDGs, which included the power to frame and formulate the same, was repelled both by this Court and the Karnataka High Court in ***Delhi Petrol Dealer Association*** and ***M/S. IBP Company Ltd.*** respectively.

(ii) The challenge in the present petitions and intervention applications is, thus, limited to the amendments made on 02.10.2017 to MDG 2012. The OMCs are, contractually, empowered to issue MDGs under various provisions contained in dealership agreements. In particular, this power is vested in them under Clause 43 (*pari materia* provision being Clause 42 as noted in the aforementioned judgements). None of the amendments made to MDG 2012 are contrary to any statutory provisions or go beyond any contractual right vested in the OMCs under the dealership agreements executed between them and their respective dealers.

(iii) Insofar as particular clauses in amended MDG 2012 are concerned, the arguments broadly, advanced were as follows.

Clause 1.5 (x) - Observance of Statutory and Other Regulations: -

(A) Insofar as ***Clause 1.5(x)*** of the amended MDG 2012 is concerned, it was submitted that the R.O. dealers have been incentivised to pay minimum wages prevailing in the concerned State/Union Territories [UTs] or the amount that is notified by OMCs from time to time, whichever is higher. Besides this, the R.O. dealers are also required to extend other benefits to its employees as may be notified by OMCs or as per may be provided by various statutory enactments. This is enabled as the dealers' margin includes

an element of salary and wages payable by R.O.s dealers to their employees. This element is calculated based on a weighted average of minimum wages as notified by States and UTs. Since there was a wide disparity in minimum wages notified by different States/UTs, representations were made by R.O. dealers to consider minimum wages that were notified by Central Government while calculating dealers' margin.

(A)(I) Thus, keeping in mind the request of R.O. dealers and to motivate its employees as also to provide the highest standard of service to the customers of R.O. dealers, a decision was taken by the OMCs to revise the wage component of the dealers' margin in line with the minimum wages as applied to scheduled employments in the Central sphere (i.e. those which were applicable to construction workers). It was in this background that upon revision of the dealers' margin w.e.f. 01.08.2018, that R.O. dealers were asked to pay enhanced wages/salaries to their employees/staff bearing in mind the increased wage component included in the dealers' margin or as notified by the concerned State Government/UT whichever was higher.

(A)(II) Although the R.O. dealers have accepted the revision in their margin without demur, they have objected, unreasonably, to the enhancement of wages/salaries *qua* their employees/staff. Furthermore, in cases where the R.O. dealer is also the manager of the R.O., the manager's salary also accrues to the dealer.

Clause 5.1.2 Short delivery of products: -

(B) The argument advanced on behalf of the petitioners and intervenors tends to misinterpret the provisions of the LM Act. While the LM Act makes a provision for maximum permissible error in the sale and supply of petroleum products, there is no bar in prescribing a higher standard for sale

and supply of petroleum products by reducing the margin of error. In this context, even where the DU delivers an excess amount of petroleum product, say by 10 millilitres, it will be recalibrated to ensure that there is no loss to the R.O. dealer. Thus, prescribing higher standards would not lead to a violation of the LM Act. The fixing of higher standards *via* amended MDG 2012 ensures the minimization of loss to customers as well as the R.O. dealers.

(B)(I) Even where seals put in place by Weights and Measures Department is intact, the sales through concerned DU are suspended forthwith and recalibration and re-stamping are ordered before recommencement of sales where short delivery of products is noticed.

(B)(II) There is, however, no imposition of a penalty if short delivery is within the permissible limit stipulated by the Weights and Measures Department. Thus, if the variation is beyond +/-10 millilitre in two consecutive measure-checks, the officers of the OMCs have been instructed to arrange for recalibration and re-stamping of DUs. However, only if the variation is beyond -25 millilitre per 5 litre measure check, does a circumstance arise which would lead to the imposition of penalty.

Toilet Facilities: -

(C) The OMCs in revising the dealers' margin has factored in a cost of 1 personnel for maintaining a toilet facility. This cost component has been calculated keeping in mind a standard sale volume of 170 KL per month at a R.O. Therefore, as sales volume enhances, the compensation towards toilet facility will also increase. The R.O. dealers having accepted the revised margin are unfairly objecting to the maintenance of toilet facilities. The toilet facilities at R.O.s are, essentially, meant for the convenience of

employees and customers and, therefore, cannot be kept locked at all times. The OMCs have advised the R.O. dealers that persons who walk-in and need to use the toilet facilities should not be turned away. The reference to The Petroleum Rules, 2002 is misleading as toilets are not installations.

Automation of R.O.s: -

(D) The apprehension expressed by the R.O. dealers that the product delivered to them in terms of quantum is less and that as against 55,000 R.O.s only 9,000 R.O.s are automated is misplaced. Under Clause 1.2 of the MDG 2012, the procedure for decanting the petroleum products is given. It is mentioned that shortages in the receipt of the petroleum product should be recorded. The document recording the transaction should bear the signatures of both the R.O. dealer or her/his representative as well as the tank-lorry driver. In accordance with the procedure followed in the industry, credit for such shortages which is acknowledged by the tank-lorry crew is given to the R.O. dealers.

(D)(I) The automation of R.O.s is being carried out to keep a track of the activities at the R.O.s. Under this initiative, tank stocks and sales of each DU can be tracked online and analyzed. This helps in building customer confidence and preventing malpractices. The amended provision is only applicable to automated R.O.s and not to other R.Os.

Disbursement of wages and salary through e-payment mode: -

(E) In this context, it was submitted that this mode of payment is suggested to prevent the exploitation of employees and/or staff engaged by R.O. dealers. Disbursement of salaries *via* the electronic mode (“e-mode”) will help the fight against “black money” and “middlemen”. The amendment is in line with the policy of the Central Government, which is, to digitize the

economy and make transactions transparent.

PMSBY and PMJJB: -

(F) The contention advanced that the employees cannot be compulsorily asked to join these schemes should be rejected by the Court as the premium for both schemes is nominal. Insofar as PMSBY is concerned, it is an insurance scheme that requires payment of Rs. 12/- per employee per annum towards premium. Likewise, PMJJB is also an insurance scheme that involves payment of premium of Rs. 330/- per annum *qua* each employee.

(F)(I) The directions *qua* the aforementioned schemes have been issued *via* the amended MDG 2012 to ensure that the employees of R.O.s have an insurance cover. It is a welfare measure that requires to be taken forward. The cost component concerning this endeavour has also been factored in the dealers' margin. Accordingly, Rs. 16.36 per KL has been included in the dealers' margin towards staff welfare.

Imposition of penalties for major irregularities: -

(G) The grievance of the R.O. dealers is untenable. The OMCs under the dealership agreements are empowered to terminate the dealership in case of infraction of the terms and conditions stipulated therein. Since the termination of the dealership is an extreme step and could potentially involve a large number of dealers, MDG 2012 has been amended to create disincentives to stem the possibility of malpractices by the R.O. dealers.

(G)(I) The R.O. dealers cannot question the imposition of penalties as that would result in a person taking advantage of her/his wrong. The R.O. dealers should be put to strict proof as to how the guideline concerning this aspect is unreasonable. The MDGs have been in place for several decades only to attain highest business ethics and provide a first-class service to the

customers.

(G)(II) The MDG are amended/updated from time to time to meet the expectations of the customers, to ensure the integrity of the product in terms of quality and quantity, to guarantee to the customer that the service rendered will be of the highest quality and to enforce strict discipline among R.O. dealers so that malpractices in the running of the business are removed. Although OMCs own the facilities, R.O. dealers must maintain the equipment and provide petroleum products of correct quality and quantity.

(G)(III) Penalties are imposed only in proven cases of malpractices or violation of guidelines. The image of OMCs is suffering *inter alia* on account of issues such as chip manipulation of DUs, short delivery, and dirty toilets.

(G)(IV) The grievance concerning the reduction in the period provided to reply to the show cause notice from 15 days to 10 days is untenable as once violation is discovered the issue needs to be resolved at the earliest.

(H) Besides this, *via* the written submissions filed on behalf of the OMCs, facts have been furnished to demonstrate as to how the dealers' margin includes component of cost so that R.O. dealers are able to provide extra manpower, enhanced salaries and wages over and above the minimum wage and salaries provided by the State Governments. The position concerning various components of dealers' commission, which according to the OMCs, has kicked in from 01.08.2018, is encapsulated in the following table as provided in the written submissions.

Dealers' Margin Revision for 170 KLS RO (Rs. Per KL)			
Elements	After revision	Before revision	Increase %

	Rs./KL		Rs./KL			
	MS	HSD	MS	HSD	MS	HSD
Operating cost	2355.48	1744.79	1784.52	1321.87	32.0	32.0
Business Return	201.77	149.46	183.42	135.87	10.0	10.0
Stock Losses	501.76	95.74	501.93	101.36	0.0	-5.5
Return on Working Capital	72.86	49.06	72.88	49.06	0.0	0.0
Return on NFA	393.74	332.18	46	39	756.0	751.7
GST on LFR	103.42	86.18	12.04	10.08	759.0	755.0
Total	3629.03	2457.41	2600.79	1657.24	39.5	48.3

(I) This apart, it is also submitted that a policy decision taken by the OMCs cannot be struck down merely because a different policy may be deemed to be wiser, fairer or more logical and/or scientific. The Court ought not to exercise powers of judicial review to intervene in complex policy matters in the absence of *mala fides* or perversity. Aspects involving policies should be left to experts for formulation and evaluation. In this behalf, reference was made to the following judgments: *Sam Built Well Pvt. Ltd. vs. Deepak Builders & Ors.*, (2018) 2 SCC 176; and *Federation of Railway Officers Association & Ors. vs. Union of India & Ors.*, (2003) 4 SCC 289.

(J) Pre-decisional hearing cannot be a ground for quashing a policy decision. In this behalf, reference was made to the following judgements. *BALCO Employees' Union (Regd.) vs. Union of India & Ors.*, (2002) 2 SCC 333.

Analysis and Reasons: -

14. Having perused the record and heard counsel for the parties at great length over several days, what has emerged and, *qua* which there is no

dispute is that the MDGs have been framed and formulated by OMCs since 1981-1982. The MDGs have also been reviewed from time to time. They have either been replaced by new guidelines or have been amended to keep pace with the changed circumstances.

15. The 1995 MDG which was formulated by the OMCs was reviewed in 1998. This MDG was challenged almost simultaneously both in this court as well as in the Karnataka High court. This Court in the judgement rendered in ***Delhi Petrol Dealer Association*** repelled the challenge. The said judgement was rendered by a Single Judge of this Court. However, a Single Judge of Karnataka High Court in ***M/S. IBP Company Ltd.*** had sustained the challenge. The Division Bench of the Karnataka High Court, though, reversed the view of the Single Judge. The Division Bench, as noted hereinabove, disapproved, the view of its Single Judge inasmuch as he had allowed the writ petition in its entirety. The Division Bench, in ***IBP Company Ltd.*** case adopted a more nuanced approach in dealing with Clause 42 of the dealership agreement (which is *pari materia* to Clause 43 of the dealership which is being presently examined by me). The Division Bench held the R.O. dealers who had Clause 42 incorporated in their dealership agreements cannot complain that OMCs are not empowered to issue guidelines to regulate and to put in place safe practices for running the R.O.s.

16. However, insofar as those dealers were concerned who did not have Clause 42 incorporated in their dealership agreements, according to the Division Bench, they were not bound by the guidelines. The OMCs, though, as per the Division Bench, could incorporate the same at the time of renewal of the dealership agreements.

17. In the instant case what one is required to grapple with is the amendment to MDG 2012 brought about on 02.10.2017. This amendment was communicated by OMCs to their respective R.O. dealers on various dates as adverted to hereinabove.

18. Therefore, before I proceed further, it would be necessary to extract Clause 43 of one such dealership agreement which is found in all the dealership agreements being standard format contracts that are not subject to any negotiation.

43. The dealer undertakes faithfully and promptly to carry out, observe and perform all directions or rules give nor made from time to time by the corporation for the proper carrying on of the dealership of the corporation.

The dealer shall scrupulously observe and comply with all laws, rules, regulations and requisitions of the Central/State governments and of all authorities appointed by them or either of them including in particular the Chief Inspector of Explosives, Government of India, and/ or Municipal and/ or any other local authority with regard to the storage and sale of such petroleum products.

19. A careful perusal of Clause 43 would show that it has two components.

- i. First, the undertaking given by R.O. dealers to faithfully and promptly carry out, observe and perform all directions issued or obligations outlined in the rules framed by the OMCs for the proper functioning of the dealership.
- ii. Second, the R.O. dealer is obliged to scrupulously observe and comply with the laws of the land which includes statues, rules and regulations, and requisitions made by the Central/State Government (would logically include UTs as well) and all statutory authorities appointed by the aforementioned governments concerning the storage and sale of petroleum products. In this behalf, (i.e. storage and sale of

petroleum products), particular emphasis is laid on the regime put in place by the Chief Inspector of Explosives, Government of India, and/or Municipal and/or any other authority.

20. Therefore, the width and the amplitude of the amendments have to be gauged bearing in mind the source of power available to the OMCs. It is important to note that while submission was made that the power to frame MDGs flows from various clauses of dealership agreement, reference was made on behalf of the OMCs only to Clause 43.

21. Therefore, in this context, it would be necessary to advert to the amendments made to MDG 2012 as the R.O. dealers have approached the Court concerning their grievances *qua* the amendments and not *vis-a-vis* the provisions which obtained in the unamended MDG 2012. Thus, I intend to take up each amendment and deal with the same in the context of the relevant material placed on record and arguments advanced on behalf of the R.O. dealers and the OMCs. The purpose is to test the reasonableness and fairness of the provision and wherever necessary to read down the same to save the provision. [See: ***Indian Social Action Forum (INSAF) Vs Union of India***, 2020 SCC OnLine SC 310] The amendment made in each clause of MDG 2012 is set forth in bold and is duly underlined for the sake of convenience.

Clause 1.5: -

1.5 OBSERVANCE OF STATUTORY AND OTHER REGULATIONS:

i) All statutory rules and regulations in connection with storage and sale of petroleum products must be followed and implemented, such as maintaining stock/sales & density records, display of daily stock, price board etc.

ii) To observe rules and regulations of the Petroleum & Explosives Standards Organisation.

iii) Dealer will not buy, sell or exchange petroleum products with any other dealer or anybody other than principal Oil company.

iv) Dealer to maintain files wherein all Inspection Reports, correspondence received from Oil Company from time to time, Test Reports, copies of Invoices etc be available at the retail outlet for ready reference at all times.

v) The provisions contained in the Motor Spirit and High Speed Diesel (Prevention of Malpractices in Supply & Distribution) Order issued by the Government of India (or any amendment or revision thereof) and instructions issued by the Oil Company/State Govt authorities etc from time to time shall be strictly adhered to and all concerned records shall be maintained and produced to Inspecting officials on demand.

vi) It is mandatory on the part of the dealers to have calibrated Hydrometers/Thermometers and ASTM Density Conversion Table and any other testing kits/equipments as applicable. These testing kits/equipments shall be maintained in good working condition and made available to inspecting authorities on demand.

vii) RO dealer shall monitor the movement of the Tank Lorry which is carrying supplies for his RO through VTS using the link provided. In case the dealer observes any deviating, supply location should be informed immediately before accepting the tank, lorry. Further action should be taken after recording the observed deviations and instructions of concerned OMC officials.

viii) In case of automated ROs, dealers will be responsible to ensure that automation is properly working at his ROs as these ROs are designed for "No automation, No Operation" (NANO). In case of any malfunctioning, the dealer must report it to the authorized official of OMC immediately and take further action as per the direction of the concerned OMC official.

ix) It must be ensured that there is a power backup facility, i.e. generator or UPS to take care of power failure. This is important for proper functioning of automated ROs, electronic totaliser, etc.

x) Dealers shall make payment of minimum wages as notified by Oil Marketing Companies (OMCs) from time to time or statutory minimum wages as notified by the respective State Governments, whichever is higher, to the manpower employed at ROs. Other benefits as notified by OMCs/Statute shall also be paid to the manpower employed at the ROs.

22. As the heading of this Clause would show, the R.O. dealers are required to follow statutory rules and regulations not only with regard to

storage and sale of petroleum products but also *qua* matters concerning payment of wages to its employees. Subclause (x) of Clause 1.5 was introduced on 02.10.2017. Subclause (x) did not find mention, in any form, in the unamended Clause 1.5.

23. The argument advanced on behalf of the R.O. dealers is that the only obligation that they have in law is to pay minimum wages as notified by the concerned State Government/UT as may apply to them. It is contended that Subclause (x), for the first time, has made it mandatory to pay minimum wages as may be notified by the OMCs from time to time in case the minimum wage notified by the OMC is higher than that which is stipulated by the concerned State Government/UT. It has been submitted that the employees engaged by the R.O. dealers have no privity of contract with the OMCs. The OMCs, therefore, cannot burden the R.O. dealers with financial costs that are beyond their statutory obligations.

23.1. On the other hand, the OMCs have taken the stand that the revision in dealers' margin, which kicked in w.e.f 01.08.2017, has factored in the minimum wages of employees. It is contended that it is a welfare measure and ought not to be interdicted by the Court.

24. It is also not in dispute that the revision in dealers' margin was brought about based on the recommendations of the Apurv Chandra Committee which were rendered *via* report dated 14.01.2011.

24.1. Apart from the fact that there is a hiatus of nearly 6 years, the material which was made available to the Apurv Chandra Committee was neither placed before this Court nor are the recommendations made in the report, directly, the subject matter of the instant writ petitions.

25. The OMCs, however, have relied upon the Apurv Chandra Committee report to justify the amendments made in various clauses of the MDGs including Subclause (x) of Clause 1.5, to demonstrate, the tenability of the measures incorporated therein.

26. In my opinion, the only issue which arises for consideration concerning Subclause (x) of Clause 1.5 is: Could the OMCs stipulate by way of a guideline that R.O. dealers should pay their employees' salaries/wages which are over and above the minimum wages as notified by the concerned State Government/UT when the OMCs have no privity of contract with the employees of the R.O. dealers?

27. In my view, however good the measure may be, the OMCs cannot make it mandatory *via* a guideline that the R.O. dealers should pay salaries/wages higher than statutorily notified minimum wages. The argument that the increase in wages is factored in the dealers' margin does not necessarily, in law, place an obligation on the R.O. dealers to use it for enhancement of salary/wages of its employees. The R.O. dealers claim that the information when sought from one of the OMCs (i.e. BPCL) concerning granular details of the dealer's margin, the response, it received *via* a communication dated 23.08.2017 was as follows:

"We write with reference to your petition to the Hon'ble Prime Minister of India, uploaded on the Public Grievance Portal with registration no PMOPG/E/2017/0458734 regarding dealer's margin workings.

Our comments are as under:

Dealer's margin is confidential information and it is communicated to the dealers by respective Sales Officers of the Oil Companies. So the petitioner is requested to meet the sales officer to clarify his queries.

We are also advising the State Head Retail, Uttar Pradesh, to arrange to communicate and clarify the queries of the petitioner.

Thanking you

Yours faithfully

For Bharat Petroleum Corporation Ltd'

[emphasis is mine]

28. Therefore, as to whether the R.O. dealers are right or not in their contention that they do not have enough information as to what are the components of the dealers' margin and how much of it covers the costs incurred by them including costs incurred towards salaries and wages it is certainly not an aspect on which the OMCs can issue a direction under Clause 43 of the dealership agreement.

Clause 5.1.2 (SHORT DELIVERY OF PRODUCTS):-

a) With Weights & Measures Department Seals intact

Sales through the concerned dispensing unit to be suspended forthwith and recalibration and re-stamping to be done before recommencement of sales.

(Even if short/excess delivery is found within permissible limit, recalibration and re-stamping to be done before recommencement of sales).

b) With Weights & Measures department Seals tampered - W&M department seals are put on Metering unit and Totaliser unit with the held of a sealing wire and a lead seal which is embossed by W&M inspector. The seal would be deemed tampered in the following cases also:

- 1. Seal itself is missing*
- 2. Different seal has been put other than embossed by W&M inspector*
- 3. Sealing wire is broken and not in one piece.*

In addition other situations which can be lead to manipulation of delivery/quantity/totaliser may also be treated as tampering.

In such cases, views and opinion of W&M authorities would be obtained and the opinion rendered by the W&M department should be final.

Based on the opinion of the W&M authorities, Penal action to be taken even if the delivery found to be correct or excess.

In case of this irregularity, sales from the concerned dispensing unit to be suspended, DU sealed. Samples to be drawn of all the products and sent to lab for testing.

29. The R.O. dealers are aggrieved by the fact that even where short/excess delivery of petroleum products is found to be within

permissible limits sales cannot recommence unless recalibration and re-stamping is done.

29.1. This is a provision which has been incorporated in Subclause (a) of Clause 5.1.2. This Subclause deals with a situation where seals of weights and measurement department are found to be intact.

29.2. The OMCs have defended the insertion of this provision on the ground that they want to provide the best service to their respective customers. According to the OMCs, this can be achieved only if the R.O. dealers were to strive for 100% accuracy.

30. The R.O. dealers, as noticed above, have placed on record, the response given by the Minister concerned with MOPNG, in Parliament, to demonstrate that 100% accuracy is not achievable even if OMCs were to install imported DUs. It is also argued on behalf of the R.O. dealers that as long as short or excess delivery is within the permissible limit outlined in the LM Act, the recommencement of sales should not await recalibration as the hiatus between the requests made for recalibration and when the request is executed is, substantial, leading to loss of revenue.

31. On the other hand, the OMCs contend that the weights and measures inspectors take more than 3-5 days to recalibrate the concerned nozzle of Multi-Product Dispensing units (in short “MPDs”). It is further stated on behalf of the OMCs that although there are no timelines specified in the statute, the recalibration which has to be carried out in the presence of weights and measures inspectors, Original Equipment Manufacturer (OEM) representative and a representative of the OMC; an exercise which does not exceed 3-5 days. It is contended that since MPDs have been introduced by OMCs to dispense petrol and diesel, the probability of all nozzles requiring

recalibration is almost non-existent and, therefore, the purported loss due to delay in recalibration is more speculative than real.

32. What has come through upon hearing the counsel for the parties is that since the DUs are electromechanical devices which are exposed to environmental elements such as dust and are subject to wear and tear, they often require recalibration. Although, it is concluded on behalf of the R.O. dealers that the periodicity of calibration is fixed at a maximum interval of 1 year, there is, in my opinion, no bar in inspecting the DUs maintained by the R.O. dealers at frequent intervals. If the inspections reveal that there is excess or short delivery of the petroleum product, I see no harm in having them recalibrated and re-stamped even if the error is within the permissible limit as there is nothing unreasonable in the OMCs hoping to achieve near 100 % accuracy.

33. The factum of short or excess delivery of petroleum products may have nothing to do with human intervention, and as correctly pointed out on behalf of the OMCs, the defect could have possibly arisen on account of natural wear and tear or environmental elements such as dust and grime. This would be a valid, *albeit*, a rebuttable presumption in such cases where weights and measures department seals are found intact. The grievance of the R.O. dealers that sale of petroleum products is put to a complete halt till recalibration and re-stamping are carried out, appears to have a minuscule probability given the fact that R.O. dealers are operating MPDs. The probability that all nozzles in an MPD require recalibration and re-stamping because of short or excess delivery of petroleum products appears to be minimal.

34. That being said, there could be a situation where all or most nozzles malfunction or the MPD as a whole malfunctions in a manner that there is short or excess delivery of petroleum product, *albeit*, within the permissible limit, degrading the sale capacity of a particular R.O. dealer and the resultant difficulty faced by the customers.

34.1. The OMCs need to make a provision for even such situations if its avowed goal is to ensure consumer satisfaction. The OMCs would, thus, do well to provide for a defined timeline by which recalibration and re-stamping are carried out, failing which, they should permit R.O. dealers to recommence sales if the error in the delivery of petroleum products is within the statutorily prescribed permissible limits.

34.2. A period of 12 hours from the time defect is noticed should be ideal. If such a provision is made, to my mind, it would meet the test of reasonableness.

Clause 5.1.14 (b): -

5.14(b) NON PROVISION OF CLEAN TOILET FACILITY

Dealers should check daily and ensure the following:-

- i) Toilets are cleaned daily.*
- ii) Proper lighting is available.*
- iii) Flush (whenever provided) is working property.*
- iv) Water is available.*
- v) Working latch is available on the toilet door.*
- vi) Signage is available.*

vii) Toilet door is not kept locked

The above protocol is to be prominently displayed near the toilet.

Maintenance sheet is to be maintained and displayed.

If OMC officials observe during the inspection that (a) Toilet is found to be not clean or (b) Water is not available or (c) Latch on the toilet door is not available/nor working or (d) Toilet door found to be locked at any outlet, a photograph of the toilet shall be taken and letter shall be issued instantly listing the penalty as per MDG.

35. This provision in substantial part existed even in the unamended MDG 2012. The only part which has been additionally incorporated is “*toilet door is not kept locked*” and, the other part, which provides for imposition of penalty in case, the toilet is not found clean and/or water is not available; latch on the toilet door is neither available nor working and/or the toilet door is found to be locked.

36. The R.O. dealers are aggrieved by the aforementioned insertions in Clause 5.1.14(b) as it is suggestive of the fact that persons other than employees or customers of the R.O.s can also use the R.O. toilet to ease herself/himself and failure to provide access to the same would involve imposition of penalty. In this behalf, reference is made to the communication dated 14.07.2016 addressed by one of the OMCs (i.e. BPCL) wherein, in paragraph 4, it is, *inter alia*, stated that although R.O.s are required to make available clean toilets for the use of its customers this “*courtesy*” should be extended to others as well i.e. those who are not the customers of the R.O.

37. On behalf of the R.O. dealers it is argued that such a provision will expose the R.O.s to a security hazard. It is contended permitting use of the R.O. toilet by persons other than who are its employees or customers is fraught with risks. It is submitted that since the Petroleum Rules, 2002 and the Explosives Rules, 2008⁵, prohibit use of mobile phones and other

⁵ Part 4

inflammable articles by employees/staff and customers at the R.O. site, if access is given to a R.O. toilet to persons who have otherwise no business with the R.O. it can endanger the safety of the R.O.

37.1. The OMCs have taken the position that although the R.O. toilets are, essentially, meant for the use by the employees/staff and/or the customers of the R.O., the Clause requires access being granted to walk-in persons only as a measure of courtesy. It is argued that the Petroleum Rules, 2002 and the Explosives Rules, 2008 apply to installations and not to toilets *per se*.

38. In my view, the concerns qua safety expressed on behalf of R.O.s and the object of the amendment which is to extend the convenience even to those who would like to use the R.O. toilet where such a need arises and, thus, prevent befoulment of public places can be met if the R.O. manager is given the discretion to decide as to whether or not the access should be given to the convenience.

38.1. In other words, the R.O. manager should be able to deny access to the R.O. toilet if she/he finds that a person is a dodgy character or is carrying inflammable articles which she/he does not wish to surrender before making use of the toilet facility. The other obligations which are placed on an R.O. dealer such as ensuring that the toilet is cleaned daily, ensuring proper lighting, the flush wherever provided is working properly, water is available, and the toilet door has a working latch were there, as noted above, in the unamended MDG 2012 as well. At this juncture, the R.O. dealers

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(23) No electronic appliances or instruments like mobile phones, pagers shall be allowed in or near the premises where explosives are manufactured, handled, stored and used.

cannot find fault with these aspects of Clause 5.1.14(b) as long as *en masse* use of the toilet facility is not granted.

39. However, the other grievance qua this clause, which is, if there is an infraction of any of the obligations provided therein including the one which requires that the “*toilet door will not be kept locked*” would lead to an imposition of penalty as provided in Clause 8.3(viii) of the amended MDG 2012 is, an issue, which I will discuss under the head penalties.

Clause 5.1.16

5.1.16 AUTOMATED RETAIL OUTLETS.

(a) *Dealer Operating the automated RO in Manual mode without authorization.*

Where automation has been completed at a Retail outlet and if any dispensing unit/MPD is found to be operating in manual mode without proper authorization from the competent authority, it will be treated under this irregularity.

(b) ***In case ATG is switched off/non-operational without authorization from the competent authority.***

(c) ***Any deliberate action on the part of Dealership or their staff or any other agency to make any component of automation system (excluding MPDs/Dispensing Units/ATGs) dysfunctional, partly or fully, without authorization from competent authority.***

(Authorization through e-mail or signed letter from Company official will only be admissible.)

40. The grievance of the R.O. dealers qua this clause is that while ATGs are devices that are both provided and regulated by OMCs, the R.O. dealers who have no part to play in the same are likely to be hauled up for discrepancies found.

40.1. It is emphasised on behalf of the R.O. dealers ATGs are used for analysing quantity and quality of the product. The ATGs are password operated and, therefore, the same cannot be switched off without the say-so

of the concerned OMC. According to the R.O. dealers, out of the 55,000 R.O.s, there are only 9,000 R.O.s which are automated. It is, thus, grouse of the R.O. dealers that more often than not the petroleum products supplied *via* tank-lorries are short and, therefore, they cannot be held responsible for the shortage.

40.2. The OMCs, on the other hand, contend that shortage, if any, noticed at the time of delivery of the petroleum products needs to be documented and that the said document should bear the signatures of both the R.O. dealers or its representative and the tank-lorry driver. It is contended that as per the industry procedure, credit for the shortage is given to the concerned R.O. dealer.

40.3. According to me, this is an issue which is relatable more to the logistics, than anything else and, therefore, by itself does not appear to be unreasonable. As long as the industry procedure and practice is followed by the concerned OMC in making requisite adjustment for short delivery of the petroleum product, the R.O. dealers concerns would substantially be taken care of.

40.4. These are issues, which, in case, the OMCs fail to make requisite adjustments would, perhaps, give rise to a dispute between the R.O. dealer and the concerned OMC that can be resolved through the dispute resolution mechanism provided under the dealership agreement.

Clause 5.1.18: -

5.1.18 PAYMENT OF WAGES

Dealers shall make payment of minimum wages as notified by Oil Marketing Companies (OMCs) from time to time or statutory minimum wages as notified by the respective State Governments, whichever is higher, to the manpower employed at ROs. Other benefits viz. PF, ESIC, Bonus, Earned/Annual Leave and Gratuity as notified by OMCs/Statute shall also be

paid.

Dealers to ensure that:

a) Salaries & wages are paid through e-Payment.

b) PF, ESIC, Bonus, Annual Leave and Gratuity are paid as notified by OMCs/Statute.

c) All Employees are covered under:

i) Pradhan Mantri Suraksha Bima Yojana (PMSBY).

ii) Pradhan Mantri Jeevan Jyoti Bima Yojana (PMJJBY).

Dealers are required to maintain records and the records should be made available at the retail outlet for inspection, at all times.

41. The first part of this clause as is apparent on a bare reading is identical to Subclause (x) of Clause 1.5. The mandatory obligation placed on the R.O. dealer to pay wages higher than the statutory minimum wages notified by the concerned State Government/UT is flawed for the reasons already articulated hereinabove in paragraphs 27 and 28 above.

41.1. The other part of Clause 5.1.18 which requires payment of other benefits such as PF, contribution to ESIC, Bonus, Earned Leave/Annual Leave and Gratuity, as notified by OMCs/Statute would be problematic only in cases where under the relevant statute there is no obligation on the R.O. dealer to extend these benefits. As noticed in the context of Subclause (c) of Clause 1.5, the employees/staff of R.O. dealers have no privity of contract with the OMCs. The OMCs cannot insist that the benefits of the kind adverted to above should be extended by R.O. dealers to its employees if the statute does not cast any obligation in that behalf on the concerned R.O. dealer.

41.2. As long as the guidelines require the R.O. dealers to follow the law of the land, one can find no fault with the same, but, if *via* guidelines, the OMCs require the R.O. dealers to compulsorily extend benefits at the pain of imposition of penalty, the same cannot be sustained however good be the motive behind it. The reason why I say so is that the clause crosses the periphery drawn *qua* the OMCs' powers to issue directions and frame rules under Clause 43 of the dealership agreement/license.

41.3. Likewise, the obligation cast on the R.O. dealers that all its employees/staff be compulsorily covered under PMSBY and PMJJBY is also a case of overreach. Here again, while the object of the provision is altruistic, the fact that it is made compulsory makes it problematic in law. The fact that the contribution per annum *qua* each employee under the PMSBY scheme is Rs. 12 and similarly under PMJJBY the contribution per employee is only Rs. 330 per annum, in my opinion, would make no difference as both schemes operate based on consent being accorded by the employee/staff for enrolment.⁶

41.4. The OMCs, to my mind, could achieve the same objective, if they were to call for details of the employees engaged by each R.O. dealer, and

⁶ **Pradhan Mantri Suraksha Bima Yojana (PMSBY)**

The Scheme is available to people in the age group 18 to 70 years with a bank account who give their *consent to join / enable* auto-debit on or before 31st May for the coverage period 1st June to 31st May on an annual renewal basis. Aadhar would be the primary KYC for the bank account. The risk coverage under the scheme is Rs. 2 lakh for accidental death and full disability and Rs. 1 lakh for partial disability. The premium of Rs. 12 per annum is to be deducted from the account holder's bank account through 'auto-debit' facility in one installment. The scheme is being offered by Public Sector General Insurance Companies or any other General Insurance Company who are willing to offer the product on similar terms with necessary approvals and tie up with banks for this purpose.

(emphasis is mine)

thereafter, handover the consent forms to enable them to join the aforementioned schemes. In case, the employees/staff of the concerned R.O. accord their consent, the OMCs can directly make the annual contribution on their behalf to enable them to join the aforementioned scheme. Such a move would achieve the same object, which is, to provide insurance cover to the employees/staff of the R.O. dealers.

41.5. Likewise, the provision in Clause 5.1.18 with regard to payment of salaries and wages through electronic mode is concerned, in my view, there cannot, once again, be any compulsion in that behalf. If the idea is to exclude cash transactions completely, then, the country would have to have an ecosystem where there is 100% penetration of internet facilities.

41.6. There are, concededly, R.O.'s which are located in remote parts of the country where the internet is not available or if available does not function at the optimum capacity. Besides this, there is enough and more data available in the public realm which shows that even in the most advanced countries a vast percentage of working-class persons like to receive their salaries/wages in cash.

41.7. The argument advanced on behalf of the OMCs that if salaries/wages are paid *via* electronic mode it would prevent exploitation of employees by R.O. dealers or weed out black money is based on an erroneous premise that the R.O. dealers would have no avenues of having the money re-routed to them. If the R.O. dealers are bent on exploiting their employees/staff they can always remit the money to the employees, in the first instance, *via* electronic mode and then ask for the refund of the same in cash. This

[See Pages 1570-1571 of the paper book in W.P. (C) 10334/2017]

provision, if tweaked, can also fall in the realm of reasonableness, provided it is based on a consensual approach.

41.8. Wherever the employee/staff agrees to receive her/his remuneration *via* electronic mode, the R.O. dealer can remit salary/wages accordingly. However, where an employee wishes to receive her/his salary in cash, the R.O. dealer should be free to make the payment in cash.

41.9. The OMCs can, like in the case of aforementioned insurance schemes, ask R.O. dealers to seek the consent of their employees/staff as to the mode and manner in which they are agreeable to receive their remuneration.

42. Before giving an option to the employees/staff of an R.O. to receive remuneration *via* electronic mode, the OMCs will have to bear in mind the location of the R.O., the distance between the R.O., the employees/staff's residence and the bank, and the penetration of the internet in the region. Any exercise which is undertaken that does not advert to the aforesaid aspects, in my opinion, would lead to the provision being dubbed as unreasonable as it could impact the interests of the employees/staff. This provision in the MDG operates on an erroneous principle that one-size-fits-all.

Clause 8.3: -

8.3 Major Irregularities:

The following irregularities are classified as major irregularities:

- i. Refusal by the dealer to allow drawl of samples/carry out inspections. (5.1.8)*
- ii. Non availability of reference density at the time of inspection. (5.1.9)*
- iii. Selling of normal MS/HSD as branded fuels. (5.1.10)*
- iv. Stock variation beyond permissible limits but sample passing quality tests (5.1.11)*

v. *Non maintenance of records since last inspection. (5.1.12)*

vi. *Overcharging of MS/HSD/CNG/Auto LPG (5.1.13)*

vii. *Non provision of clear toilet facility. [5.1.14 (b)].*

viii. Automated Retail outlets: 5.1.16 (a), (b), (c)

ix. Non-payment of Salary, Wages and other benefits (as per clause 5.1.18) to the manpower employed at the ROs.

x. Short delivery of products with W&M seals intact: 5.1.2(a)

Action: Except in case of (iii), (vii), (viii), (ix) & (x) above:

First instance: Suspension of sales and supplies for 15 days.

Second instance: Suspension of sales and supplies for 30 days.

Third instance: Termination of the dealership.

Action in case of (iii) above would be as under:-

First instance: Penalty of recovery of differential price since last inspection.

Second instance: Termination of the dealership.

Action in case of (vii) above would be as under:-

First instance: Penalty of Rs.15,000 (Rupees Fifteen Thousand).

Second instance: Penalty of Rs.25,000 (Rupees Twenty Five Thousand).

Third & subsequent instances: (a) Rs.35,000 or 45% of the monthly dealer margin (based on average of last 6 months), whichever is higher; and (b) Suspension of Sales and supplies for 7 days or rectification of the defect in toilet, whichever is later.

Action in case of (viii) above would be as under:-

First instance: Penalty of Rs.1,00,000 (Rupees one lakh only)

Second instance: Penalty of Rs.2,00,000 (Rupees two lakhs only) and suspension of sales and supplies for 7 days.

Third instance: Termination of the dealership.

Action in case of (ix) above would be as under:-

First instance: Penalty of 20% of the monthly dealer margin (based on average of last 3 months).

Second instance: Penalty of 30% of the monthly dealer margin (based on average of last 3 months).

Third & subsequent instances: Penalty of 40% of the monthly dealer margin (based on average of last 3 months) & suspension of sales and supplies for 15 days.

Action in case of (x) above would be as under:

First instance: Rs.25,000 (Rupees twenty five thousand only) per nozzle found delivering short beyond permissible limit as specified in Legal Metrology Act/Rule & suspension of Sales and supplies for 15 days.

Third instance (within one year of 1st instance): Termination of the dealership.

42.1. This is the most disputative and if I may say so the core issue which has led to the eruption of the instant dispute between the R.O. dealers and the OMCs. Under this clause, the OMCs have alluded to various provisions which if violated are to be construed as major irregularities and, would thus, lead to imposition of monetary penalties.

42.2. With the 02.10.2017 amendment kicking in, the following provisions have been included in Clause 8.3.

- a) Subclause (vii): Automated R.O.
- b) Subclause (ix): non-payment of salary as per 5.1.18 to the manpower employed at the R.O.s
- c) Subclause (x): Short delivery of product with weights and measurements seals, intact Clause 5.1.2(a)

43. Besides this, *qua* a pre-existing Subclause i.e. Clause (vii) which concerns the obligation to provide clean toilet facility [i.e. Clause 5.1.14(b)], a provision for the imposition of the penalty has also been incorporated.

44. As would be evident from the foregoing discussion, the R.O. dealers have advanced arguments not only concerning to the scope and ambit of the impugned clauses but also made independent submissions concerning the imposition of the penalty where they are found to have failed in discharging the obligations placed upon them by the aforementioned clauses.

45. Insofar as the imposition of penalty is concerned, the R.O. dealers argue that there is no power vested in the OMCs to levy monetary penalties. The stated source of power i.e. Clause 43 of the dealership agreement, on plain reading, would show that it confers no such power on the OMCs.

45.1. It is contended that even if Clause 43 is given the widest amplitude it cannot include the power to levy monetary penalties. The only power that is vested in the OMC by the dealership agreements is to terminate the same upon establishing a commission of breach by the concerned R.O. dealer of the contractual obligations cast upon her/him.

45.2. Under the Contract Act penalties cannot be levied. The provision for levying of penalties is violative of Section 74 of the Contract Act.

45.3. At the highest, the concerned OMC could recover damages, and that too, if it is able to establish a commission of a breach by the R.O. dealer and the fact that the breach caused an injury which requires to be compensated monetarily to put the OMC in the same position as if no breach had been committed. The compensation, if any, awarded for damages/injury would have to be reasonable since it would have to commensurate with the

damage/injury caused in consonance with the provisions of Section 73 of the Contract Act.

46. The OMCs, on the other hand, say that monetary penalties have been provided to avoid exposing R.O. dealers to an extreme option available to the OMCs which involves termination of the dealership. The OMCs are attempting to ensure that malpractices in the conduct of business are excluded and the customers' interests are secured. It is submitted that the penalties have been provided to ensure that these goals are met and, therefore, cannot be found fault with. The penalties are in addition to and not in substitution to the consequences provided in various statutes *qua* offences committed by R.O. dealers under them. Thus, the provision made in the LM Act for levy of fine and imprisonment is independent of the penalties provided under Clause 8.3 of the amended MDG 2012.

47. In my opinion, the argument advanced on behalf of the OMCs is completely untenable. There is, no power, contractual or otherwise vested in the OMCs to levy monetary penalties. The dealership agreements fall in the realm of contracts even though these are not negotiated agreements.

48. Therefore, the R.O. dealers are right in their contention that Section 74 of the Contract Act prohibits the imposition of penalties. In case infraction/breach of any of the provisions incorporated in the dealership agreement causes injury to the concerned OMC, it would be open to the said OMC to claim reasonable compensation if it is able to establish that the infraction/breach caused injury and, hence, requires to be recompensed [See: *Maula Bux v. Union of India*, (1969) 2 SCC 554; and *Kailash Nath Associates v. DDA*, (2015) 2 SCC (Civ) 502].

49. The argument advanced on behalf of the OMCs that they do not wish to take the extreme step of terminating the dealership agreement for every infraction/breach does not, in my view, provide justification in law, for the imposition of penalties by taking recourse to MDGs framed in the guise of exercising power under Clause 43 of the dealership agreement.

50. Therefore, all those parts of the Clause 8.3 which provide for the imposition of a penalty for an infraction committed by the R.O. dealers *qua* Clause 5.1.14(b) [non-provision of clean toilet facility]; Clause 5.1.6 (a), (b), (c) [automated R.O.s]; Clause 5.1.18 [non-payment of salaries, wages, and other benefits to the manpower employed at the R.O.s]; and Clause 5.1.2 (a) [short delivery of products with weights and measures seals intact] as included in Subclause (vii), (viii), (ix) and (x) of Clause 8.3 are bad in law and are hence, quashed.

51. Before I conclude, I must also deal with the argument advanced on behalf of the OMCs that Clause 43 of the dealership agreement vests the power in the OMCs to formulate and amend the MDGs to remedy malpractices and breaches. This is a proposition that cannot be found fault with as long as it does not cross the jurisdictional periphery put in place by the said clause. Therefore, it is necessary to look at each such amendment as was done in this case, to ascertain as to whether it is a case of overreach and therefore unreasonable.

52. At this juncture, it may be necessary to emphasize the fact that the R.O. dealers do not question the power conferred on the OMCs to frame and formulate the MDG *per se*. Their grievance, as discussed above, is related to the amendments which were brought about by the OMCs on 02.10.2017 which traverse beyond the power to frame guidelines concerning the proper

functioning of the dealership and/or require the dealers to follow the law of the land and requisitions issued by State authorities that are rooted in a Statute and/or rules or regulations framed thereunder. Therefore, the judgement of the Single Judge of this Court in *Delhi Petrol Dealer Association*, in that sense, does not come in the way of the R.O. dealers.

53. Furthermore, one cannot also quibble, with the proposition that courts ordinarily do not carry out a judicial review of complex policy decisions as long as they are not arbitrary or unfair and, hence, fall foul of Article 14 of the Constitution. OMCs are well within their rights to frame guidelines to ensure that the business of sale of petroleum products is carried out by R.O. dealers ethically and in consonance with the best practices so that the interests of the customers are fortified. However, this power, as discussed above, cannot be used to mulct R.O. dealers with obligations beyond what is provided by the legislature in various statutes. Likewise, the OMCs have no power to impose monetary penalties to secure adherence to its guidelines. If this is permitted, it would tantamount to conferring on the OMCs the power to unilaterally vary the contracts (i.e. the dealership agreements) to the prejudice of the R.O. dealers. This is not permissible in law. The fact that the dealership agreements are standard format contracts can only make matters worse from the point of view of the dealers if such measures are permitted.

54. The other argument that the writ petition would not lie as the dispute lies within the realm of a contract, in my opinion, is completely untenable. The reason why I say so is that apart from anything else the OMCs themselves have taken the stand before me that the amendments to MDG 2012 were brought about in the larger public interest. If that be the case,

there is certainly, even according to the OMCs, a public law element injected in the subsisting dispute which arises between the parties before me. OMCs are, in one sense, instrumentalities of the State and, therefore, amenable to writ jurisdiction.

55. Doubt, if any, in this behalf, was put to rest by the Supreme Court, with its decision rendered in *Kumari Shrilekha Vidhyarthi and Others vs. State of Uttar Pradesh and Others*, (1991) 1 SCC 212. For the sake of convenience, the relevant observations are extracted hereafter.

“22. There is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that 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. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.”

23. Thus, in a case like the present, if it is shown that the impugned State action is arbitrary and, therefore, violative of Article 14 of the Constitution, there can be no impediment in striking down the impugned act irrespective of the question whether an additional right, contractual or statutory, if any, is also available to the aggrieved persons.

24. The State cannot be attributed the split personality of Dr Jekyll and Mr Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation

of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity.

25. In *Wade: Administrative Law* (6th edn.) after indicating that 'the powers of public authorities are essentially different from those of private persons', it has been succinctly stated at pp. 400-01 as under:

"... The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.

There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed. Nor is this principle an oddity of British or American law: it is equally prominent in French law. Nor is it a special restriction which fetters only local authorities: it applies no less to ministers of the Crown. Nor is it confined to the sphere of administration: it operates wherever discretion is given for some public purpose, for example where a judge has a discretion to order jury trial. It is only where powers are given for the personal benefit of the person empowered that the discretion is absolute. Plainly this can have no application in public law.

For the same reasons there should in principle be no such thing as unreviewable administrative discretion, which should be just as much a contradiction in terms as unfettered discretion. The question which has to be asked is what is the scope of judicial review, and in a few special cases the scope for the review of discretionary decisions may be minimal. It remains axiomatic that all discretion is capable of abuse, and that legal limits to every power are to be found somewhere."

(emphasis supplied)

The view, we are taking, is, therefore, in consonance with the current thought

in this field. We have no doubt that the scope of judicial review may vary with reference to the type of matter involved, but the fact that the action is reviewable, irrespective of the sphere in which it is exercised, cannot be doubted.

26. A useful treatment of the subject is to be found in an article "Judicial Review and Contractual Powers of Public Authorities" [(1990) 106 LQR 277-92] . The conclusion drawn in the article on the basis of recent English decisions is that "public law principles designed to protect the citizens should apply because of the public nature of the body, and they may have some role in protecting the public interest". The trend now is towards judicial review of contractual powers and the other activities of the government. Reference is made also to the recent decision of the Court of Appeal in *Jones v. Swansea City Council* [(1990) 1 WLR 54 : (1989) 3 All ER 162] where the court's clear inclination to the view that contractual powers should generally be reviewable is indicated, even though the Court of Appeal faltered at the last step and refrained from saying so. **It is significant to note that emphasis now is on reviewability of every State action because it stems not from the nature of function, but from the public nature of the body exercising that function; and all powers possessed by a public authority, howsoever conferred, are possessed 'solely in order that it may use them for the public good'. The only exception limiting the same is to be found in specific cases where such exclusion may be desirable for strong reasons of public policy. This, however, does not justify exclusion of reviewability in the contractual field involving the State since it is no longer a mere private activity to be excluded from public view or scrutiny.**

27. Unlike a private party whose acts uninformed by reason and influenced by personal predilections in contractual matters may result in adverse consequences to it alone without affecting the public interest, any such act of the State or a public body even in this field would adversely affect the public interest. Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. This is equally true of all actions even in the field of contract. Thus, every holder of a public office is a trustee whose highest duty is to the people of the country and, therefore, every act of the holder of a public office, irrespective of the label classifying that act, is in discharge of public duty meant ultimately for public good. With the diversification of State activity in a Welfare State requiring the State to discharge its wide ranging functions even through its several instrumentalities, which requires entering into contracts also, it would be unreal and not pragmatic, apart from being unjustified to exclude contractual matters from the sphere of State actions required to be non-arbitrary and justified on the touchstone of Article 14.

28. Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Article 14 and permit judicial review, we have no hesitation in saying that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters. We, therefore, find it difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14.

Conclusion: -

56. Accordingly, the following directions are issued:

(i) Subclause (x) of Clause 1.5 is read down to the extent that the R.O. dealers will not compulsorily be required to pay wages/salaries to its employees which are higher than statutorily notified minimum wages stipulated by the concerned State Government/UT.

(i)(a) Therefore, as a logical corollary, communication dated 19.09.2017 which is assailed in W.P.(C)No.11246/2017 cannot be sustained. It is, consequently, set aside.

(ii) Clause 5.1.14(b) is read down to the extent that access to the R.O. toilet facility to persons other than employees/staff and customers would be at the discretion of the R.O. dealer and/or its Manager. The R.O. dealer/Manager will employ her/his discretion keeping in mind the security and safety of the R.O. The R.O. dealer/Manager will have the right to exclude dodgy characters and those who insist on carrying inflammable article(s) to the toilet facility. Travellers who do not have access to other public conveniences in close proximity will not be denied access unreasonably as long as they adhere to the safety protocol.

(iii) The obligation contained in the first part of Clause 5.1.18 placed on the R.O. dealer to pay wages higher than those statutorily notified as minimum wages by the concerned State Government/UT will not apply to

R.O. dealers. Likewise, R.O. dealers will not be called upon to pay other benefits like PF, contribution to ESIC, Bonus, Earned Leave/Annual Leave and Gratuity unless they are required to extend these benefits under the relevant statutes.

(iv) Likewise, Subclause (a) and (b) of Clause 5.1.18 are read down in the manner indicated in paragraphs 41 and 42 above.

(v) Clause 8.3 to the extent it levies monetary penalties for infraction of Clause 5.1.14(b) [non-provision of clean toilet facility]; Clause 5.1.6 (a), (b), (c) [automated R.O.s]; Clause 5.1.18 [non-payment of salaries, wages and other benefits to the manpower employed at the R.O.s]; and Clause 5.1.2 (a) [short delivery of products with weights and measures seals intact] is struck down.

(vi) Any show cause notice(s) and/or adjudication order(s) issued in the interregnum will be revisited by the concerned OMC in the light of the foregoing discussion and directions.

57. Thus, the captioned writ petitions are disposed of in the aforesaid terms. Resultantly, pending interlocutory application(s) shall stand closed.

MARCH 18, 2020 **RAJIV SHAKDHER, J.**