

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.04.2008

CORAM:

THE HONOURABLE MR.JUSTICE S.J.MUKHOPADHAYA
AND
THE HONOURABLE MR.JUSTICE R.SUBBIAH

W.A.No.344 of 2008
& M.P.No.1 of 2008

Kala Agencies,
Rep. by its Proprietrix
Mrs.R.Kalavalli,
No.2, Maran Nagar Extension,
Poonamallee,
Chennai-600 056.

vs.

1. The Deputy General Manager (LPG),
Indian Oil Corporation Ltd.,
Indian Oil Bhavan,
139, Nungambakkam High Road,
Chennai-600 034.
2. The Chief Area Manager,
Indian Oil Corporation Ltd.,
Indian Oil Bhavan,
139, Nungambakkam High Road,
Chennai-600 034.

.. Appellant

.. Respondents

Writ Appeal against the order of this Court dated 21.2.2008 in Writ Petition No.35677 of 2007. Presented under Article 226 of the constitution of India to issue a writ of certiorari calling for the records of the constitution of India to issue a writ of certiorari calling for the records relating to the letter dated 20.11.2007 of the 1st respondent and quash the same.

For appellant : Mr.P.S.Raman, Senior Counsel for
Mr.P.R.Raman

For respondents : Mr.T.R.Rajagopalan,
Senior Counsel for
M/s.Anand, Abdul
and Vinodh Associates

JUDGMENT

S.J.MUKHOPADHAYA, J

The appellant-writ petitioner (Kala Agencies) is a LPG distributor of Indane Gas. By order dated 20.11.2007, its distributorship was suspended by the Deputy General Manager (LPG), Indian Oil Corporation Limited (hereinafter referred to as 'the IOC'), Chennai. Against the said order dated 20.11.2007, it preferred Writ Petition in W.P.No.35677 of 2007 before this Court. In view of the submission made on behalf of the IOC that there is a clause in the agreement between the parties to refer any dispute to arbitration, the learned single Judge dismissed the Writ Petition on 21.2.2008, giving liberty to the appellant-writ petitioner to avail such remedy of arbitration, giving rise to the present Writ Appeal.

2. The only question to be determined in the present case is, in the facts and circumstances, while distributorship of a Gas Agency, if suspended, arbitration can be said to be an alternative remedy to refuse the relief under Article 226 of the Constitution of India.

3. The petitioner was granted distributorship of Indane Gas by the IOC, pursuant to the agreement dated 30.3.1996. As per Clause 37 of the agreement, right is conferred on the parties to refer any dispute for arbitration.

4. It appears that since November 1997, for one or other ground, such as shortage of some domestic cylinders, delay in weekly remittances, discrepancies in the operation of the distributorship, etc., the IOC imposed penalty on the petitioner. In the year 2007, during random customer contact, as certain customers could not be located in the address as mentioned in the history card and some of the customers have informed that they had not received refills as per the number of refills recorded as delivered in the history card, an explanation was called for from the petitioner by the IOC, vide letter No.CHAO:525, dated 18.10.2007 and having received reply on 29.10.2007, being not satisfied, the Deputy General Manager (LPG) suspended the petitioner's distributorship, vide impugned letter No.TNL/S/332, dated 20.11.2007. In the impugned order of suspension, past histories were shown and the petitioner was informed that the suspension of its distributorship is without prejudice to the rights of the IOC for taking further action as it deemed fit against the petitioner.

5. The petitioner, while denying the allegations, has alleged that the impugned order of suspension of the distributorship was issued without conducting any enquiry and without seeking specific explanation from it. According to the petitioner, the gas connection is issued on the strength of ration card or letter of no ration card, issued by the Civil Supplies Department of the State. The random customer contact as stated to have been made by the respondents-IOC, if so made, was behind the back of the petitioner and therefore, such report cannot be used against it. Further case of the petitioner is that there are no irregularities committed within the span of two years from the first deficiency and therefore, the impugned action is contrary to Marketing Discipline Guidelines for LPG, 2001. So far as the action alleged to have been taken by the respondents-IOC, according to the petitioner, except pointing out one penalty in the year 2007, there is no other penalty imposed within the span of two years and thus, as per the Guidelines, no action can be taken on the basis of the previous conduct.

6. The learned Senior Counsel appearing for the petitioner, while submitting that arbitration is not the remedy against the impugned order of suspension of distributorship, there being no dispute between the parties, relied on the decisions of the Supreme Court and this Court in support of his contention that Writ Petition under Article 226 of the Constitution of India, is maintainable against such order of suspension.

7. On the other hand, according to the learned Senior Counsel appearing for the respondents-IOC, the contract between the parties being not a statutory contract, the present Writ Petition is not maintainable and in view of Clause 37 of the agreement, remedy in regard to the dispute can be resolved by an arbitrator.

8. The respondents, in their affidavit filed before the learned single Judge, while highlighting certain irregularities as were committed by the petitioner since November 1997 and penalty imposed thereon, it is alleged that there are complaints received from the customers regarding improper and delay in refill delivery; non-receipt of refills; forcing the customers to take a refill from the go-down and collection of excess charges for supply of refills without bills.

9. We have heard the learned counsel appearing for the parties and noticed the rival contentions. The judgments referred to by the parties have also been noticed, apart from the Guidelines issued by the IOC for suspension and termination of distributorship of its LPG distributors.

10. The latest Guidelines as supplied by the learned Senior Counsel appearing for the respondents-IOC, were issued, vide-Circular No.SL/TD/1601, dated 3.6.2003, which reads as follows:

"SL/TD/1601

03.06.2003

State Heads

**Sub: GUIDELINES RELATED TO SUSPENSION &
TERMINATION OF DISTRIBUTORSHIPS**

The following policy guidelines have been approved by Management on Comprehensive this is in order to bring in more clarity on the extant policy on Authorities, Situation, Modalities, Time Schedule of Suspension, Extension of Suspension, Revival from Suspension, Issuance of Show Cause Notice and Termination of all types of distributorships including SC/ST distributorships, in line with the MDG 2001. These recommendations supercede all provisions on the above actions available hitherto.

Kindly take necessary action to implement the guidelines with immediate effect.

A.Authorities

The different level of approving authorities are follows:

Action	Authority (SC/ST cases)	Authority (Others)
Suspension upto 3 months initially	LPG Sales Head, HO	LPG I/G, SO
Extension of Suspension upto 6 months	ED (LPG), HO	LPG I/C, SO
Extension of Suspension beyond 6 months	ED (LPG), HO	State Head
Revival From Suspension	ED (LPG), HO	State Head
Issuance of Show Cause notice for Termination	ED (LPG), HO	LPG I/C, SO
Termination	Dir (M)	State Head

Upon approval, all the letters addressed to the distributor on Suspension, its Revival and Show Cause for Termination shall be signed by the LPG/IC of the

State Officer. However, Termination letter should only be signed by State Head. While issuing Termination letter to an old distributorship, clarification in the matter of signatory/appointing authority as discussed in earlier HO communication SL/KKH/1407 dtd.05.11.1999 must be adhered to.

B.Situations

A distributorship should be suspended only in case where continuation of operation of the distributorship could be detrimental to the interest of IOC. The following can be considered as the guidelines for taking a decision for Suspension:-

- a. Cancellation/Suspension of statutory license of a distributorship viz. Trade/Retail Selling License, Explosive Storage License, Sales Tax Registration etc. approval by Local/District/State/Central Government.
- b. Specific written order to IOC from Local/District/State Central Government to Suspend/Terminate a distributorship.
- c. Repeated equipment shortage of more than 10 cylinders in two consecutive surprise inventories.
- d. Repeated operational deficiency of same nature found during 4 consecutive inspections.
- e. Delay of more than one month in remitting Weekly Remittance payment amounting more than Rs.50,000.00 paying to IOC, to preempt the possibility of further accumulation of outstanding. This would be in addition to the existing provisions in MDG 2001.
- f. Any other act of the distributor which may be detrimental to the interest of IOC.

2. Suspension of a distributorship should primarily be in order to arrest the further deterioration of situation or to prevent possible loss to IOC and should not be used as a form of punishment to the distributor as MDG-2001 contains adequate provisions to deal with malpractice and irregularities.

3. As proposed in the Authority above, normally the period of Suspension shall not exceed 3 months and further action for Revival from/Extension of Suspension, issuance of Show Cause Notice and Termination as the case may be, should also be obtained from/decided by the competent authority within this period. Extension of the Suspension beyond 3 months and upto 6 months is to be concurred only when there are compelling circumstances restricting Revival from Suspension or further action towards Termination is necessitated and the same should be recorded in writing.

C. Modalities/Time Schedule

1. Area Office is to initiate the note for Suspension giving their details of the deficiencies/malpractice based on which it can be inferred that further continuation of the distributorship would be detrimental to the interest of IOC or the instructions from Government Authorities as listed above. The note should be signed by at least two officers from the Area Office including the Area Manager and put up to State Office.

2. Decision on the note by State office is to be given within 7 working days of receipt of the note. In case the proposal is turned down or further information/clarification is required. State Office is to communicate the same in writing to Area Office and Area Office in turn would respond to such queries within 3 working days of receipt of the advice. In case it is not possible to respond within 3 working days, then an interim reply should be sent by Area office to State Office stating by which time the response shall be sent. If such clarification/information is obtained by phone, the same should also be confirmed by State Office in writing to the Area Office.

3. In case of Suspension of SC/ST distributorships, State Office shall send the note to Head Office after concurrence of the State Head. Head Office would convey the decision on writing to the State Office within 7 working days of receipt of the note for compliance. In case the proposal is turned down or further information/clarification is required, Head Office is to communicate the same in writing to State Office and State Office in turn would respond to such

queries within 3 working days of receipt of the advice. In case it is not possible to respond within 3 working days, then an interim reply should be sent by State Office to Head Office stating by which time the response shall be sent. If such clarification/information is obtained by phone, the same should also be confirmed by Head Office in writing to the State Office.

4. However, in case of urgency e.g. order from Government Authorities directing immediate suspension when even a few days leverage is not available for processing the note and to obtain approval, telephonic approval may be taken and then the note should be put up mentioning details for such compelling circumstances leading to not facto regularization of the Suspension approval.

5. The above modalities are to be followed in case of further course of actions like Extension of/Revival from Suspension, Issuance of Show Cause Notice and Termination also, as the case may be. However, with respect to time schedule, timely action should be taken so as to obtain approval on the proposed further course of action within the period of Suspension already approved and a clear time period of 15 working days must be made available to the approving authority. Such a note should clearly justify the proposed further course of action with supporting documents/relevant details. If for some specific/compelling reason (to be recorded in writing) the approving/recommending authority fails to decide further course of action within the 15 working days period, the onus of initiating and obtaining approval for Extension of Suspension shall be with such approving or recommending authority only. However, such incidents should be bare minimum if not zero and concerned Office should take adequate effort to avoid such a situation.

6. On need base, draft letter on Suspension, Revival from Suspension, Show Cause Notice and Termination should be approved from the State law Department within 15 working days from the date of approval so that the letter is issued to the addressee within next 2 working days.

D. General Points

1. Once a distributorship is suspended, depending upon circumstances, Area Office is to take necessary action to arrange safe custody of all the IOC equipment and stationery lying at the distributorship and also arrange for alternate refill supply and allied services to the customers of the distributorship in consultation with local/district Government as per extant guidelines.

2. State Head shall review all cases pertaining to Suspension once in every quarter for speedy disposal of the same.

(S.K.Kohli)
GM (LPG-Sales)

Cc.GM I/C (LPG)
Cc.LPG In charges of State Offices
Cc.All Area Managers."

11. In the present case, the impugned order of suspension has been issued by the first respondent-IOC on 20.11.2007 and the Officer being in-charge of LPG, as per the Guidelines, the suspension order could remain in force for a period of three months initially, with further extension for a period up to six months. However, for the extension of the period of suspension beyond six months, the State Head can issue the order of suspension, but in the present case, there is nothing on the record to show that any order of extension has been issued by any authority. The order of suspension having been issued on 20.11.2007, by the time the learned single Judge passed the order (21.2.2008), more than three months having been passed, the learned single Judge ought to have decided whether the order of suspension ceased its effect in the absence of an order of extension issued by the competent authority. The matter should not have been left open for determination by an arbitrator in the light of guidelines aforesaid.

12. Admittedly, except that the petitioner had challenged the order of suspension of distributorship, dated 20.11.2007, it had not claimed any compensation from the respondents. There being no dispute in regard to the authority who issued the order of suspension, in the absence of any other dispute, there was no occasion for the learned single Judge to ask the parties to move before an arbitrator.

13. We have noticed the submission as made by the learned Senior Counsel appearing for the respondents-IOC that the

petitioner has disputed certain facts based on which the order of suspension has been issued. But that cannot be stated to be a dispute between the parties for determination by an arbitrator.

14. As per the Guidelines of IOC, the suspension of distributorship is a temporary measure as may be taken, if there are certain allegations pending enquiry and if it is found that the continuation of the distributorship in the meantime, could be detrimental to the interest of the IOC. On such suspension, the relationship between the IOC and the distributor, does not terminate till an order of termination of distributorship is issued by the competent authority. Such temporary measure (of suspension) can be taken initially for about three months, which can be extended in appropriate case for further period of six months or till the competent authority takes a final decision. As in an appropriate case, the authority may exonerate the dealer, there is no occasion for any of the parties to move before an arbitrator till any final order is passed against the distributor.

15. We, accordingly, hold that the recourse to Clause 37 of the agreement for appointment of an arbitrator cannot be taken by any party against an interim order of suspension.

16. So far as the question of maintainability of the Writ Petition is concerned, similar matter fell for consideration before the Supreme Court in the decision reported in 2003 (2) SCC 107 (Harbanslal Sahina vs. Indian Oil Corpn. Ltd). That was a case where the dealership of the appellant therein was terminated by the IOC for an irrelevant and non-existing cause. Having not granted the relief by the High Court under Article 226 of the Constitution of India on the ground that there is a remedy by way of recourse to arbitration, when the matter was moved before the Supreme Court, the Apex Court held as follows:

"7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where

there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See Whirlpool Corp. v. Registrar of Trade Marks (1998(8)SCC 1). The present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."

17. In the case of "The Indian Oil Corporation Ltd. (Marketing Division), Tamil Nadu State Office vs. Bommai Kadhirvelu, Proprietor, JBR Indane Gas Service and 3 others" (unreported decision) in Writ Appeal No.371 of 2006, disposed of on 20.6.2006, a Division Bench of this Court noticed the similar submissions as made by the IOC in the present case. That was a case in which agreement was reached between the IOC and the first respondent therein and the first respondent therein was a dealer in petroleum products. For certain grounds, the distributorship of the first respondent in that case, was terminated, which was challenged before this Court in a Writ Petition and the learned single Judge set aside the order of termination on merits. In that case, in the appeal, the IOC took a similar plea that there was an alternative remedy before an arbitrator under the relevant clause of the agreement and the Writ Petition was not maintainable. A Division Bench of this Court, by the aforesaid judgment, dated 20.6.2006, while framing the following question in paragraph 5 of the judgment, refused to grant the relief and made the following observations:

"5. The only question which arises our consideration is whether the discretionary jurisdiction under Article 226 of the Constitution of India could be refused to be exercised only on the ground of existence of an alternative remedy, which is not efficacious. It is well settled that access to justice by way of public law remedy would not be denied when a lis involves public law character and when the forum chosen by the parties would not be in a position to grant appropriate relief."

"7. In Harbanslal Sahnia and Another Vs. Indian Oil Corporation Limited and others (2003) 2 SCC 107, Lahoti, J. (as His Lordship then was), relied upon Whirlpool Corporation Vs. Registrar of Trade Marks, (1998) 8 SCC 1 observing that in an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged."

18. In view of the judgment of the Supreme Court, the judgment of this Court as referred to above and observations as we have made in the preceding paragraphs, we are of the view that the learned single Judge, instead of dismissing the case for moving before arbitrator, should have entertained the Writ Petition for its determination on merit.

19. Further, as it is not in dispute that the petitioner was not communicated with any specific instance relating to one or other incident or any customer, relating to which, vague reference has been made in the impugned order of suspension and no specific instance having been shown by the respondents and as the allegation that the random customer contact was made by the Field Officer behind the back of the petitioner, has not been denied and now more than five months have passed after the order of suspension, we are of the view that the order of suspension should not continue any further, in the absence of any order of extension issued by the competent authority.

20. We accordingly set aside the impugned order passed by the learned single Judge dated 21.2.2008 in W.P.No.35677 of 2007 and the order of suspension of distributorship, dated 20.11.2007, but give liberty to the respondents, if they so choose, to make proper enquiry and to pass appropriate orders in accordance with law, after notice and hearing the petitioner.

21. The Writ Appeal is allowed with the aforesaid observations, but there shall be no order as to costs. The Miscellaneous Petition is closed.

Cs

Sd/
Asst.Registrar

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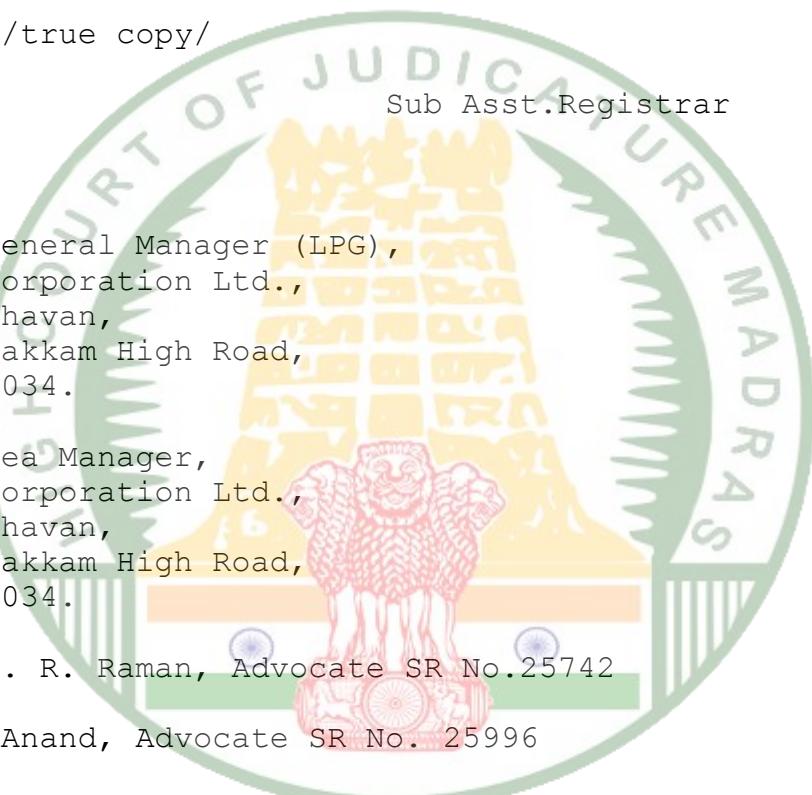
Sub Asst.Registrar

To

1. The Deputy General Manager (LPG),
Indian Oil Corporation Ltd.,
Indian Oil Bhavan,
139, Nungambakkam High Road,
Chennai-600 034.
2. The Chief Area Manager,
Indian Oil Corporation Ltd.,
Indian Oil Bhavan,
139, Nungambakkam High Road,
Chennai-600 034.

+ 1 cc to Mr. P. R. Raman, Advocate SR No.25742

+ 1 cc to M/s. Anand, Advocate SR No. 25996



Judgment
in

W.A.No.344 of 2008

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MRD (CO)
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