IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH, JALPAIGURI
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

PRESENT:

The Hon'ble Justice Aniruddha Roy

W.P.A. 347 of 2023

Smt. Nabanita Malakar
Vs.
Indian Oil Corporation Limited and Others

For the petitioner:	**Mr. Debashis Kundu, Sr. Adv.,** **Mr. Milindo Paul, Adv.,** **Mr. Nabankur Paul, Adv.,** **Ms. Sutapa Sen Paul, Adv.,** **Ms. Bedashruti Bose, Adv.,** **Mr. Subham Das, Adv.,** **Mr. Bodhisatya Ghosh, Adv.**
For the respondent IOSL:	**Mr. Bikramaditya Ghosh, Adv.,** **Ms. Supriya Singh, Adv.**
For the State:	**Mr. Hirak Barman, Adv.,** **Mr. Pritom Das, Adv.**
Heard on:	**12.09.2024**
Judgment on:	**27.11.2024**

ANIRUDDHA ROY, J.:

Facts:

1. The petitioner claims to be the proprietor of one **Ms. Khitish Service Center** and carries on a petrol pump under the dealership of **Indian Oil**

Corporation Limited, the respondent no.1 herein (for short, the Oil Company), since November 29, 2021 at District Cooch Behar.

2. Initially the retail outlet has commenced its business in the year 2007 under PNP (W) category and one Smt. Runu Sarkar (for short, erstwhile proprietor) was the proprietor.

3. Runu was not in a position to run the retail outlet efficiently and she entered into a negotiation with the petitioner sometime in 2020. As one of the terms of such negotiation both the erstwhile proprietor and the petitioner submitted a joint application before the Oil Company for change of proprietorship in respect of the said retail outlet in favour of the petitioner. After the preliminary approval being granted by the oil company, ultimately the petitioner was appointed as dealer of the said retail outlet under a dealership agreement dated **November 29, 2021**,. **Annexure P-4** at **page 42** to the writ petition (wrongly mentioned as **Annexure P-1** in the writ petition). The petitioner has commenced business as a dealer of the retail outlet on and from November 29, 2021.

4. There are two Dispensing Units (for short, DU) as particularly mentioned in paragraph 5 of the writ petition. This DU's are required to be calibrated and stamped only by the concerned Metrological Officer, the respondent no.4 herein. Accordingly the said fuel dispensers were only calibrated, verified and stamped by the respondent no.4. On June 24, 2021 in course of the annual calibration, one of the DU with **Serial No. 201604000849** got rejected on the ground that the software could not be updated to the new version. Thereafter, a Multiple Disciplinary Team (for short, MDT) visited the retail outlet on July 06, 2021 and carried a detailed inspection of the DU,

although the concerned team found the DU seal intact but allegedly reported that that DU Motherboard for the said DU was found with suspicious wiring leading to manipulation of the electronic parts. The DU has been inspected in presence of the representatives of the legal metrology and OEM Service Engineer. The DU ERA parts have been removed for further investigation by the OEM. The verification and inspection report dated June 24, 2021 are made part of the writ petition.

5. Although the MDT while conducting inspection on July 6, 2021 observed that the K factors were matching with the last calibration certificate and there is no abnormal error but the erstwhile dealer by a letter dated July 06, 2021 was advised to submit her explanation within 10 days from receipt thereof. The erstwhile dealer by its letter dated July 12, 2021 replied to the said letter dated July 06, 2021 and contended that there was no anomaly, as the respondent no.4 after calibrating the DU sealed it and the seal was intact when the certificate of rejection was served upon the erstwhile dealer. It was also contended by the erstwhile dealer that the electronic board was dismantled for the first time after the concerned DU was installed as it was functional during all previous calibration. All these facts were not known to the petitioner since she was not involved in running the retail outlet at the relevant point of time when the inspection took place by the Oil Company and the allegation of tampering were raised with issuance of show cause notice upon the erstwhile dealer.

6. The petitioner at the material point of time had no knowledge of tampering of the subject DU.

7. In view of the above, by a letter dated **April 18, 2022** alleging violation of the relevant Marketing Discipline Guidelines, 2012 (for short, MDG) and Clause 42 of the dealership agreement, the respondent no.3 issued a **show cause notice** upon the petitioner asking her to show cause as to why the dealership of the **petitioner** under the name and style of Ms. Khitish Service Center should not be terminated.

8. By a letter dated **May 03, 2022** the petitioner submitted its **reply** to the said show cause notice dated April 18, 2022. The Principle defense taken by the petitioner was that the petitioner only became the dealer of the retail outlet on and from November 29, 2021 and the outlet was made over to the petitioner on December 01, 2021. The entire incidence of alleged tampering of DU had happened much prior thereto during the dealership of the erstwhile dealer and the petitioner neither was a party thereto nor was aware of it. The breach of provisions of the said MDG, if any, or the dealership agreement, if any, was not at the instance of the petitioner at all and the petitioner has not caused any breach of her dealership agreement. Both the show cause notice and the reply are part of the writ petition.

9. By a notice dated August 20, 2022 the petitioner was asked to attend a hearing scheduled on August 29, 2022 at the office of the respondent no.3 along with the erstwhile proprietor. The hearing was conducted. The petitioner attended the hearing and denied her involvement with the alleged tampering of DU. The subsequent hearing dated October 07, 2022 was also attended by the petitioner when the petitioner further denied her involvement and nexus with the alleged tampering.

10. Ultimately by a **termination notice dated January 24, 2023** the competent authority of the oil company has terminated and approved the termination of the retail outlet dealership in line with Clause 8 (i) and 42 of the dealership agreement dated November 29, 2021 and Clause 5.1.4 of NDG, 2012 as amended attracting final action under Clause 8.2-IV. Accordingly the dealership agreement dated November 29, 2021 executed with the petitioner had been terminated and the security amount was forefeited.

11. Challenging the said termination of dealership, the petitioner has filed the instant writ petition praying for withdrawal and cancellation of the said termination notice dated January 24, 2023 with a consequential direction for restoring the dealership agreement dated November 29, 2021 along with other consequential reliefs.

12. Respondents have filed their affidavit-in-opposition. The petitioner has filed its affidavit-in-reply.

13. Parties to the writ petition have also filed their written notes.

<u>Submissions:</u>

14. Mr. Debasish Kundu learned senior counsel appearing for the writ petitioner submits, at the outset that, whether the dealership agreement of the petitioner is liable to be terminated by the oil company on the basis of the alleged charges which admittedly took place at point of time when the petitioner was not the dealer of the retail outlet and the erstwhile dealer was there who was running the outlet under the dealership granted by the oil company.

15. Referring to the show-cause notice dated **April 18, 2022, Annexure P-5 at page 74** to the writ petition, learned counsel submits that the charge levelled therein is principally manipulation of the DU relates to a period during **June/July, 2021** which is admittedly prior to the execution of the **dealership agreement dated November 29, 2021** executed by the oil company in favour of the petitioner. Therefore, the incidents alleged to have happened, if any, much prior to when the dealership agreement was executed with the petitioner and the petitioner cannot be charged for the same and her dealership cannot be terminated on such ground. Thus, issuance of the said show-cause notice for termination of petitioner's dealership and following that all the subsequent steps are illegal, arbitrary and mala fide and in breach of the right of the petitioner guaranteed under Article 19(1)(g) of the Constitution of India.

16. Learned senior counsel then submits while proceeding for termination of the dealership of the petitioner no opportunity of hearing was granted to the petitioner, as such, there was a fundamental breach of the principle of natural justice.

17. Learned senior counsel for the petitioner further submits that during June and July, 2021 when the incidents were alleged for tampering and manipulation of DU against the erstwhile dealer and inspection was carried out at the instance of the oil company, during such inspection the petitioner was not present and name of the petitioner was not there in the inspection report.

18. Referring to the impugned termination letter dated January 24, 2023, Annexure P-8, at page 161 to the writ petition, learned senior counsel

submits that, all the fact finding materials would show that alleged tampering, if any, had happened prior to the dealership agreement executed with the petitioner. Prior to the execution of the said dealership agreement with the petitioner, there was no privity between the oil company and the petitioner. Therefore, for the incidents alleged to have happened prior to the execution of the said dealership agreement with the petitioner, the petitioner could not have been made liable for the same. He submits that the impugned decision of termination of dealership of the petitioner dated **January 24, 2023** is clearly perverse and is a result of mechanical and arbitrary exercise of power by the oil company.

19. It was then submitted on behalf of the petitioner that the provisions of the Marketing Guidelines (for short, MDG) shall only apply upon the dealers. The writ petitioner not being the dealer at the relevant point of time prior to November 29, 2021 when the erstwhile dealer was running the retail outlet and during her tenure the tampering/manipulation at the DU was alleged to have been found, if any, no steps could have been taken against the petitioner as the dealer of the retail outlet. Referring to **Clause 5** from the said MDG learned senior counsel submits that, when the marketing guidelines specifically applies on the dealers, the question of applying any provision thereunder against the writ petitioner for the alleged incidents which allegedly happened, if any, prior to the execution of her dealership agreement would not arise. He further submits that the issue had already received the attention of the Hon'ble Division Bench in its order dated June 15, 2023, when interim order was passed.

20. Mr. Debashis Kundu learned senior counsel submits that though an arbitration clause is embodied in the dealership agreement executed with the petitioner but the law is settled that despite existence of such arbitration clause as an alternative redressal forum, the Writ Court still has jurisdiction to interfere and to grant relief when the petitioner's fundamental right is infringed and where there is breach of principal of natural justice and when the order of termination is wholly without jurisdiction. In the instant case, admittedly by virtue of order of termination the right of the petitioner under Article 19(1)(g) of Constitution of India has been violated and since no opportunity of hearing was granted to the petitioner before terminating her dealership agreement, the principal of natural justice has also been violated. In support he has relied upon a decision of the Hon'ble Division Bench ***In the matter of: Harbanslal Sahnia & Anr. Vs. Indian Oil Corporation Ltd. & Ors., reported at (2003) 2 SCC 107.***

21. Learned Senior counsel then submits that while terminating the dealership agreement of the petitioner, the oil company failed to appreciate that at the relevant time when the alleged incident of tampering and manipulation had been alleged, the petitioner was admittedly not the dealer. In such a situation writ petition is maintainable, since the act of oil company is wholly without jurisdiction. In support, he relied upon the following decisions:

    (i) ***In the matter of: ABL International Ltd. Vs. Export Credit Guarantee Corporation of India Ltd. & Ors., reported at (2004) 3 SCC 553.***

    (ii) ***In the matter of: Indian Oil Corporation Ltd. Vs. Amritsar Gas Service & Ors., reported at (1991) 1 SCC 533.***

22. In the light of the above submissions Mr. Kundu learned senior counsel appearing for the petitioner prays for setting aside and quashing of the impugned decision dated **January 24, 2023** terminating the dealership of the petitioner and restoration of the said dealership agreement dated **November 29, 2021.**

23. Mr. Bikramaditya Ghosh learned counsel appearing for the respondent nos. 1 to 4 submits that on June 26, 2020 the erstwhile dealer and petitioner submitted an application for reconstitution of the dealership. On **June 5, 2021** the writ petitioner executed a letter of indemnity at **page 31** to affidavit-in-opposition filed by the respondent no.1 to 4. The indemnity stated that the petitioner had taken over the assets and liabilities of the erstwhile dealership firm and further undertook to continue to operate the erstwhile dealership business and would pay all outstanding dues etc. for the period till the dealership agreement is executed in her favour. Thereafter on **June 24, 2021** during calibration the subject DU was found to be tampered/manipulated when inspection was conducted and the detailed tampering was detected at the dispensing unit. On July 6, 2021 a detailed letter with finding of facts was issued by the oil company in the name of the retail outlet i.e. Ms. Khitish Service Center which was also received by one of its employees, namely, Jhuton Banik, an employee of the retail outlet. On July 12, 2021 an explanation was submitted by the erstwhile dealer at page 72 to the writ petition. All these incidents had happened after the letter of indemnity dated June 5, 2021 was issued by the petitioner.

24. Referring to a minute of the meeting dated **October 15, 2020** at **page 19** to the affidavit of opposition held amongst Runu Sarkar, erstwhile dealer and

the petitioner on the one hand and the representative of the oil company on the other, it was discussed and recorded that the erstwhile dealer was seeking to retire from the dealership and the petitioner was seeking to be inducted as the proprietor and dealer of the said retail outlet. The reconstitution proposal was submitted before the oil company for reconstitution of the dealership by executing a fresh dealership in favour of the petitioner. The said minute was signed by all present including the writ petitioner. Learned counsel for the respondents then refers to a document at **pages 21 to 28** to the affidavit-in-opposition, which clearly show that, the proposal for reconstitution of the dealership by granting fresh dealership in favour of the writ petitioner was agreed in principal subject to various terms and conditions as would be evident from the document dated **December 17, 2020** at **pages 24, 28** to the said affidavit-in-opposition.

25. Referring to the letter of indemnity dated **June 5, 2021** at page 31 and 32 to the said affidavit-in-opposition, Mr. Bikramaditya Ghosh learned counsel for the respondents has relied upon the following provisions from the letter of indemnity:

> *"3.Accordingly, Smt. Nabanita Malakar of the newly constituted dealership firm in the name and style of "M/S Kshitish Service Centre"are furnishing the indemnity bond as under:-*
>
> *a. The Proprietor of the newly constituted dealership firm Smt. Nabanita Malakar have taken over the assets and liabilities of the erstwhile dealership firm. The newly constituted partnership firm shall continue to operate the dealership business under the same name and style of "M/S Kshitish Service Centre".*
>
> *b. The Proprietor of the newly constituted dealership firm will enter into a fresh*

Dealership Agreement with the corporation and operate the dealership firm as per the said agreement with the corporation under the terms and conditions contained therein. It is agreed by the newly constituted dealership firm that with the execution of such fresh dealership agreement, the earlier dealership agreement with erstwhile partners shall stand terminated and cancelled without, however, prejudice to the rights and provisions accrued in favor of the corporation.

c. The Proprietor in the newly constituted dealership firm will for the reason stated above perform all obligations of the erstwhile dealership firm and pay all outstanding dues which may at anytime be found due to the corporation form the erstwhile dealership firm and indemnify the Corporation for all its claims, demands dealership firm. all its claims, demands subsisting and/or, which may arise as against the erstwhile dealership firm.

d. The Proprietor of the newly dealership firm and their successors, executors and administrators jointly and severally hereby undertake to keep the corporation harmless and indemnified against all claims, demands, actions, suits and/or proceedings that may be brought against IOCL by any person/body of persons/ entity whomsoever in connection with the working of dealership or its present reconstitution".

26. The said letter of indemnity was duly signed and executed by the petitioner and the petitioner has not denied the execution and existence thereof.

27. Mr. Ghosh learned counsel submits that, from the show-cause notice and the letter of termination issued by the oil company, it would appear that the oil company has terminated the dealership of the petitioner not only on the basis of the breach of dealership agreement but also on the ground of the breach of provisions under the MDG.

28. It was then submitted on behalf of the Respondents that from the said letter of indemnity dated June 5, 2021 and all the documents referred to above from the affidavit-in-opposition, it would appear that at the relevant point of time the petitioner was in actual and effective control of the retail outlet as

the same was taken over by her already when the inspection was conducted on June 24, 2021. Being in effective control of the retail outlet, the petitioner executed the said letter of indemnity dated **June 5, 2021** and, inter alia, on the basis thereof the oil company agreed to execute the dealership agreement and ultimately executed the dealership agreement on **November, 29, 2021** in favour of the petitioner. The letter of indemnity specifically shows that the petitioner indemnified the oil company for whatever liability and acts agreed and committed at the behest of the erstwhile dealer, the petitioner shall hold herself to be responsible for the same and on that basis the dealership agreement was executed with the petitioner. All the assets and liabilities of the retail outlet was taken over by the petitioner.

29. Mr. Ghosh further submits that whenever at any outlet, if the oil company finds any tampering or manipulation in the calibration system in the DU, the marketing guidelines and the dealership agreement specifically empower the oil company to terminate the dealership following its guidelines. Accordingly, in the instant case the show-cause notice was issued which was replied to by the petitioner and then after granting an adequate opportunity of hearing as would be evident from the letter of termination, the dealership agreement was terminated after the oil company was satisfied that the several fact finding enquiries depicted manipulation and tampering at the dispensing unit.

30. In the light of the above submissions, Mr. Ghosh learned counsel appearing for the respondents submits that, the dealership agreement provides for an arbitration clause to adjudicate upon the impugned decision of the oil company terminating the dealership of the petitioner. Several fact finding

enquiries are required to be conducted, for which arbitration is the appropriate remedy. This Constitutional Court in exercise of its power under Article 226 of the Constitution of India cannot conduct such fact finding enquiry in detail which are essential for adjudication of the impugned decision for termination. It is, therefore, submitted that, this writ petition is devoid of any merit and should dismissed in lemini.

31. In reply Mr. Debashis Kundu learned senior counsel submits that, the letter of indemnity dated June 5, 2021 mentions four different heads of indemnity which were to be indemnified by the petitioner under the letter of indemnity in favour of the oil company and the same does not include any **Penal Action** which was taken by the erstwhile dealer.

32. Mr. Hirak Barman learned counsel appearing for the respondent no.5 has adopted the submissions made by Mr. Bikramaditya Ghosh on behalf of the oil company. No affidavit-in-opposition has been filed by respondent no.5.

Decision:

33. The facts which are admitted by the parties are that on June 5, 2021 the letter of indemnity was executed and issued by the petitioner indemnifying the oil company for the liability and conduct of the erstwhile dealer. The execution and existence of the documents at pages 17 to 28 to the affidavit-in-opposition filed by the oil company are also admitted. It is also admitted that on November 29, 2021 the dealership agreement was executed by and between the oil company and the petitioner in respect of the subject outlet. The dealership agreement provides for arbitration in the event any dispute arises by and between the parties thereto.

34. On the existing records and documents which are part of this proceeding, already discussed above and in the light of the submissions made on behalf of the parties, it appears to this Court that, on the basis of the allegation of tampering and manipulation at the DU when the enquiry was conducted by the technical team of the oil company, it is alleged by the oil company that, the petitioner was present and/or aware of the situation. The minute for reconstitution of the proprietorship of the retail outlet held on **October 15, 2020** at page 19 was duly signed by the petitioner and the erstwhile dealer. The erstwhile dealer and the petitioner jointly applied for change of dealership in favour of the petitioner and the terms and conditions were recorded on **December 17, 2020** at page 24 to 26 to the affidavit-in-opposition. In the backdrop of existence of these facts when the oil company specifically asserts that, the petitioner at all material time was in effective control of the retail outlet even prior to the execution of the dealership agreement with her is required to be gone into by conducting a detail fact finding enquiry.

35. The letter of indemnity dated **June 5, 2021** at page 31 to the affidavit-in-opposition was signed by petitioner and the same has not been denied by the petitioner. From clauses of indemnity already quoted above from the letter of indemnity, would specifically demonstrate that with the execution of the new dealership agreement the erstwhile dealership agreement with the erstwhile dealer would stand terminated and cancelled without, however, prejudice to the rights and provisions accrued in favour of the oil company. It further mentions that, the writ petitioner being proprietor of the newly constituted dealership firm has taken over the assets and liabilities of the

erstwhile dealership firm and the petitioner shall continue to discharge and perform all obligations of the erstwhile dealership firm and pay all outstanding dues payable to the oil company by the erstwhile dealer and has indemnified the oil company for all its claims, demands, subsisting and/or which may arise as against the erstwhile dealership firm. The liability is joint and several of both the petitioner and the erstwhile dealer. It was further indemnified that, the petitioner undertook to keep the oil company harmless and indemnified against all claims, demands, suits and/or proceedings that may be brought against the oil company in connection with the working of the dealership or its present reconstitution. On the existing facts already discussed above, to come to a conclusive finding with regard to the obligation of the petitioner under the said letter of indemnity also requires a detail fact finding enquiry which is not the job of the Writ Court, moreso when the arbitration proceeding is contemplated under dealership agreement.

36. Insofar as the contention of the petitioners that the marketing guidelines would only apply against the dealer and all the incidents of tampering as alleged took place during the tenure of the erstwhile dealer, therefore, no liability of the erstwhile dealer can be foisted upon subsequent dealer, the same is also required to be adjudicated by a detail fact finding enquiry in the light of the existing records. The existing records do not and cannot unimpeachably demonstrate that the petitioner did not have any nexus or connection with the alleged incident of tampering of DU and the liability as alleged against the petitioner by the oil company cannot be brushed aside summarily. To come to a logical conclusion on this issue a summary

proceeding like a writ petition is not the proper remedy moreso when there is a specific provisions for arbitration under the dealership agreement executed with the petitioner.

37. The law is well settled that merely on the plea of triable issue or disputed question of facts, a writ petition cannot be dismissed if it appear from records and affidavits used in the writ petition that the issue before the court is otherwise can be adjudicated without going into any disputed questions of facts or without going for a trial. The power of Constitutional Court in exercise of its jurisdiction under Article 226 of the Constitution of India is plenary to grant relief to the petitioner in a writ petition against an illegal and arbitrary action of an Article 12 authority. However, when from the records of the proceeding it appears to the Constitutional Court that, the facts are so disputed triable issue would arise, then a writ court should refrain itself from exercising its high prerogative writ jurisdiction. In the instant case, as discussed above from the record of the proceeding, it appears that to ascertain the conduct of the petitioner several fact finding enquiries are required to be carried out which would give rise to several triable issues. Hence this constitutional court thinks it fit not to exercise its discretion in the facts and circumstance of this case. Accordingly the ratio laid down ***In the matter of: ABL International Ltd. & Anr. (supra)*** and ***In the matter of: Amritsar Gas Services & Ors. (supra)*** shall not apply in the facts and circumstances of the case.

38. It is equally trite that mere existence of an arbitration clause in a contract shall not debar the petitioner to maintain a petition under Article 226 of the Constitution of India. Relief granted under Article 226 of the Constitution of

India are equitable and discretionary. The power of the constitutional court is plenary to see that justice is done whenever the court is satisfied that there is breach of any constitutional right or any other legal right of an aggrieved person. The nature of proceeding under Article 226 is summary. When the court finds several fact finding enquiry is required to be made and if necessary to conduct a proper witness action between the parties, the constitutional court shall seldom exercise its power under Article 226 of the constitution. The court shall relegate parties to a civil action and there is no hard and fast rule for the same. It depends on facts and circumstances of each case. In the instant case, the records and submissions made in the proceeding clearly show that, there was no breach of natural justice as the petitioner was granted opportunity of hearing before issuing the impugned termination order. The termination order speaks for the same in detail. The impugned termination order terminating the dealership of the petitioner records several findings on the basis of detail fact finding enquiry conducted from time to time. To assess the correctness and propriety of the allegation, a competent forum needs to go for examination of detail facts and records and if necessary on the basis of witness action, which is not the job of the writ court. Moreso, the parties have agreed for the arbitration which otherwise is a competent forum to assess the impugned order of termination on merit after causing necessary fact finding enquiries on the basis of the existing records. Here, the self-restriction comes on a writ court not to adjudicate on those fact finding issues. Thus, this court is of the considered and firm opinion that in the facts and circumstances of the case, the instant writ petition is not maintainable and for complete adjudication on the said impugned decision for termination of the dealership of the petitioner, the petitioner should invoke the arbitration clause and to proceed for arbitration reference.

39. The order of the Hon'ble Division Bench dated **June 15, 2023** passed in **MAT 21 of 2023** was an interim order. The Hon'ble Division Bench has also observed that ***'We may make it clear that our observations shall not influence the final outcome of the writ petition'.*** '

40. It is made clear that, this Court has not gone into the merits of the rival contentions of the parties. The parties if apply for arbitration, they shall be at liberty to urge whatever points they wish to urge before the arbitral tribunal and the arbitral tribunal shall come to a logical conclusion on the issue independently in accordance with law and without being influenced by observations made by this Court, if any.

41. In view of the foregoing reasons and discussions this Court is of the firm view that this writ petition is not maintainable and accordingly this writ petition **WPA 347 of 2023** stands **dismissed** without any order as to costs.

(Aniruddha Roy, J.)

Later:

Mr. Debashis Kundu, learned senior counsel pray for an injunction against the oil company so that the petrol pump cannot be handed over to a third party. Such prayer is considered. The operation of this judgment and order shall remain stayed for a period of four weeks from date.

(Aniruddha Roy, J.)