

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27/09/2002

CORAM

THE HON'BLE MR.JUSTICE E.PADMANABHAN

WRIT PETITION NO. 15788 OF 1999
and WMP.Nos:22837 of 1999

M/s.Samarias Garage
rep. by Jacob George,
NO.154, Rangarajapuram Main Road,
Kodambakkam, Chennai-24 ..Petitioner

-Vs-

Hindustan Petroleum
Corporation Ltd., rep. by
The Chief Regional Manager and
duly constituted Attorney,
No.8, Gandhi Irwin Road,
Egmore, Chennai-8 ..Respondent

Petition filed under Article 226 of The Constitution of India praying
for the issue of a writ of Mandamus, as stated therein.

For petitioner:: Mr. N.G.R.Prasad for
Mr.P.Pugazhendhi

For respondent:: Mr.K.Kumar, ACGSC

:O R D E R

The petitioner prays for the issue of a writ of mandamus or
appropriate writ, directing the respondent to permit the petitioner to run the
retail business in petrol, diesel, motor oil etc., at No.65, Kolathur Inner
Ring Road, Kolathur, Chennai by getting pump/tank from the respondent
Corporation pursuant to the Dealership Licence No.Ms.20 10 and pass such
further order as this court deems fit.

2. Heard Mr.N.G.R.Prasad, learned counsel appearing for Mr.P.
Pugazhendhi for the petitioner and Mr.K.Kumar, Additional Central Government
Standing Counsel, appearing for the respondent. With the consent of counsel
for either side, the writ petition itself is taken up for final disposal when
WMP.No.22837 of 1999 came to be listed along with WMP.Nos:28407, 28408 of 1999

and 5641, 5642 of 2000 in W.P.No.19373 of 1999.

3. According to the petitioner, the deponent of the affidavit and two other persons constituted a partnership firm by name M/s.Samarias Garage, which firm was granted dealership for retail sale of petrol, diesel, motor oil etc., at Mount Road, Teynampet by ESSO Petroleum Company which has since been taken over by M/s.Hindustan Petroleum Corporation Ltd., a Government of India Undertaking. A memorandum of agreement was entered into between the petitioner and the respondent on 1.11.1989. Two partners went abroad and settled there. As a consequence, two of the partners submitted resignation on 11.12.1995 which were reported to the respondent corporation. The remaining sole partner continued the outlet as a sole proprietor. During October 1998, the respondent requested the premises at Mount Road under the occupation of the petitioner for locating its Regional office and the respondent in lieu of delivery of possession of the said premises offered to approve a resitment of the outlet in other area by way of compensation and rehabilitation. The petitioner consented to give delivery of the premises in return of the approval of the respondent for resitment so as to enable him to continue his business to put up the outlet in other area. The petitioner made representation in writing to the effect that he is ready to surrender the existing retail outlet at Teynampet provided the existing outlet should be resited immediately at No.65, Inner Ring Road, Kolathur Mr.Kandasamy, and the land owner of the new site, be taken in as a partner.

4. The respondent took delivery of the premises at Teynampet on 23.10.1998 on the understanding and agreement that the existing outlet to be resited at the new place, that there was continuous correspondence, exchanged between the petitioner and the respondent, which would irresistibly show that there is an agreement or understanding in this behalf. The petitioner also relies upon a letter addressed by the Senior Regional Manager to Joint Chief Controller of Explosives, application submitted for no objection certificate, the letter of the respondent-Corporation dated 20th April 1989 and the representation of the petitioner dated 25.3.1994. The respondent took delivery of the Mount Road site by assuring pump at other location and the respondent required the petitioner to select a site and construct a building for retail outlet. The petitioner informed the respondent about his financial inability to purchase the site and construct the building and therefore the petitioner expressed his willingness to take a financial partner. The petitioner identified a site at Kolathur which was inspected by the Deputy Manager, Senior Regional manager, Chief Sales Manager of the Respondent-Corporation and the site was purchased at a huge cost. Detailed plan were prepared and submitted for approval of the Joint Controller of Explosives and for issuance of NOC from the Police. The above steps were taken during May, June and July, 1999. The petitioner removed the Pump and Tank to the new site and completed the works awaiting for orders to open the pump and start sales. Queries made by the respondent were answered. It is claimed that the petitioner has satisfied all the requirements for opening the retail outlet at the Kolathur site. The petitioner requested the respondent on 29.7.1999 for orders starting sales. The respondent kept silent. The respondent clandestinely removed the pump as if some repairs are being done. Nothing tangible had been done by the respondent. Placing reliance upon the

assurance of resitment, the petitioner delivered the possession of the premises at Teynampet on 23.9.1998 and it has thus altered its position to its prejudice.

5. It is alleged that assurance for resitment is only a ruse and dubious plan to get the retail outlet from the petitioner and the petitioner has been virtually cheated. The petitioner invokes the principles of promissory estoppel as well as legitimate expectation. But for the understanding and agreement, the petitioner would not have handed over the Teynampet site. It is further stated that the respondent is bound to rehabilitate the petitioner like very many others who were rehabilitated. The petitioner has no other alternative remedy and therefore he has approached this court. The respondent being instrumentality of the State has to act fairly and reasonably and cannot adopt dubious method to deny the petitioner's right to run the business on a new site. Hence the present writ petition.

6. The respondent filed a common counter in W.P.No.19373/99. This has been adopted as counter in this writ petition as well. According to the respondent, the petitioner is guilty of violation of the dealership agreement and the stipulations agreed. Clause 55 of the Dealership Agreement provides for termination of the dealership agreement in case if the dealer continues to breach any of the covenants and stipulations contained in the agreement and fail to remedy such breach within four days of the receipt of written notice of the corporation, besides the said agreement provides for number of stipulations. Very many clauses in the agreement including Clause 66 provides for Arbitration has been referred by the respondent and it is contended that no writ is maintainable as the contract is non statutory and the arbitration clause will disable the writ petitioner from invoking the writ jurisdiction of this court. The respondent also contended that there was a fall in business, that there was no intimation regarding reconstitution of the partnership firm etc.,

7. It is alleged that the petitioner has violated the dealership agreement and had chosen to transfer his interest in the dealership by issuing a power of attorney and clause 34 of the dealership agreement has been violated. There was no personal supervision and no active part was taken by two of the three partners in running the outlet. Two of the partners retired and acted in violation of the clause 44 of the dealership agreement. The partnership firm consisting of all the three stood dissolved with the retirement of Mrs.Molly Abraham, and Ms.S.Thomas. In order to improve the sales Sri Jacob George had come up with the proposal to reconstitute the dealership with an incoming financial partner as the two other partners have retired.

8. It is admitted that the possession of retail outlet was handed over on 23.10.1998, besides it is alleged that the petitioner was not in exclusive possession of the premises and his possession was that of a licensee as per clause 2 of the dealership agreement. Since partnership firm ceased to exist on the resignation/retirement of the two out of three partners, the said licence also stood cancelled. In that context the respondent issued a show cause notice on 1.9.1999 as to why the dealership agreement dated 1.11.1989

should not be terminated as per clause 55 A and 55B(ii) of the Dealership Agreement, within 45 days from the date of receipt of the notice. Mr. Jacob George replied to the show cause notice on 16.9.1999 and no reply was received from the other two partners. After considering the materials available on record, the respondent terminated the dealership agreement in terms of Clause 55A and 55B(ii) after affording personal hearing as well. The said order of termination is a well considered one and it is based on terms of the dealership agreement and it is as a result of the breach of the stipulations contained in the agreement.

9. As regards the relief prayed for in this writ petition the respondent has stated thus in the counter:-

"The order of termination is a well considered one and is based on and terms of the breach of Dealership agreement. The past conduct on record, which is within the knowledge of the petitioner in failure to perform the contractual obligations, coupled with lame excuse and failure to offer proper explanation and failure to appear before the respondent despite giving the petitioner man opportunity to appear will clearly establish the case of the respondents as regards the breach of contractual obligations committed by the petitioner which is clearly reviewable by the respondent company and the same could not be negated, with great respect, by allegedly contending that the respondent company wanted the site where the retail outlet is located, for the purposes of putting up Regional Office of the Respondent Company. The said contention of the petitioner is make believe and nothing but figment of imagination. No doubt the respondent company had a proposal for resitement of the retail outlet to Kulathur, which after a through review and was found out to be not feasible particularly for the reasons explained above. The fact on record is that the petitioner's performance of the retail outlet in the Chennai's city itself is quite obvious."

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"With regard to para 4, it is submitted that the respondent corporation had raised certain queries on 20.4.1999 to which the petitioner responded on 28.4.1999. However, the basic understanding of the respondent Corporation was that the reconstitution/resitement proposal shall be in accordance with the policy guidelines. But on reviewing the response given by the petitioner in his letter dated 28.4.1999, it was noted from the facts stated therein that such a reconstitution and resitement was not within the guidelines of the Corporation. Therefore, even though there was a proposal initially, the respondent corporation could not pursue the reconstitution/resitement since the fundamental requirements for operation of the dealership and resitement guideline were not properly adhered to by the Petitioner herein, and the incoming partners Shri V.Kandasamy. The said Shri V.Kandasamy had a kerosene dealership and the license was suspended by Civil Supplies Department. It is incorrect to state the petitioner satisfied all requirement for opening up of the retail outlet. The said statement is purely self serving."

"With regard to para 5, this respondent denies the allegations &

averments made in this paragraph and say and submit that there was no assurance by the respondent Corporation that the retail outlet dealership at Teynampet would be resited to Kolathur upon the surrender of the existing site at Teynampet. The site at Teynampet is owned by the respondent company. The dealer was not in exclusive possession of the premises and the dealer had been given only licence to enter on the site and as per clause 2 of the Dealership agreement it has been specifically agreed and declared in particular that the dealer shall not be deemed to be in exclusive possession of the premises. It is further submitted that as per the dealership agreement it has been specifically agreed and declared that the said premises and outlet shall remain the absolute property of the Corporation, and hence the petitioner cannot complain about the handing over. It is not correct to assume or presume that the said handing over/taking over was done in lieu for resitement. The allegation that it is only a ruse and devious plan to get the retail outlet is totally against the spirit of terms & conditions of dealership agreement."

xx xx xx xx xx xx

"The claim of legitimate expectation & Promissory estoppel does not apply in the given case where the grant/award of dealership is only in furtherance of social objective."

The respondent prayed for dismissal of the writ petition.

10. Mr.N.G.R.Prasad, learned counsel while taking the court through the typed set of papers and Mr.K.Kumar, learned Additional Central Government Standing Counsel while taking this court through the correspondence exchanged, advanced their respective contentions. Mr.K. Kumar further raised a preliminary objection that this writ petition is not maintainable as the arbitration clause 66 of the dealership agreement provides for arbitration and therefore the petitioner cannot invoke the jurisdiction of this court.

Mr.K.Kumar, learned counsel also relied upon few of the pronouncements of this court such as, Sitaraman Vs. Hindustan Petroleum Corporation Ltd., reported in 2000 WLR 739, Sitaraman Vs. Hindustan Petroleum Corporation Ltd., (W.A.No.2609/99, dated 1.2.2000 (D.B.)), and two other pronouncements in support of his contention that in respect of a non statutory contract, which contract provides for arbitration, no writ petition is maintainable and the parties cannot invoke the writ jurisdiction of this court under Art.226 and the parties have to work out the remedies in terms of the Arbitration and Conciliation Act.

11. Per contra, Mr.N.G.R.Prasad, learned counsel for the petitioner contended that resitement is not provided for or agreed to nor it is stipulated nor there is any provision in the earlier dealership agreement entered between the parties and therefore the arbitration clause cannot be invoked, nor the respondent could thrust upon arbitration agreement which was never contemplated, except the fresh agreement or understanding entered between the petitioner and respondent for resitement and such fresh agreement or understanding is outside the dealership agreement itself. There is force in the contention advanced by Mr.N.G.R.Prasad.

12. This court called upon Mr.K.Kumar, learned counsel for the respondent to point out the clause which would cover the claim of the petitioner for resitement and the agreement entered between the parties for resitement on the petitioner surrendering the Teynampet site on the assurance given by the respondent.

13. If there is a arbitration clause, it is fairly admitted by either side that the present writ petition will not be maintainable as has been held by various pronouncements relied upon by Mr.K.Kumar referred to above. However, on a construction of the earlier dealership agreement dated 1.11.1989, it is held that the said agreement will not cover a resitement or grant of a new dealership or a novation of the contract in the absence of written agreement providing for arbitration. The clause in the earlier agreement dated 1.11.1989 providing for arbitration cannot be pressed into service.

14. At the request of Mr.K.Kumar, this court adjourned the matter to study the stipulations in the dealership agreement dated 1.11.1989 and on the adjourned date, Mr.K.Kumar, made his submissions. Mr.K. Kumar, learned counsel is unable to point out any stipulation in the said agreement stipulating that even in respect of resitement or in respect of another contract or understanding or in the event of novation, the very stipulation contained in the dealership agreement dated 1 .1.1989 will apply. Mr.N.G.R.Prasad, learned counsel for the petitioner strongly contended that there is no such stipulation and in the absence of any written agreement providing for arbitration, the respondent cannot contend that the writ petition is not maintainable.

15. Mr.K.Kumar, learned counsel for the respondent relied upon clauses, 42,43,and 44 of the dealership agreement. The said clauses read thus:

"42. The Dealer undertakes faithfully and promptly to carry out, observe and perform all directions or rules given or made from time to time by the corporation for the proper carrying on of the dealership of the corporation. The dealer shall scrupulously observe and comply with all laws, rules regulations and requisitions of the Central/ State Government and of all authorities appointed by them or under of them including in particular the Chief Controller of Explosives, Government of India, and/or Municipal and/or any other local authority with regard to the storage and sale of such petroleum products.

43. The dealer shall indemnify and save harmless he corporation from all losses, damages, claims, suits or actions which may arise out of or result from any injury to any person or property or from violation of any statutory enactments, rules or regulations or other written orders of other laws or caused by or resulting from non observance by the dealer of the provisions of this agreement.

44. It shall be a paramount condition or the agreement that the dealer himself (if he be and individual) or both partners of the dealer firm

(if the dealer is a partnership firm consisting of two partners only) or the majority of the members of the dealer cooperative society (if the dealer is a cooperative society) as ;the case may be shall take active part in the management and runnign of the retail outlet and shall personally supervise the same an shall not under any circumstances do so through any other person, firm or body."

16. Though Mr.K.Kumar, strained himself to rely upon the above clauses, on a construction of the said stipulations this court is unable to concur with the argument advanced by Mr.K.Kumar. Mr.K.Kumar's attempt is to rewrite the above clauses in the agreement and his interpretation placed on the above clauses cannot be sustained at all. Nowhere in the dealership agreement dated 1.11.1989, there has been any stipulation or the agreement provides for resitement or for shifting or for relocation and even in such cases which were not covered or in respect of novation of the contract, the arbitration clauses also would apply.

17. This court has to agree with Mr.N.G.R.Prasad, learned counsel for the petitioner and hold that the stipulations in the earlier agreement dated 1.11.1989 has no application and consequently the arbitration clause cannot be pressed against the writ petitioner. The preliminary objection raised in this respect has to be rejected.

18. The other objection raised by Mr.K.Kuamr is that excepting a vague plea of understanding for resitement or relocation of the dealership, no concluded contract has been made out by the writ petitioner and on mere suggestinos or inferences a contract or the details of which cannot be made out and that too a mandamus by way of specific performance. It is contended that assuming that there is a contract between the parties for resettlement or assuming that the respondent had assured for grant of new dealership at Kolathur, the same cannot be enforced byway of writ petition and the very alleged terms suggested by the petitioner has been denied stoutly and it is a disputed question.

19. Mr.Prasad, learned counsel referred to the portions of the counter affidavit which were extracted above and also took the Court through the correspondence, it cannot be stated that the petitioner is successful in establishing a concluded contract, excepting the argument that there was an understanding, and therefore the petitioner has surrendered the Teynampet outlet and the respondent has gone back or that the respondent is estopped or that the respondent has acted in violation of the legitimate expectation which the petitioner as a dealer is entitled to relocate his dealership, is of little consequence, nor it could be held that the petitioner has succeeded in establishing a concluded contract.

20. Even assuming that there was a novation of the earlier contract and there is an understanding to confer new dealership or relocation of the dealership at Kolathur in the absence of sufficient materials, this court will not be justified in rendering a finding either way as it is a disputed question of fact. The alleged understanding or the concluded contract claimed

in novation of the earlier agreement dated 1.11.1989 for relocation or resettlement or new grant of dealership has to be decided only by letting in oral and documentary evidence. That apart, being a commercial contract and not being a statutory contract, the petitioner cannot maintain a writ petition by way of a mandamus as prayed for.

21. The mandamus prayed for in this writ petition is nothing but specific performance of a alleged understanding which has been disputed and denied by the respondent. Mr.Prasad, learned counsel though referred to the correspondence in the counter and sought to suggest that that there was an understanding, this court will not be justified in immediately jumping into a conclusion that there was a concluded contract or as to the terms of the said contract or as to the stipulations agreed to between the parties in the absence of any material. If at all, the petitioner could prove the same by letting in oral and documentary evidence, that has to be established by him in an appropriate suit instituted in this respect.

22. On mere assumptions or inferences this court will not be justified in inferring that there was a concluded contract of such a nature or details of stipulations or novation of the earlier contract by correspondence between the parties and that too in the present writ petition. There are very many disputed questions of fact which cannot be gone into and decided in a writ petition, apart from the fact that the petitioner cannot seek for specific performance of the alleged understanding by way of mandamus. The very alleged understanding or the stipulations or the terms or clauses itself are in dispute. In this respect, the objection raised by Mr.K.Kumar is formidable and deserve to be sustained.

23. A contract to be enforced should be clear in its terms or stipulations and it should be a concluded contract. Without expressing any finding in this respect, this court holds that it is open to the writ petitioner to go before the competent civil court and seek for appropriate relief including the relief of specific performance against the respondent, if so advised. Sitting in writ jurisdiction, this court will not be justified in deciding the disputed question of the alleged understanding or stipulations or reaching a finding as to whether there was a valid agreement or enforceable agreement between the parties for resettlement or relocation or grant of new dealership outlet at Kolathur. No contract could be inferred on the correspondence exchanged or on the basis of counter affidavit.

24. This court is unable to sustain the contention advanced by Mr. K.Kumar, learned counsel for the respondent that the respondent has to follow the policy laid down by the Government of India and therefore resettlement if any is not permissible, it would amount to violation of the regulations or guidelines prescribed in this behalf by the Government of India. In a properly instituted suit, such a contention can be gone into and it is for the petitioner to prove that a concluded contract has been entered into between the parties and that it is enforceable.

25. Such a contract cannot be readily inferred by this court as it is

a disputed question of fact, besides it is a civil dispute. In the circumstances, this court dismiss the writ petition and the connected WMPs and direct the petitioner to work out its remedies before a competent civil court by letting in oral and documentary evidence. The points raised in this writ petition are left open to be agitated in the suit that may be filed, if such a claim is enforceable, or such a suit is not barred by limitation.

26. With the above direction, the writ petition is dismissed.

Consequently, connected WMPs are also dismissed. The parties shall bear their respective costs.

Internet:Yes

Index:Yes

gkv

27-09-2002

Copy to:-

Hindustan Petroleum
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The Chief Regional Manager and
duly constituted Attorney,
No.8, Gandhi Irwin Road,
Egmore, Chennai-8

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