

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CWP-25428-2023
Date of Decision:05.03.2024

MOGA PERIPHERY PUMP ASSOCIATION Petitioner

Versus

UNION OF INDIA AND ORS. Respondents

CORAM: HON'BLE MR. JUSTICE JAGMOHAN BANSAL

Present : Mr. Chetan Mittal, Sr. Advocate with
Mr. Shreenath A. Khemka, Advocate and
Mr. Udit Garg, Advocate for the petitioner.

Mr. Satya Pal Jain, Addl. Solicitor General of India with
Mr. Dharam Chand Mittal, Senior Panel Counsel,
Ms. Saigeeta Srivastava, Senior Panel Counsel and
Mr. Ashish Rawal, Senior Panel Counsel
for the respondents No.1 to 3-UI.

Mr. Ashish Kapoor, Advocate for respondent No.4.

Mr. Raman Sharma, Advocate for respondent No.5.

JAGMOHAN BANSAL, J. (Oral)

1. The petitioner through instant petition under Article 226 of the Constitution of India is seeking setting aside of advertisement dated 28.06.2023 (Annexure P-7) whereby respondents have invited applications for 60 additional petrol pumps in the District Moga.
2. The petitioner is an Association of petrol pump dealers. The members of the Association are having petrol pumps within District Moga. The respondents by impugned advertisement have invited applications for setting up 60 additional petrol pumps in the District Moga. The grievance of the petitioner is that no additional petrol pump should be set up within jurisdiction of Moga because existing petrol

pumps are sufficient to cater need of the consumers.

3. Mr. Chetan Mittal, Sr. Advocate submits that as per contract executed between Oil Companies and existing petrol pump dealers, a dealer is required to achieve minimum turn over of 350 KL of Motor Spirit & High Speed Diesel (for short 'MS & HSD'). There are 141 petrol pumps in District Moga and average turn over of these petrol pumps is 92 KL per month which is much lower than minimum prescribed limit. If 60 new petrol pumps are set up within District Moga, the turn over of every dealer would substantially reduce and no petrol pump would be financially viable. It would lead to malpractices and unethical competition. The respondents have advertised sites which are in the close proximity of existing petrol pumps. The setting up of these petrol pumps would be in violation of guidelines of Ministry of Road Transportation & Highways (for short 'MORTH') and further guidelines laid down by Central Pollution Control Board (for short 'CPCB'). Different High Courts have already held that guidelines issued by CPCB are binding in nature and no petrol pump can be set up in violation of these guidelines. The Oil Companies since 2017 have not revised commission payable to dealers, thus, if turn over reduces, the average income of every petrol pump would abysmally reduce and their financial condition would turn dilapidated. As per report of Oil Companies, the minimum expected turn over of every petrol pump is 170 KL whereas petitioners are unable to achieve even 100 KL. The act of respondents amounts to violation of Articles 14 and 19 (1) (g) of the Constitution of India.

4. Per contra, Mr. Ashish Kapoor, and Mr. Raman Sharma,

learned counsel for the respondents submit that members of the Association have entered into agreement with respective Oil Companies and in the agreement, it has been specifically jotted down that Oil Company may establish any number of petrol pumps. The dealer cannot object to setting up of other petrol pumps. The respondents invited applications vide advertisement dated 28.06.2023 (Annexure P-7). The last date to apply was 28.09.2023 which was extended to 17.10.2023. The petitioners till the last date did not file petition before this Court. A number of applicants have applied and to comply with minimum conditions of the advertisement, they have procured/arranged land as well as finance. Any adverse order passed by this Court would directly affect rights of those parties whereas they have not been impleaded. The Oil Companies after issuing LOI would apply for NOC in terms of Rule 144 of Petroleum Rules, 2002 and Deputy Commissioner before issuing NOC would get approval from different departments including Pollution Control Board, Police, Traffic and PWD. If Deputy Commissioner finds that there is violation of guidelines issued by Central/State Government, he would not issue NOC, resultantly, petrol pumps would not be set up. In 2018, the respondent-BPCL advertised 8 sites, however, only 2 petrol pumps could be set up because of multiple reasons including absence of NOC from Deputy Commissioner.

5. I have heard arguments of both sides and scrutinized record with their able assistance.

6. The conceded position emerging from record is that petitioner is an Association having different members who are operating petrol pumps within jurisdiction of District Moga. There are 141 petrol

pumps within jurisdiction of District Moga. The respondents have advertised 60 new petrol pumps. The advertisement was issued in June' 2023 and last date to apply was 28.09.2023 which was extended to 17.10.2023. The members of the petitioner have entered into contract with respective Oil Companies at the time of setting up of petrol pump. As per terms and conditions of the contract, Oil Companies are free to set up any number of petrol pumps.

7. The petitioner is primarily alleging that setting up new petrol pumps within the vicinity of existing petrol pumps would wipe out their financial feasibility. The existing petrol pumps are sufficient to cater need of the consumers. As per contract, the existing dealers are supposed to sell minimum 350 KL Motor Spirit & High Speed Diesel. The existing dealers are not even able to sell 100 KL Oil in a month, thus, setting up new pumps would violate their fundamental rights guaranteed by Articles 14 and 19(1) (g) of the Constitution of India.

8. The members of the petitioner-Association indubitably at the time of setting up of petrol pump have entered into contract with the respective Oil Company. In the contract, it has been specifically provided that Corporation shall be free to set up any number of petrol pumps. The dealer has no right to inhibit Corporation from setting up new petrol pumps. Clause 7 of the agreement is reproduced as below:

“Nothing contained in this agreement shall be construed to prohibit the corporation from making direct and/or indirect sales to any person whomsoever or from appointing other dealers for the purpose of direct or indirect sales at such place or places as the corporation may think fit. The dealer shall not be entitled to any claim or allowance for such direct or indirect sales”

9. From the perusal of above quoted clause, it is evident that Corporation is free to appoint any number of dealers for the purpose of direct or indirect sales at such place or places as the Corporation may deem fit.

10. A new petrol pump can be set up only after compliance of statutory provisions as well as binding guidelines. The petitioner is claiming that new petrol pumps would be set up in violation of guidelines issued by CPCB as well as MORTH. The guidelines of MORTH are applicable to petrol pumps set up at National Highway. In case of other locations, guidelines issued by State Government are applicable. The respondents have conceded and even otherwise, it is settled proposition of law that Deputy Commissioner in violation of guidelines of Pollution Control Board as well as MORTH and State Government cannot issue NOC under Rule 144 of Petroleum Rules, 2002. The authorities are bound to act in accordance with law. This Court is sanguine of the fact that as soon as Oil Companies would apply for NOC in terms of Rule 144 of Petroleum Rules 2002, the jurisdictional Deputy Commissioner would take care of guidelines issued by CPCB, MORTH and State Government.

11. The petitioner is an Association of existing petrol pumps and they have filed present petition to inhibit respondent Corporation from setting up new petrol pumps. Anybody can bring in the knowledge of Court, any illegality committed or to be committed by authorities. In the case in hand, intent of the petitioner is not to stop alleged illegality on the part of the authorities whereas the intent is to avoid competition. The petitioner is trying to use judicial forum to halt setting up of new petrol

pumps. Judicial process cannot be used to stop healthy competition in the guise of allegation of violation of any instruction issued by Government.

11.1 In ***Nagar Rice & Flour Mills & Ors v. N Teekappa Gowda & Bros Ors. (1970) 1 SCC 575***, the Hon'ble Supreme Court considered the issue of the locus standi of a rival trader to impeach the grant of fresh license or permission that increases competition in the petitioners area of trade. The Apex Court held that the provisions of Section 8(3)(c) of the Rice Milling Industry Regulation Act, 1958 are merely regulatory and if not complied with, the appellants may probably be exposed to a penalty but the competitors in the business cannot seek to prevent the appellants from exercising their right to carry on business because of the default nor can the rice mill of the appellants be regarded as a new rice mill. The Court clarified that a person cannot claim independently of any restriction imposed by a law referable to Article 19 of the Constitution that any other person shall not carry on business or trade so as to affect his trade or business adversely. The relevant extracts of the judgment read as :

9. Section 8(3)(c) is merely regulatory, if it is not complied with the appellants may probably be exposed to a penalty, but a competitor in the business cannot seek to prevent the appellants from exercising their right to carry on business, because of the default, nor can the rice mill of the appellants be regarded as a new rice mill. Competition in the trade or business may be subject to such restrictions as are permissible and are imposed by the State by a law enacted in the interests of the general public under Article 19(6) but a person cannot claim independently of such restriction that another person shall not carry on business or trade so as to affect his trade or business adversely. The appellants complied with the

statutory requirements for carrying on rice milling operations in the building on the new site. Even assuming that no previous permission was obtained, the respondents would have no locus standi for challenging the grant of the permission, because no right vested in the respondents was infringed.

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11. The appellants had been carrying on business in milling rice for more than 30 years and the mill was by reason of the proposal to submerge the site in the Sharavathi Hydro-Electric Project had to be shifted from its location. The State allotted another piece of land to the appellants and did not acquire their machinery and permitted erection of their rice mill building on the new location, this was done with a view to cause minimum hardship to the appellants arising in consequence of the proposed construction of the dam resulting in submerger of their land. The State also granted permission to the appellants to change the location under the Rice Milling Industry (Regulation) Act, 1958. The permission cannot be said to be granted without consideration of the relevant circumstances.

12. The appeal is allowed and the petition filed by the respondent N. Teekappa Gowda and brothers is ordered to be dismissed with costs throughout in favour of the appellants.

11.2 In **Mithilesh Garg etc. v. Union of India and others, (1992) 1 SCC 168**, a three Judge Bench of Apex Court had occasion to advert with challenge laid by existing stage carriage operators to route permits granted to various transport operators. The Court turned down pleas of the existing operators and held :

“6. As mentioned above the petitioners are permit

holders and are existing operators. They are plying their vehicles on the routes assigned to them under the permits. They are in the full enjoyment of their fundamental right guaranteed to them under Article 19(1)(g) of the Constitution of India. There is no threat of any kind whatsoever from any authority to the enjoyment of their right to carry on the occupation of transport operators. There is no complaint of infringement of any of their statutory rights. Their only effort is to stop the new operators from coming in the field as competitors. We see no justification in the petitioners' stand. More operators mean healthy competition and efficient transport system. Overcrowded buses, passengers standing in the aisle, persons clinging to the bus doors and even sitting on the rooftop are some of the common sights in this country. More often one finds a bus which has noisy engine, old upholstery, uncomfortable seats and continuous emission of black smoke from the exhaust pipe. It is, therefore, necessary that there should be plenty of operators on every route to provide ample choice to the commuter public to board the vehicle of their choice and patronise the operator who is providing the best service. Even otherwise the liberal policy is likely to help in the elimination of corruption and favouritism in the process of granting permits. Restricted licensing under the old Act led to the concentration of business in the hands of few persons thereby giving rise to a kind of monopoly, adversely affecting the public interest. The apprehensions of the petitioners, that too many operators on a route are likely to affect adversely the interest of weaker section of the profession, is without any basis. The transport business is bound to be ironed out ultimately by the rationale of demand and supply. Cost of a vehicle

being as it is the business requires huge investment. The intending operators are likely to be conscious of the economics underlying the profession. Only such number of vehicles would finally remain in operation on a particular route as are economically viable. In any case the transport system in a State is meant for the benefit and convenience of the public. The policy to grant permits liberally under the Act is directed towards the said goal. The petitioners who are already in the business want to keep the fresh entrants out of it and as such eliminate the healthy competition which is necessary to bring efficiency in the trade.

(Emphasis supplied)

12. The argument of petitioners that setting up of new petrol pumps would wipe out financial viability of existing petrol pumps is misconceived and cannot be countenanced by this Court. The members of petitioner-Association have entered into commercial contract with respondents which are Government Companies, however, the contracts are not statutory in nature. These contracts are commercial in nature.

A three judge Bench of Hon'ble Supreme Court in ***State of Haryana Versus Lal Chand, (1984) 3 SCC 634*** has already adverted with question of commercial vis-a-vis statutory contracts. The Court has clearly held that a contract executed between Government and private party in terms of a statutory provision is a statutory contract and all other contracts are commercial contracts. The relevant extracts of the judgment read as:

“10. There is a distinction between contracts which are executed in exercise of the executive powers and contracts which are statutory in nature. Under Article 299(1), three conditions have to be satisfied before a binding contract by

the Union or the State in exercise of the executive power comes into existence : (1) The contract must be expressed to be made by the President or the Governor, as the case may be. (2) It must be executed in writing and (3) The execution thereof should be by such person and in such manner as the President or the Governor may direct or authorize. There can be no doubt that a contract which has to be executed in accordance with Article 299(1) is nullified and becomes void if the contract is not executed in conformity with provisions of Article 299(1) and there is no question of estoppel or ratification in such cases. Nor can there be any implied contract between the Government and another person : K.P. Chowdhar v. State of M.P. [AIR 1967 SC 203:(1966) 3 SCR 919:(1967) 2 SCJ 119], Mulamchand v. State of M.P. [AIR 1968 SC 1218 : (1968) 3 SCR 214 : (1968) 2 SCJ 924], State of M.P. v. Rattan Lal [1967 MPLJ 104] and State of M.P. v. Firm Gobardhan Dass Kailash Nath [(1973) 1 SCC 668 : AIR 1973 SC 1164] .

11. *It is well settled that Article 299(1) applies to a contract made in exercise of the executive power of the Union or the State, but not to a contract made in exercise of statutory power. Article 299(1) has no application to a case where a particular statutory authority as distinguished from the Union or the States enters into a contract which is statutory in nature. Such a contract, even though it is for securing the interests of the Union or the States, is not a contract which has been entered into by or on behalf of the Union or the State in exercise of its executive powers. In respect of forest contracts which were dealt with by this Court in K.P. Chowdhary [AIR 1967 SC 203 : (1966) 3 SCR 919 : (1967) 2 SCJ 119] , Mulamchand [AIR 1968 SC 1218 : (1968) 3 SCR 214 : (1968) 2 SCJ 924] , Rattan Lal [1967 MPLJ 104] and Firm Gobardhan Dass [(1973) 1 SCC 668 : AIR 1973 SC 1164] cases, there are provisions in the Indian Forest Act, 1927 and the Forest Contract Rules framed thereunder for*

entering into a formal deed between the forest contractor and the State Government to be executed and expressed in the name of the Governor in conformity with the requirements of Article 299(1), whereas under the Punjab Excise Act, 1914, like some other State Excise Acts, once the bid offered by a person at an auction sale is accepted by the authority competent, a completed contract comes into existence and all that is required is the grant of a licence to the person whose bid has been accepted. It is settled law that contracts made in exercise of statutory powers are not covered by Article 299(1) and once this distinction is kept in view, it will be manifest that the principles laid down in K.P. Chowdhary [AIR 1967 SC 203 : (1966) 3 SCR 919 : (1967) 2 SCJ 119] , Mulamchand [AIR 1968 SC 1218 : (1968) 3 SCR 214 : (1968) 2 SCJ 924] , Rattan Lal [1967 MPLJ 104] and Firm Gobardhan Dass [(1973) 1 SCC 668 : AIR 1973 SC 1164] cases are not applicable to a statutory contract e.g. an excise contract. In such a case, the Collector acting as the Deputy Excise and Taxation Commissioner conducting the auction under Rule 36(22) and the Excise Commissioner exercising the functions of the Financial Commissioner accepting the bid under Rule 36(22-A) although they undoubtedly act for and on behalf of the State Government for raising public revenue, they have the requisite authority to do so under the Act and the rules framed thereunder and therefore such a contract which comes into being on acceptance of the bid, is a statutory contract falling outside the purview of Article 299(1) of the Constitution.

12. We are clearly of the opinion that in the case of a statutory contract like the one under the Excise Act, the requirements of Article 299(1) cannot be invoked. In A. Damodaran v. State of Kerala [(1976) 3 SCC 61 : AIR 1976 SC 1533 : (1976) 3 SCR 780] the Court interpreting Section 28 of the Kerala Abkari Act, 1967 which was in pari materia with Section 60 of the Punjab Excise Act, 1914 held that

even if no formal deed had been executed as required under Article 299(1), still the liability for payment of the balance of the licence amount due could be enforced by taking recourse to Section 28 of the Act. The Kerala High Court rejected the contention of the appellants by holding that the liability to satisfy the dues arising out of a bid was enforceable under Section 28 quite apart from any contractual liability and this view was upheld by this Court on the ground that the word “grantee” in Section 28 has a wide connotation to mean a person who had been granted the privilege by acceptance of his bid. It was further held that the statutory duties and liabilities arising on acceptance of the bid at a public auction of a liquor contract may be enforced in accordance with the statutory provisions and that it was not a condition precedent for the recovery of an amount due under Section 28 of the Act, that the amount due and recoverable should be under a formally drawn up and executed contract. This is in recognition of the principle that the provisions of Article 299(1) of the Constitution are not attracted to the grant of such a privilege to vend liquor under the Act.”

12. Applying the ratio laid down by aforesaid judgment, it is lucid that contracts executed between existing petrol pumps and Oil Companies are commercial in nature. It is prerogative of the parties to decide question of commission and their viability. The Court cannot decide question of their viability. People who have applied for setting up new petrol pumps must be mindful of the fact that existing petrol pumps are not able to achieve minimum targets. It cannot be expected that Oil Companies are more interested to widen their net of petrol pumps rather than their sale. Every Oil Company in the form of Tanks, Dispensers and other equipments has to invest a good amount while setting up a petrol pump. If the Oil Companies have decided to set up new petrol pumps, it

is their wisdom and Court cannot substitute a policy decision of a Corporation especially when the contracts between the parties are commercial in nature.

13. The members of the petitioner-Association have undoubtedly right of business and trade as guaranteed by Article 19(1)(g) of the Constitution of India, however, they have no right to restrict anyone else to trade. If this proposition is accepted, every businessman or professional would come forward and claim that no new person should be permitted to come in his business or profession because it would wipe out his financial viability. Article 19 (1)(g) of the Constitution of India guarantees right to trade but does not permit to quell or devour a competition which is neither unethical nor against the ethos of our Constitution.

14. In the wake of above discussion and findings, the present petition is disposed of with the hope and trust that jurisdictional Deputy Commissioner while adjudicating application under Rule 144 of Petroleum Rules, 2002 of Oil Companies would take care of statutory provisions and bindings guidelines.

(JAGMOHAN BANSAL)
JUDGE

05.03.2024
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Whether speaking/reasoned	Yes/No
<i>Whether Reportable</i>	<i>Yes/No</i>