

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Jay Sengupta

WPA 22976 of 2018
Maharaj Murmu
Versus
Bharat Petroleum Corporation Ltd. & Ors.

For the petitioner : Mr. Debabrata Saha Roy
Mr. Pingal Bhattacharyya
Mr. Subhankar Das
.....Advocates

For the respondent nos. 1 to 9 : Mr. Sanjib Kr. Mal
Mr. Bimalendu Das
Ms. Shomrita Das
Mr. Shomrik Das
.....Advocates

Heard lastly on : 20.02.2023

Judgment on : 07.07.2023

Jay Sengupta, J.:

1. This is an application under Article 226 of the Constitution of India praying for a direction upon the respondents herein to rescind, cancel and/or withdraw the purported inspection/enquiry allegedly conducted in the petitioner's retail outlet by the SGS India Private Limited, Oil Gas & Chemical Services on 16.09.2018 and to rescind, cancel and/or withdraw

the consequent show cause notice, the order of termination to the petitioner's retail outlet issued by the Head (Retail) East, Bharat Petroleum Limited and the subsequent order of the Director (HR), BPCL being the nominated Appellate Authority confirming such termination of dealership.

2. Mr. Saha Roy, learned counsel appearing on behalf of the petitioner, submitted as follows. In response to an advertisement for appointment of retail outlet dealer (reserved for ST) at Manguria, District: Purulia, the writ petitioner being an ST candidate, submitted his application. In continuation to the letter of intent (LOI) dated 22.09.2007, the BPCL authority issued an offer letter in favour of the petitioner in the name and style of M/S. Mahabir Automobiles. In January, 2008 the retail outlet of the petitioner started functioning. From the very beginning, the petitioner was provided with normal diesel and petrol. Altogether there were three underground tanks, one for petrol and two tanks (Tank-1 and Tank-2) for normal diesel. Subsequently, in a discussion held with the then Sales Manager, BPCL in consultation with the then Territory Manager, BPCL, Rajbandh, it was decided that instead of normal diesel, high speed diesel (HSD) would be supplied to the petitioner's retail outlet. Accordingly, instruction was given by the BPCL authority to keep underground tank no. 1 (diesel) empty and dry. On 08.09.2008 the petitioner kept the underground tank no. 1 (diesel) empty and dry. For the purpose of selling HSD, the BPCL authority decided to install Dispensing Unit (DU) for HSD replacing normal diesel DU. On 11.09.2008 South Point Engineer & Contractor installed reconditioned DU in the petitioner's retail outlet and the same was connected with the tank

no. 1 (diesel) which was kept dry from 08.09.2008. On 12.09.2008 the maintenance representative of the BPCL authorities prepared stamping maintenance report after inspection about installation of new DU, saying that everything was alright. On 12.09.2008, the Legal Metrology Department issued a certificate in respect of the reconditioned dispensing unit for HSD recording the tank reading 002887.3 and also issued a certificate for the dispensing unit in respect of petrol. On 16.09.2008 the SGS India Pvt. Ltd. inspected petitioner's retail outlet and found that the new reconditioned dispensing unit (nozzle) meant for HSD (replaced on 11.09.2008) was adulterated which turned as pink with meter reading recording 002894.8. Out of total three underground tanks, only newly replaced dispensing unit of HSD in place of normal diesel, connected to tank no. 1 (diesel/HSD) was purportedly found adulterated. Only 7.5 ltrs. HSD had been flushed. On 17.09.2008 the Executive Sales (Retail), Durgapur BPCL intimated that the HSD samples of Tank – 1 (replaced on 11.09.2008) failed in the marker test and also suspended the petitioner's retail outlet. On 18.09.2008 since the Tank – 1 was kept dry on and from 08.09.2008 and since sufficient flushing was also not done in the reconditioned dispensing unit and the said dispensing unit was dipped in kerosene for long time the initial delivery from the said reconditioned dispensing unit was laden with kerosene. Accordingly, the petitioner by a representation requested for re-examination of tank product instead of product from dispensing unit. On 20.09.2008 the South Point Engineers & Contractor also intimated the BPCL Authority for sufficient flushing of the reconditioned dispensing unit. On 18.11.2008 the

BPCL authority issued the show-cause notice and intimated the petitioner that the depot retention sample as well as tank lorry retail outlet retention sample passed the marker test whereas retail outlet HSD Tank – 1 sample taken from the nozzle of the dispensing unit failed the marker test and also instructed to submit reply. On 24.11.2008 the petitioner submitted exhaustive reply denying all the allegations. On 12.03.2009 a personal hearing was taken by the six officials' Committee of the BPCL Authority. On 12.01.2016, after lapse of near about seven years from the date of first hearing, a different authority of the BPCL again instructed the petitioner to appear before him for personal hearing on 20.01.2016. In this regard, it was pertinent to mention herein that first personal hearing was taken on 12.03.2009 by a team of six officials of the BPCL Authority. However, second hearing was taken by only one person i.e., the Head (Retail) East, BPCL, who was not present during the first hearing took place on 12.03.2009. On 10.07.2017, after lapse of nine years from the date of issuance of show-cause notice, eight years from the first hearing and one and half years from the second hearing, termination order was issued by the single individual in the guise of collective decision saying 'we', but signed by an individual. On 31.07.2017 the petitioner preferred statutory appeal before the Appellate Authority. On 22.09.2017, in response of RTI application by the petitioner, a response came intimating that the appeal must be disposed of within 90 days. It was further intimated that marker test had been discontinued from 01.01.2009. On 19.07.2018 this Court disposed of a writ petition directing the Appellate Authority of the BPCL to dispose of the appeal. On 20.08.2018

a hearing took place. On 07.09.2018, after one year and two months from the date of filing statutory appeal, the Appellate Authority confirmed the termination order, without dealing with the grounds taken in the appeal, particularly the grounds of delay to conclude the proceedings and violation of Rules of Natural Justice and of shockingly disproportionate punishment. Due to no fault on the part of the petitioner, the petitioner was penalized. It was settled law that the person who had taken the hearing should take the decision not by any other authority or person. However, in the instant case though the hearing was taken by a six member officials' Committee on 12.03.2009, a different authority relying on the said hearing terminated petitioner's retail outlet. This clearly demonstrated procedural infirmity that violated the petitioner's right protected under Article 14 and 19(I) (g) of the Constitution of India. The inordinate delay in concluding proceedings vitiated the same. The order of termination and confirmation of the same by the Appellate Authority were non-speaking, unreasoned and also cryptic ones and on that sole ground both the order were not sustainable in the eye of law. Reliance was placed on (i) AIR 2001 (SC) 3173, Awani Roy versus State of Bihar; (ii) (2010) 6 SCC 384, Joint Commissioner of Income Tax Veruss Saheli Leasing; (iii) AIR 2009 (Cal) 24, Indu Bhusan Jana Versus Union of India; (iv) (2006) 5 SCC 88, M.V. Bijlani Versus Union of India; (v) AIR 1959 (SC) 308 31, Gullapalli Nageswara Rao & Ors. Versus Andhra Pradesh State Road Transport Corporation & Anr. The judgments relied on that issue on behalf of the respondents were not applicable in this case.

3. Mr. Mal, learned counsel representing the respondent nos. 1 to 9, submitted as follows. The reconditioned Dispensing Unit (DU) was installed and after due calibration on 12th September, 2008 a certificate was issued by the respondent authorities at the RO of the writ petitioner. Reconditioned DUs were installed at the RO. However, the underground tank was not completely dry as stated by the writ petitioner. The tank dip reading at the time of SGS inspection was 20.3 cm which was equivalent to around 1100 litres, which could be verified from the SGS report and accordingly, a suspension letter dated 17th September, 2008 was issued to the writ petitioner. Keeping the Tank Lorry retention sample (in short "TT") had nothing to do with the tank having a low stock (in the instant case it was approximately 1100 litres). As per the guidelines issued by the oil companies, the dealers were expected to retain the Tank Lorry (TT) sample of particular receipt till the same automatically disposed of on receiving fresh replenishment. Samples of petroleum products stored in underground tanks at RO had to be collected through the nozzle only as there was no provision to collect samples directly from the underground tank. DU might not have been used for selling but during stamping, 60 litres of HSD was used for verification of measures of the Dispensing Unit (DU) Sr. No 05GB0804V. The HSD could only have been used for verification of this DU as only one HSD Dispensing Unit was calibrated on that day. This quantity was sufficient to remove SKO which would have been present in the metering unit at the time of installation of the DU. If at all any traces were present, it would be insufficient to give 'pink' result as the SGS marker test could detect only if

adulteration of HSD was carried out by at least 1% of the SKO. Since, the HSD stock in Tank No. 1 was at least 1100 litres, to adulterate the same, at least 11 litres of SKO would have been required to contaminate Tank No. 1. The conditioned metering unit had a capacity of less than 1 litre (around 0.87 litre). Thus, it can be said that the HSD in the Tank No. 1 was already contaminated and this was what was dispensed at the time of testing by SGS. Petroleum products were given to the dealer (SC/ST) as a form of financial assistance by the Corporation. The money recovery process was supposed to start after 12 months. However, since the sales and supplies of the Retail Outlets were suspended even prior to the completion of 12 months it did not give the petitioner the right to reject the claim of the respondent no. 1 for payment of monetary loan advanced in the form of petroleum products. Since operation of the retail outlet had been suspended on ground of adulteration of HSD and thereafter, dealership of the petitioner was terminated, it did not mean that the petitioner was not liable to return outstanding loan amount. All dealerships were governed by the laid down policies and guidelines. Since, the petitioner's RO was found to be involved in adulteration, action as per the laid down guidelines had been taken. Termination order of the petitioner's selling license for RO was issued after following due procedure. At the time when the RO of the petitioner was charged for adulteration on the basis of SGS inspection, there was no policy/notification which prevented the MDG action on ROs involved in SKO adulteration. Under the memo of DPSL agreement dated 24th January, 2008 executed in between the writ petitioner and the respondent no. 1, it would

appear at clause 10(g) that the dealer should not adulterate petroleum products and Clause 10(o) provided that BPCL, its officers, agencies and servants would have power to investigate the facilities of the Petroleum Pump. And Clause 13(a) (vii) and (viii) provided for the termination of the dealership. The Marketing Discipline Guidelines, 2005 provided at Clause 2.2.2.3 that agencies authorised by the Oil Companies would draw samples. Amendment to these Guidelines was issued on 15 January, 2007 by the Ministry of Petroleum & Natural Gas, Government of India which provided for agencies authorised to draw samples and Modalities of Market Test. The respondent no. 1 had intimated to all the Retail Outlets that all Oil Marketing Companies had appointed SGS Pvt. Ltd. to conduct necessary Market Test for dispensing units for MS & HSD stocked dispensed from the outlets. The subject Retail Outlet was inspected on 16.09.2008 when Market Test result showed positive and sales of the Retail Outlet were suspended from 17th September, 2008. Accordingly, the writ petitioner was asked to be present on 26.09.2008 for laboratory test. At the laboratory test the sample of Retail Outlet HSD tank no. 1 failed in presence of the writ petitioner. Consequently, a show cause notice was issued on 18th November 2008 by the respondent no. 1 authorised representative. The writ petitioner was personally present at the time of personal hearing consequent to the show cause notice. The writ petitioner had referred to a judgment passed by a Division Bench of this Hon'ble Court. However, the said judgment did not take note of the judgment of another Hon'ble Division Bench reported in 2012(3) CHN HC 37 (Ramesh Kejriwal Versus Union of India) wherein the

appointment, conduct of test and result of the test conducted by the agency of the oil company had been upheld. In the said judgment the Hon'ble Division Bench had also relied on other judgments on the same issue passed by the Hon'ble Supreme Court as also by this Hon'ble Court. The Hon'ble Allahabad High Court (Division Bench) by a judgment dated 14th May, 2010 passed in Writ Petition no. 16930 of 2009 (Kishore Auto Sales & Ors. versus Bharat Petroleum Corporation Limited & Ors.) held regarding the authority of the respondent no. 1 to authorize SGS Pvt. Ltd. to conduct marker test. In Writ Appeal No. 391 of 2008 (Hindustan Petroleum Corporation Ltd. Versus D. Nagarajan & Co.) the Hon'ble Madras High Court held that the SGS Pvt. Ltd. had authority to carry out marker test. In a judgment reported in 2009(2) CHN 689 a Learned Single Judge of this Hon'ble Court dealt with all questions raised and held in favour of authority of SGS Pvt. Ltd. to draw sample. In another judgment reported at AIR 2010 SC 463 it had been categorically held by the Hon'ble Apex Court that Courts should not ordinarily interfere with the policy decision of a State. In another judgment reported at (2003) 6 SCC 503 it had been held by the Hon'ble Apex Court that the company was having legal authority in terms of the dealership agreement to take action for any breach of any condition in the agreement. In the instant case the writ petitioner was responsible for adulteration and action was taken after verification at the company's approved laboratory at Budge Budge. In judgments reported in (1996) 5 SCC 54, (1997) 4 SCC 713, and (2008) 12 SCC 481 it had been held by the Hon'ble Apex Court that the writ Courts being governed by the principles of

equity should ensure that reliefs might be granted only in favour of litigants coming with clean hands. The writ petitioner having adulterated HSD was not entitled to get any relief. It had been held by the Hon'ble Supreme Court in a judgment reported at (2012) 11 565 that a proceeding was liable to be quashed on the grounds that the same had been initiated at a belated stage or could not be concluded in a reasonable period. Gravity of alleged misconduct was a relevant factor to be taken into consideration while quashing a proceeding. In the instant case the writ petitioner never challenged the subject proceeding and only after decision was pronounced terminating the dealership of the petitioner, the petitioners had challenged the final finding on an alleged ground of inordinate delay, which was not tenable in the facts of that case, especially considering the gravity of offence committed and the penalty attracted for the same. Similar finding had been made by the Hon'ble Supreme Court in Civil Appeal No. 3935 of 2013 (Anant R. Kulkarni vs. YP Education Society & Ors.). Civil Appeal No. 8263 of 2012 arising out of SLP (C) No. 1667 of 2011 (Chairman, LIC of India & Ors. Versus A. Masilamani), the Hon'ble Supreme Court held that the magnitude of misconduct alleged had to be examined before quashing or setting aside a departmental enquiry. In the instant case, the departmental enquiry was over and both the Enquiring Authority and the Appellate Authority terminated the dealership of the writ petitioner for the grounds stated in the said order.

4. I heard learned counsels appearing on behalf of the parties and perused the writ petition, the affidavits and the written notes of submissions.

5. Besides the factual aspect, the petitioner has raised certain points regarding alleged violation of principles of natural justice. The first hearing was taken by a six members' official committee, subsequently the petitioner was heard by an individual official who finally passed the order of termination of retail outlet. Secondly, the order of termination and confirmation of the same by the Appellate Authority were non-speaking and unreasoned.

6. On the first issue, it appears that the petitioner was afforded sufficient opportunity of hearing during the disciplinary proceeding. Before that at the laboratory test the sample of retail outlet HSD tank no. 1 failed in the presence of the writ petitioner. After the show cause was issued, the petitioner was heard in details by the six members committee. Thereafter, a second notice was issued in continuation of the first proceeding and the petitioner was heard again. He filed written submissions. After that a decision would be taken on the termination of his retail outlet. Therefore, there was no dearth of hearing given to the petitioner in this regard. Even in ordinary law there are several such procedures or arrangements where although evidence is recorded by or partly by a Judge, further evidence is recorded by a succeeding Judge who delivers the judgment. Here, the authority finally deciding on the issue of termination of the petitioner's retail outlet not only heard the petitioner fully, but also considered materials

collected earlier. On this score, it cannot be said that there was a violation of principles of natural justice.

7. Therefore, the issue that the petitioner's appeal was not being heard came up for consideration before this Court in an earlier writ petition. A direction was passed.

8. The order of termination and the appellate order affirming it do not appear to be unreasoned or cryptic at all.

9. The other aspect of delay raised by the petitioner in this application is also of not much relevance. No prejudice seems to have been caused to the retailer in this regard. Besides, last hearing took place about one and half years ago.

10. Now, on the question of the authority of the SGS Private Limited to carry out the marker test is concerned, reliance has rightly been placed by the Oil Company on diverse decisions. Therefore, the authority of that entity to carry out the marker test is not in doubt.

11. It is further germane to mention that there is nothing on record to show that the marker test was discontinued because of any inherent defect in the test. It may be because the unscrupulous adulterators started using finer techniques to bypass the prevalent test.

12. Now, on merits as to whether the failure in the marker test was a result of contamination during test is concerned, it has been clearly explained by the Oil Company that sufficient flushing was done in the reconditioned dispensing unit. If at all any trace of SKO was present, it would be insufficient to give "pink result" as the SGS marker test could

detect only if adulteration of HSD was carried out by at least 1% of the SKO. As the HSD stock in tank no. 1 was at least 1100 litres, to adulterate the same at least 11 litres of SKO would have been required to contaminate tank no. 1. But, the conditioned metering unit had a capacity of less than 1 litre (around .87 litre). Therefore, the only inference that could be drawn is that the HSD in the tank no. 1 was already contaminated.

13. It is further pertinent to mention that the samples of petroleum product stored in underground tanks had to be collected through the nozzle only as there was no provision to collect samples directly from the underground tank.

14. As had been stated earlier but in a different context, the sample of retail outlet HSD tank no. 1 failed at the laboratory test in presence of the writ petitioner.

15. In view of the above discussions, I do not find any merit in the petitioner's application.

16. Therefore, the writ petition is dismissed.

17. However, there shall be no order as to cost.

18. Urgent photostat certified copies of this judgment may be delivered to the learned Advocates for the parties, if applied for, upon compliance of all formalities.

(Jay Sengupta, J.)