IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Jay Sengupta

WPA 25853 of 2022
Tarun Kumar Halder
Versus
Bharat Petroleum Corporation Limited & Ors.

For the petitioner	:	Mr. Amlan Jyoti Sengupta Mr. Manabendra Thakur Mr. Soumen Mandal .....Advocates
For the Respondent nos. 1, 2	:	Mr. S.K. Mal Mr. B. Das Mr. S. Das .....Advocates
Heard lastly on	:	16.02.2023
Judgment on	:	16.05.2023

Jay Sengupta, J.:

1. The writ petitioner has challenged the order dated 28.10.2022 passed by the Appellate Committee which was constituted by the respondent authority in terms of the solemn order passed by a Division Bench of this Court in MAT No. 1188 of 2013. A review application was also purportedly filed by the writ petitioner/appellant before the Appellate Committee, but the same was not disposed of.

2. Learned counsel appearing on behalf of the petition submitted as follows. On 02.11.1998 an agreement was executed by and between Bharat Petroleum Co. Ltd. (BPCL for short) and Sankar Filling Centre (an unregistered firm) represented by its partners for running a petrol pump at 73D, Narkeldanga, Main Road, Kolkata – 700 054. There was no allegation about adulteration of petrol or diesel of the said petrol pump till 03.12.2007. Since before independence, the petitioner's father was running a petrol pump under the then Burma Shell at Jessore, now in Bangladesh. After independence, the petitioner's father, since deceased, was running petrol pump at the present site. As such, there is a reputation in their business. On 03.12.2007 a person of the SGS India Pvt. Ltd. claiming to be an authorized agent of the BPCL collected and tested by way of 'Marker' test and told that HSD was found adulterated, without giving sample of the drawn sample of HSD from the petrol pump to the petitioner. The sales and supply to the petitioner's pump was suspended. The petitioner had suspicion from the very beginning. Subsequently, market test was allegedly conducted in the laboratory of the BPCL. Thereafter, the BPCL issued show cause notice to the petitioner's firm. A reply was given by the petitioner. On 07.12.2007 the petitioner made a representation for clinical test, because there is a provision for clinical test in the Marketing Discipline Guidelines of the Oil Company, 2005. Market Test was introduced in the year 2007 and the same was withdrawn on 01.01.2009 by all the oil companies. The petitioner preferred the first writ petition before this Court challenging the authority of the SGS. The said writ petition was dismissed on contest. The petitioner preferred an appeal challenging the said dismissal order before this Court. The said appeal was dismissed. On 05.12.2009 the BPCL took physical possession of the petrol pump without raising any objection. However, a complaint case bearing No. C/24950 of 2009 under Section 156(3) of Cr. P.C. was initiated by the petitioner before the Chief Metropolitan Magistrate, Kolkata and against one Kanyalal Pandit of the SGS Ltd. The C.M.M was inclined to direct the concerned police to investigate into the matter and to file a report. The police during the course of presence of investigation drew the sample from the HSD tank of petitioner's petrol pump of oil company and sample was sent to the National Laboratory for clinical test. Clinical test was done and the police after collecting report, submitted the same before the Court. There it was reported that the sample met the requirements of IS:1460 – 2005 specification for Automotive Diesel Fuel in Bharat Stage – II Grade only. The HSD was kept in an iron tank, which was kept underground and by natural course, the quality of the HSD would be decayed. As such, clinical report said that "Specification for Automotive Diesel Fuel in Bharat Stage-II Grade only" which was as per Marketing Discipline Guide Line for RO/SKO dealership of public sector oil marketing companies. On 5th December 2009 by a letter the BPCL unilaterally terminated the agreement dated 24th November, 1998. On 2nd May, 2011 the petitioner made a representation before the BPCL for reconsideration of their decision. Subsequently, the petitioner called at the office of the BPCL and enquired about the fact of his representation and came to know that the BPCL was going to create third party interest. The petitioner preferred a writ petition being WP No. 8155 (W) of 2011 challenging the said termination letter and also the advertisement dated July 26th 2010. This Court was pleased to pass an ad-interim order with a direction on the BPCL not to create any third party interest. The BPCL preferred an appeal and this Court was pleased to dispose of the appeal with a direction to the BPCL to run the petrol pump without creating any third party interest till decision of the trial Court. The writ petition being WP No. 8155 (W) of 2011 was disposed of by an order to the BPCL to consider the petitioner's representation dated May 2, 2011 in accordance with law and to pass a reasoned order. On January 3, 2012 representation was heard and subsequently, a written note of argument was filed by the petitioner on 09.01.2012. After expiry of time as directed by the Hon'ble Court, the BPCL issued a purported Memo dated 10th February, 2012. Being aggrieved, the petitioner preferred a writ petition bearing WP No. 4329 (W) of 2012 this Court and the said writ petition came up for hearing before this Court on 05.07.2013 and this Court was pleased to dispose of the said writ petition with a direction to the BPCL to constitute an Appellate Committee consisting of three members. Being aggrieved, the BPCL preferred an appeal bearing MAT 1188 of 2013 along with CAN 8 of 2013. On 07.04.2015, a Division Bench was pleased to direct the BPCL/Appellant to prepare adequate number paper books within a period of 10 days and the BPCL was further directed to maintain status quo as directed by the Trial Court. The said appeal finally came up for hearing before this Court on 16.06.2022 and after hearing submissions their Lordships were pleased to dispose of these said appeal with a direction to the BPCL to constitute a Committee, consisting of three members and the respondent/writ petitioner was directed to file appeal before the Appellate Committee and the Appellate Committee would dispose of the said appeal after giving reasonable opportunity of hearing to the petitioner. The writ petitioner accordingly filed the appeal before the Appellate Committee within time as directed. The Appellate Committee passed the impugned order on 28th October, 2022, whereby it rejected the appeal on the ground that the petitioner/appellant could not formulate any new ground and holding that the "valve of the HSD tank was in loose condition". The petitioner filed a review application before the Appellate Committee on 08.11.2022 with one of the prayers not to create third party interest till the disposal of the said review application. But, the said review application was not disposed of and the BPCL intentionally and arbitrarily issued LOI to a third party during pendency of the review petition. The petitioner filed this writ petition challenging the impugned order dated 28.10.2022 passed by the Appellate Committee. The respondent Oil Company filed their opposition avoiding to deal all the grounds made by the writ petitioner in his writ petition only banking on the report of "Market Test", but not relying the 'Clinical Test'. The concerned Police Station during investigation took sample of HSD from the HSD tank in presence of representative of the BPCL. The said sample was sent to National Lab for conducting clinical test. After clinical test the experts opined that "in respect of test carried out the sample meets the requirements of IS: 1460-2009 Specification for Automotive Diesel Fuel in Bharat Stage II Grade only" which was as per Marketing Discipline Guidelines for RO/SKO dealership of public sector oil marketing companies. When the sales and supply of petroleum products to the petitioners petrol pump was suspended i.e. on 03.12.2007, valves of all the tanks were sealed. When the respondent company found that the seal of the valve was in alleged loose condition above, they did not lodge any complaint before the police authority. The petitioner had been discriminated by the respondent authority in not allowing to resume sales and supply of petroleum products to the petitioner's petrol pump, when in the similar circumstances other petrol pumps situated in other States had been given permission. The writ petitioner was relying an unreported judgment dated 19.11.2009 passed by this Court in WP No. 9100 (W) of 2009 (Ashutosh Chakraborty and Anr. Versus Union of India & Ors.). The High Court can intervene under Article 226 of the State or its instrumentality acted in an arbitrary manner even in a matter of contract, the High Court could intervene with any order passed by State or its instrumentality by way of judicial review. The petitioner relied on a decision reported in (2004) 3 SCC 572 (ABL International Ltd. & Anr. Versus Export Credit Guarantee Corporation of India Ltd. & Ors.).

3. Learned counsel representing the respondent nos. 1 and 2 submitted as follows. M/s Sankar Filling Centre was initially an old retail outlet (RO) commissioned by respondent no. 1 in 1980. By way of Dispensing Pump and Selling License (DPSL) Agreement dated 2nd November 1998, the dealership was operating through a partnership firm. The said DPSL agreement was initially valid for a period of 15 years from 26.06.1998. Public Sector Oil Marketing Companies (OMC's) had consistently taken steps to check and control adulteration of petroleum products. One such step was the introduction of the three tier sampling system which, inter alia, included collecting samples and testing the same in order to establish whether any malpractice had taken place at the supply location or during transportation or at the retail outlet. The elaborate procedure and guidelines for the sample collection and testing were contained in the Marketing Discipline Guidelines (MDG) as amended and updated from time to time. The Ministry of Petroleum and Natural Gas (MOPNG) had decided to adopt the marker test with the objective of preventing diversion of PDS kerosene for adulteration of Motor Spirit (MS) and High Speed Diesel (HSD). The marker, being a chemical substance, was mixed/blended in trace amount at the depot/installation level in PDS kerosene and thereafter if the marker test was carried out, pink band would appear showing that the sample was positive for marker. Contract for supply of marker was awarded by OMC's to the SGS India Pvt. Ltd. The SGS was duly authorised by the OMC's to carry out tests and collect samples at various points including retail outlets. On 3rd December 2007, a marker test of all the products was carried out at the RO by officers of the SGS India Pvt. Ltd. wherein the HSD sample was found failing (turned pink). Further sample of HSD was obtained in presence of dealer's representative and sealed by SGS officer. As per usual procedure the TT retention sample was also handed over to the SGS officer who submitted the same along with RO sample and field reports to the BPCL sales officer. As per Guidelines, the sales and supplies of all products of the dealership were suspended immediately. Thereafter tests of both the TT retention sample as well as the RO sample were conducted at the BPCL Budge Budge laboratory on 06.12.2007 in the presence of the petitioner and the SGS representative after prior intimation. On testing the RO HSD sample for marker at the laboratory, it was observed that the sample indicated "P"(Pink) colour and hence, failed the analytical result. Subsequently, the tank lorry HSD sample was tested for marker and it was observed that the sample indicated "N"(Not Pink) hence passing the analytical result. Thus a SCN (Show Cause Notice) dated 07.12.2007 was issued by BPCL to the partners seeking their explanation for failure of the HSD sample. In due compliance with the Court directions, a letter was issued by the respondent no. 2 to the writ petitioner on 14th July 2022 informing that the appellate body had been constituted and to accordingly file his appeal. Thereafter, the writ petitioner filed his appeal dated 10.08.2022 and opportunity for personal hearing before the appellate body was granted on 29th August 2022. Consequently, the hearing took place on 29th August 2022 wherein the writ petitioner along with his advocate made submissions and subsequently filed written submissions on 06.09.2022. Consequent to such hearing which took place on 29th August 2022, a speaking order dated 28.10.2022 was passed by the Appellate Committee rejecting the appeal filed by the writ petitioner. This was communicated to him by letter of the respondent no. 2 dated 03.11.2022. The writ petition was not maintainable in view of the fact that the dealership was allotted in favour of a partnership firm having three partners. However, the instant writ petition was filed by only one of the partners allegedly on behalf of the firm. Hence, this writ petition was not maintainable in law in view of the specific provisions of the Partnership Act, 1932. The learned Single Judge while disposing of W.P. No. 4329 of 2012 by order dated 5th July 2013 had recorded that the dispute involved highly technical issues and required proper forum to adjudicate the dispute. It was categorically submitted that after passing of the order dated 28th October 2022 in compliance of the Court directions, there was no scope of filing the instant writ petition re-agitating the issues. That consequent to the rejection of the appeal by the Appellate Committee vide speaking order dated 28th October 2022 the answering respondent had issued Letter of Intent (LOI) to Mr. Sandip Kumar Saha for running the dealership in respect of the particular RO. The steps that were taken by the SGS Private Ltd. were in accordance with the existing Marketing Discipline Guidelines (MDG) as also in consonance of the January 2007 amendment carried out in the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2005 incorporating the marker test for control of adulteration in petroleum products being sold to the public. All action taken by the BPCL and the SGS was as per the policy and guidelines and had been upheld by this Hon'ble Court in the previous rounds of litigation. It was settled law in Indian Oil Corporation Ltd. Versus Amritsar Gas Service & Ors. (1991) 1 SCC 533 that once a determinable agreement had been terminated by a party, the only relief available to the aggrieved party was to claim damages. The contract could not be specifically enforced as per Section 14 of the Specific Relief Act. The respondent nos. 1 and 2 have also relied on the following judgments in support of their case - (i) W.P. No. 16930 of 2009 (Kishore Auto Sales Versus BPCL) (Unreported judgment of Hon'ble Allahabad High Court, Division Bench); (ii) 2009 (2) CHN 689; (iii) F.M.A No. 609 of 2009; (iv) 2012 (3) CHN 37; and (v) WP No. 9100(W) of 2009.

4. I heard the learned counsels and perused the writ petition, the affidavits and the written notes of submission.

5. First, on the question of maintainability of this writ petition vis-a-vis the respondent's contention about only one of the partners in the firm approaching this Court for a relief, it is held that an individual partner of a partnership firm can fairly vent his grievances before a Court of law in respect of infringement of his rights even if the same pertains to his engagement with the partnership firm, especially when it involves violation of the petitioner's fundamental rights.

6. In an ideal situation, the time tested reputation of an entity is quite indubitably relevant in public discourse. However, it is unfortunate that in the present times all these had to make way for the accumulation of money power and influence as a surer "marker" of acceptability. Of course, the flip side of an argument about reputation is that even a single exception of indiscretion can tarnish the hard work of years.

7. Be that as it may, it seems more pertinent to deal more directly with the impugned order in question. For doing so it is indeed necessary to refer to the scope that was chalked out by the Division Bench of this Court for passing such order. The relevant portion of the order dated 14th June, 2002 passed in MAT 1188 of 2013 is quoted as under –

"The learned Single Judge did not set aside the adjudication dated February 10, 2012. It was however felt that in view of such conflicting report, an expert body might be formed for the purpose of deciding whether proper procedure was adopted at the time of taking sample for conducting test and the manner, method and procedure of testing applied in ascertaining the quality of the diesel supplied to the writ petitioner conform to establish norms. The writ petitioner, having lost his business as a result of a finding of adulteration, may expect an impartial report with an opportunity to raise all points with regard to the report filed by the National Test House.

In view thereof, we do not find any reason to interfere with the order dated July 5, 2013 passed by the learned Single Judge. The time to constitute the appellate body is extended by eight weeks from date and the time to file the appeal before the appellate body by the writ petitioner is extended by thirty days from the date of constitution of the appellate body. The appellate body is directed to dispose of the appeal to be filed by the writ petitioner after giving reasonable opportunity of hearing to the parties within a period of two months from the date of first hearing.

With the aforesaid observations, the appeal is disposed of."

8. In the connected criminal proceeding, the police did collect a sample and had it tested. Here, there was a specific direction by a Division Bench of this Court to go to the root of the matter and deal with the apparent discrepancy between the result found by the police and the result obtained by the private agent being the SGS or at the laboratory of the oil company on a sample forwarded by the said SGS. Yet, the impugned order failed to attach adequate importance to the issue and deal with the matter by way of a plain denial. The reasoning was far from adequate.

9. It is true that the authority of the SGS has been vindicated in several decisions. But, no one can vouch for the infallibility by the personnel engaged by the SGS in respect of collection and testing of samples. When an apparent discrepancy was detected, it was incumbent upon the concerned authority to have properly dealt with the same. In a way, the Appellate Committee constituted for such purpose only paid lip service to the directions passed by this Court.

10. What is more perturbing is the fact that even before the petitioner could approach this Court for an appropriate relief, a third party interest was created in respect of the petrol pump in question. This is clearly against the spirit of the consistent directions passed by this Court from time to time. Earlier, a clear direction had been passed not to create third party interest pending adjudication. This was continued for quite sometime. Merely because the respondents could technically find a gap during which such interim direction was not there, it was not proper for them to have rather hastily created a third party interest. This Court deprecates such action.

11. It is no less surprising that the Appellate Committee found the absence of presentation of any new facts or evidence as one of the grounds to dismiss the petitioner's appeal. At least, this Court, while setting the course to be charted by the Committee in deciding the appeal, did not ask to look for new evidence or grounds.

12. In view of the above discussions, the impugned order dated 28.10.2022 passed by the Appellate Committee of the respondent authorities cannot be sustained.

13. Accordingly, the impugned order is set aside and the matter is remanded back to the Appellate Committee for fresh consideration. The committee shall decide the matter afresh within two months from the date of communication of this order and within a fortnight thereafter, communicate the result to the petitioner.

14. With these observations, the writ petition is disposed of.

15. 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.)

S.M