

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE:29-02-2008

CORAM:

THE HON'BLE MR.JUSTICE P.JYOTHIMANI

W.P.No.29561 of 2007

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M/s.D.Nagarajan & Co.
Rep. By its Managing Partner
156/7 GST Road
Villupuram 605 602. Petitioner

vs.

The Chief Regional Manager and duly
Constituted Attorney
Hindustan Petroleum Corporation Ltd.
Chennai Retail Regional Office
3rd Floor Thalamuthu Natarajan Building
No.1, Gandhi Irwin Road
Egmore, Chennai 600 008. Respondent

Writ Petition filed under Article 226 of the
Constitution of India praying for issuance of a Writ of
Certiorari calling for the records of the Notice dated 01.09.07 in
Ref: CR/RET of the respondent herein and quash the same.

For petitioner : Mr. AR.L.Sundaresan, Sr.Counsel
for Mrs.A.L.Gandhimathi

For respondent : Mr.Ravi Ananthapadmanabhan

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ORDER

The writ petition is filed challenging the show-cause
notice issued by the respondent dated 1.9.2007 by which the
petitioner is directed to show-cause as to why action including the
termination of dealership agreement cannot be taken against the
petitioner in accordance with clauses 55(I) and (K) for violation
of clauses 26 and 42 of the dealership agreement by giving 7 days'
time to the petitioner.

2. The petitioner company was appointed as a dealer for sale of petroleum products of the respondent Corporation from 1962 and an agreement was entered into subsequently on 1.6.1981. On 14.8.2007, an inspection was conducted in the retail outlet of the petitioner by M/s.SGS India Private Limited and on test of sample, it was observed that nozzle sample of both MS & HSD have failed in the Marker Test as they were found to have turned into pink. Thereafter, the nozzle samples of MS/HSD in Marker Test and the Tank Truck Retention samples and nozzle samples were collected from the outlet jointly by SGS and the respondent on the same day and sent for Joint Test. In the Joint Marker Test conducted on 17.8.2007, it was observed that MS and HSD drawn from the outlet failed in the Marker Test while the Tank Truck Retention Samples stood passed the said test. Copies of the Joint Test Reports were also handed over to the petitioner. According to the petitioner, since the nozzle samples and Tank Truck Retention Samples resulted in variations, the samples should got tested as per the Marketing Discipline Guidelines as per Three Tier Sampling system. The said method is provided in clause 2.4.4 of the Guidelines. The complaint of the petitioner is that without following the said guidelines and procedure, the impugned show-cause notice was issued by the respondent having coming to the premeditated conclusion that the petitioner has altered MS and HSD and therefore, the show-cause notice is only an empty formality.

3. The impugned show-cause notice is challenged on various grounds including that it is illegal and arbitrary. The test conducted is in violation of clauses 26 and 42 of the agreement since in the show-cause notice the respondent has observed that the nozzle sample has failed and therefore, the conclusion has already been arrived at by the respondent and the impugned notice is vague. Even though the impugned notice is worded as notice, it has finally determined the issue since the respondent has concluded that the petitioner has committed adulteration which warrants the termination of contract as per the terms of contract and it is only the premeditated intention of the respondent which would lead to its arbitrary exercise as per clause 55(I) and (K) and it is violative of Articles 14 and 19(1)(g) of the Constitution of India.

4. It is the case of the respondent in the counter affidavit that the writ petition is not maintainable since it is only a show-cause notice which is impugned in the writ petition. However, it is stated by the respondent that the petitioner cannot challenge the issue of show-cause notice after causing proved adulteration of Motor Spirit (MS) and High Speed Diesel (HSD). According to the respondent, the writ petition is not maintainable because there is an arbitration clause in the dealership agreement by which any dispute can be referred to the arbitration proceedings. It is also stated by the respondent that the petitioner has quoted wrong guidelines while the respondent has acted as per the amended MDG (Marketing Discipline Guidelines) dated 15.1.2007. It is the further case of the respondent that the petitioner's case is a proven adulteration of petrol and diesel and

there is no premeditation in issuing show-cause notice.

4(a). It is the case of the respondent that on 14.8.2007 the authorised agent of the respondent viz., M/s.SGS India Private Limited conducted the Marker Test at petitioner's retail outlet by taking nozzle samples of both MS and HSD from dispensing pump on both tanks 1 and 2. The Marker Test showed that MS and HSD turned pink. On the same day, viz., 14.8.2007 after prima facie finding by M/s.SGS India Private Limited as stated above in the Marker Test, second nozzle samples of MS and HSD together with Tank Truck Retention (TTR) sample were taken from the petitioner and handed over to the respondent's official who sent them to supply location for the Joint Marker Test. The Joint Marker Test was done on 17.8.2007 in the presence of the representatives of the petitioner, respondent and SGS India Private Limited apart from the transporter. The result was that the nozzle samples again failed and turned pink. However, the Tank Truck Retention sample has passed the test. Therefore, according to the respondent, it is a proven case of adulteration.

4(b). According to the respondent, clause 2.4.4 of the MDG is not applicable. That clause is applicable to the test done by the Mobile Lab, whereas, in the present case the Marker Test was performed by the authorised agent as per the amended guidelines dated 15.1.2007 issued by the Ministry of Petroleum and Natural Gas, Government of India. The Government of India have introduced Chapter 12 by amending the Marketing Discipline Guidelines, 2005 dated 15.1.2007. By the said amendment the Government has decided to implement the blending of marker in potential adulterations to prevent adulteration of petrol and diesel. Therefore, a special procedure was contemplated and with that view, the amendment was effected. The Marker Test can be done at any time at any retail outlet and if the test fails, TTR sample retained by the dealer will also be tested in the presence of marker. If the Marker Test of TTR sample fails, then no action will be taken against the dealer since the responsibility will become that of the carrier. If the Marker Test of TTR samples passes, action will be taken against the retail outlet dealer since it is a proven case of adulteration with kerosene.

4(c). According to the respondent, fresh sample test will not apply. It is the case of the respondent that the Tank Truck Retention sample was very much in possession of the petitioner throughout. Therefore, there is no question of fresh sample test. Inasmuch as in TTR sample there was no adulteration, no such fresh test is warranted. It is also the case of the respondent that under some of the clauses of the Guidelines, the respondent can suspend the supply of products immediately and also take penal action. Therefore, according to the respondent, the impugned show-cause notice is perfectly in order and not with any premeditated intention.

5. Mr.AR.L.Sundaresan, learned senior counsel appearing for the petitioner would submit at the first instance, even though the impugned notice is captioned as show-cause notice, a reading of the entire contents shows that the same has been issued with predetermined notion and therefore, it cannot be stated that the writ petition is not maintainable against show-cause notice on the factual situation here. He would rely upon the judgement in Siemens Ltd. v. State of Maharashtra (2007 (1) CTC 844). He would also rely upon an unreported judgement of the Hon'ble First Bench of this Court in W.A. No.731 of 2006 to show that when the arbitration is not effective, the Court can always interfere under Article 226 of the Constitution of India. According to him, as it is seen in the impugned notice itself, there is a gross error regarding the method of sampling and by committing gross mistake, the respondent has come to a conclusion as if the petitioner is a proven adulterator. In such circumstances, the writ petition is the only effective remedy. He would also rely upon the judgements in Harbanslal Sahnia v. Indian Oil Corporation Ltd. (2003 (1) CTC 189) and State of Jharkhand v. Ambay Cements (2004(5) CTC 515).

5(a). According to him, the impugned notice suffers for not following the principles of natural justice and it is in total violation of the Marketing Discipline Guidelines issued by the respondent itself. He would insist that as per clause 2.4.4 of the said guidelines which have come into effect from August 1, 2005, the procedure of drawal of samples by mobile laboratories has been mentioned which also speak about the clinical test of nozzle samples of MS and HSD taken from all tanks and if the sample fails, thereafter, the mobile lab will take six one-litre samples in respect of MS from each of the concerned tanks where the product failed; two to be given to the dealer; two for the concerned oil company for retention; and the last two to be given to the concerned oil company for testing and in respect of HSD, three one-litre samples are taken from each of the concerned tanks where the product failed; one to be given to the dealer; one for the concerned oil company for retention and the other to oil company concerned for testing and thereafter the samples are sent to laboratory within 10 days of collection and appropriate action will be taken based on the test results.

5(b). According to the learned senior counsel, when that is the procedure, which has to be followed scrupulously, the respondent has resorted to marker test by a third party, viz., M/s.SGS India Private Limited which has no connection with the respondent at all and there is no possibility for the respondent to delegate its powers to such an agency under the law and therefore, the entire procedure is not in accordance with the guidelines issued by the respondent. He would submit that even if the subsequent amendment is applied, SGS India Private Limited which is not connected with the respondent, has no right whatsoever to take any sample and therefore, the process is totally unsustainable. He would also submit that such a delegation which is not permissible is bad in law. He would rely upon the judgement

reported in State of M.P. v. Bhupendra Singh (2000 (1) CTC 554) to substantiate his contention that the delegation is not valid and under section 3 of the Essential Commodities Act, the Control Order passed by the Central Government has to specifically confer authority on the concerned officer and inasmuch as SGS India Private Limited is not an authority contemplated under the law as well as the guidelines issued by the Government of India, such samples taken by SGS India Private Limited cannot be held to be valid.

5(c). He would also submit that when law prescribes a particular method of action, the same has to be followed, by relying upon the judgement of the Supreme Court in State of Jharkhand v. Ambay Cements (2004(5) CTC 515). He would also submit that such executive instructions given by the Government by way of guidelines must be in conformity with the Rules, by placing reliance on the judgement of the Supreme Court in Union of India v. Central Electrical & Mechanical Engineering Service (CE & MES) Group 'A' (Direct Recruits) Assn. (2007 (8) SCJ 269).

6. On the other hand, Mr.Ravi Anantha Padmanabhan, learned counsel appearing for the respondent would submit that the judgement relied upon by the learned senior counsel for the petitioner in Harbanslal Sahnia v. Indian Oil Corporation Ltd. (2003 (1) CTC 189) relates to an order of termination. He would also submit that the judgement in Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1] based on which the judgement in Harbanslal Sahnia v. Indian Oil Corporation Ltd. (2003 (1) CTC 189) was given, was a case without jurisdiction and therefore, the judgements are not applicable to the case on hand.

6(a). He would also submit that by the impugned show-cause notice, the respondent was only prima facie satisfied that the petitioner is an adulterator and it does not mean as if a decision has been arrived at. He would also submit that the judgement relied upon in Siemens Ltd. v. State of Maharashtra (2007 (1) CTC 844) has no application to the present case. His contention is that the contract entered into between the petitioner and the respondent is non-statutory in nature and therefore, the arbitration clause which is available under the contract has to be enforced and the writ petition is not maintainable. His submission is that the marker sample was taken only based on the amendment which was introduced to the Marketing Discipline Guidelines which came into effect from 12.1.2007, and it is, as per the amendment effected, the marker test has been introduced and three sample systems which are applicable to mobile laboratories have been given up.

6(b). According to the learned counsel for the respondent, SGS India Private Limited is a business partner of the respondent and it is the supplier of markers, which is a chemical, throughout the world, specifically approved by the Government of India and the duty of SGS India Private Limited is to make inspection since

large number of petrol bunks are in operations, the respondent is not in a position to carry out inspection by itself. His further submission is that whenever SGS India Private Limited takes a preliminary inspection and in the marker test, if samples are found to be positive, then, the procedure of taking samples and inspecting in the presence of concerned dealer will be followed on the same day.

6(c). He would submit that as per clause 42 of the Dealership Agreement, all actions taken by the respondent are binding upon the petitioner. He would also rely upon clause 55(H) and (I) to substantiate his contention. His contention is that it is only a show-cause notice and the writ petition is not maintainable. His submission is that the decision of SGS India Private Limited is not a final conclusion and it is only a basis for further test that can be made by giving samples to the dealer and therefore, the dealer's interest is protected. In the present case, the first marker test was done by the SGS India Private Limited on 14.8.2007 and immediately on finding that the marker test was positive, samples were taken and the same were given to the petitioner/dealer also and other samples were sent for test and the test was done in the presence of representatives of the petitioner as well as the carrier apart from the respondent and SGS India Private Limited. He would heavily rely upon the amendment introduced to the guidelines which are statutory in nature and submit that the respondent has only acted as per the amendment since as per the contract entered into between the petitioner and the respondent, the petitioner is bound by any other amendment which are introduced subsequently to the Marketing Discipline Guidelines.

7. I have heard the learned senior counsel for the petitioner and the learned counsel for the respondent and perused the entire records.

8. On the basis of the contentions raised by both the counsel, it is necessary to decide as to whether the writ petition is maintainable, at this stage on the grounds; (i) the impugned notice is only a show-cause notice directing the petitioner to show-cause as to why termination of dealership should not be effected as per the terms of agreement; and (ii) when there is an arbitration clause in the agreement, how the writ petition can be entertained.

9. As per the dealership agreement between the petitioner and the respondent dated 1.6.1981, the petitioner gets the right of dealership to sell the products of the respondent. Clause 37 of the agreement enables the respondent Corporation or any of its duly authorised representatives to enter and inspect the petitioner premises at any time. The said clause 37 reads as under:

"37. The Corporation will be entitled at all times to enter into and inspect the management of the retail

outlet by the said dealer in all respects and the dealer shall be bound to render all assistance and give all information to the corporation and its duly authorised representatives in that behalf."

In clause 42 of the agreement, the petitioner being the dealer has undertaken to follow and carry out all directions or rules given or made from time to time by the Corporation. The said clause is as follows:

"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 either 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."

Under clause 55(H), (I) and (K), the respondent is given liberty to terminate the agreement, if the petitioner being the dealer does not adhere to the instructions from time to time issued by the Corporation or where the petitioner contaminates or tampers with the quality of any of the products supplied by the Corporation. The said clauses are as follows:

"55. Notwithstanding anything to the contrary herein contained, the Corporation shall be at liberty to terminate this agreement forthwith upon or at any time after the happening of any of the following, namely:

(A) to (G) xxx

(H) If the dealer does not adhere to the instructions issued from time to time by the Corporation in connection with safe practices to be followed by him in the supply/storage of the Corporation's products or otherwise.

(I) If the dealer shall contaminate or tamper with the quality of any of the products, supplied by the Corporation.

(J) xxx

(K) If the dealer shall either by himself or by his servants or agents commit or suffer to be committed any act which, in the opinion of the District Manager of the Corporation for the time being in Madras, whose decision shall be final, is prejudicial to the interest or good

name of the Corporation or its products the District Manager shall not be bound to give reason for such decision."

10. The clause 66 of the agreement provides for arbitration which is as follows:

"66. Any dispute or difference of any nature whatsoever or regarding any right, liability, act, omission or account of any of the parties hereto arising out of or in relation to this agreement shall be referred to the sole arbitration of the Managing Director of the Corporation or of some officer of the Corporation who may be nominated by the Managing Director. The dealer will not be entitled to raise any objection to any such arbitrator on the ground that the arbitrator is an officer of the Corporation or that he has to deal with the matters to which the contract relates or that in the course of his duties as an officer of the Corporation he had expressed views on all or any of the matters in dispute or difference. In the event of the arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason the Managing Director as aforesaid at the time of such transfer, vacation of officer or inability to act, shall designate another person to act as arbitrator in accordance with the terms of the agreement. Such person shall be entitled to proceed with the reference from the point at which it was left by his predecessor. It is also a term of this contract that no person other than the Managing Director or a person nominated by such Managing Director of the Corporation as aforesaid shall act as arbitrator hereunder. The award of the arbitrator so appointed shall be final, conclusive and binding on all parties to the agreement subject to the provisions of the Arbitration Act, 1940 or any statutory modification of or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause."

11. By virtue of clause 42 of the agreement, there is no doubt that the petitioner being a dealer under the respondent is bound by the Marketing Discipline Guidelines (MDG) issued by the Government of India by a Gazette Notification.

12. For dealing with the question of maintainability of the writ petition against show-cause notice, it is necessary to consider the terms of the impugned notice wherein the marker test conducted on 14.8.2007 by M/s.SGS India Private Limited and thereafter the joint marker test conducted on 17.8.2007 were referred to. Before referring to various clauses of the agreement, in the impugned notice it is stated,

"Please note that failure of Nozzle Samples of MS/HSD in the Market Test tantamount to Adulteration of MS/HSD which is violative of Clause Nos.26, 42 and liable for auction under clause Nos.55(I) & 55(K) of the subject Agreement dated 01.06.1981".

13. In the counter affidavit filed by the respondent in September, 2007, the respondent has clearly stated that the petitioner has committed proved adulteration of Motor Spirit and High Speed Diesel in para-2 as follows:

"After causing proved adulteration of Motor Spirit (MS) and High Speed Diesel (HSD), the petitioner challenges the issuance of our show cause notice dated 1.9.2007 without even giving a reply to it."

Certainly, the said clause in the impugned notice along with the above contents of the counter affidavit supports the case of the petitioner that there is a predetermination by the respondent even at the time when the show-cause notice is issued on the basis of a test conducted by the respondent said to have been done by its agent M/s.SGS India Private Limited.

14. In a similar circumstance, in Seimens Ltd. v. State of Maharashtra (2007 (1) CTC 844) the Supreme Court, while dealing with a case of show-cause notice wherein the authority has directed to make payment of cess with interest in respect of alleged supply of goods from the appellant's factory to parties in Navi Mumbai, in the light of the contents in the counter affidavit a reading of which shows that the respondent has made up its mind while issuing the show-cause notice, held that the writ petition is maintainable by referring to various judgements, in the following words:

"10. Although ordinarily a Writ Court may not exercise its discretionary jurisdiction in entertaining a Writ petition questioning a notice to show cause unless the same inter alia appears to have been without jurisdiction as has been held by this Court in some decisions including State of Uttar Pradesh v. Brahm Datt Sharma and Anr., AIR 1987 SC 943, Special Director and Another v. Mohd. Ghulam Ghouse and Another, 2004 (3) SCC 440 and Union of India and another v. Kunisetty Satyanarayana, 2006 (12) SCALE 262, but the question herein has to be considered from a different angle, viz., when a notice is issued with pre-meditation, a Writ petition would be maintainable. In such an event, even if the Court directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose. See K.I.Shephard and Others v. Union of India and Others, 1987 (4) SCC 431: AIR 1988 SC 686. It is evident in the instant case that the respondent has clearly made up its mind. It explicitly said so both in the counter affidavit as also in its purported show cause.

11. The said principle has been followed by this Court in V.C.Banaras Hindu University and Ors. v. Shrikant, 2006 (6) SCALE 66, stating:

'The Vice Chancellor appears to have made up his mind to impose the punishment of dismissal on the respondent herein. A post decisional hearing given by the High Court was illusory in this case'.

In K.I.Shephard & Ors., etc. etc. v. Union of India & Ors. AIR 1988 SC 686, this Court held:

'It is common experience that once a decision has been taken, there is tendency to uphold it and a representation may not really yield any fruitful purpose.'

12. See also Shri Shekhar Ghosh v. Union of India & Anr. 2007 (1) SCC 331 and Rajesh Kumar & Ors. v. D.C.L.T. & Or. 2006 (11) SCALE 409.

13. A bare perusal of the order impugned before the High Court as also the statements made before us in the counter affidavit filed by the respondents, we are satisfied that the statutory authority has already applied its mind and has formed an opinion as regards the liability or otherwise of the appellant. If in passing the order the respondent has already determined the liability of the appellant and the only question which remains for its consideration is quantification thereof, the same does not remain in the realm of a show cause notice. The writ petition, in our opinion, was maintainable."

15. While considering the question whether the alternative remedy available under the contract can exclude the jurisdiction of the High Court under Article 226 of the Constitution of India, the Supreme Court held that in cases where a party seeks enforcement of fundamental rights or there is a failure of the principles of natural justice or when the orders or proceedings are wholly without jurisdiction or where the vires of the Act is challenged, there is no need to drive the party to the arbitration proceedings. That was the decision of the Supreme Court in Harbanslal Sahnia v. Indian Oil Corporation Ltd. (2003 (1) CTC 189). Even though it was a case relating to termination of contract and not relating to show-cause notice, it is relevant to point out that the Supreme Court in the said case has held, by following the judgement in Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and others, 1998 (8) SCC 1, that such arbitration clause cannot exclude the writ jurisdiction on the basis that availing of alternative remedy is a rule of discretion and not one of compulsion. The Supreme Court has held as follows:

"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, 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 and is challenged. See Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and others, 1998 (8) SCC 1. The present case attracts applicability of first two contingencies. Moreover, as noted the petitioner's 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."

16. That was also followed by the Hon'ble First Bench of this Court in W.A.No.731 of 2006 by judgement dated 20.6.2006 stating that in cases where the lis involved is of public law character, public law remedy would not be denied. The relevant portion of the judgement is as follows:

"The only question which arises for 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."

17. In the present case, looking into the issue involved as a whole, the questions that arise for consideration are, whether the Marketing Discipline Guidelines issued by the Government of India in the year 2005 regarding the procedure to be followed for identifying the adulteration have to be applied or the amendment sought to have been made by the Government with effect from 12.1.2007 to the said guidelines by introducing Marker Test has to be applied; whether the procedure prescribed in the said guidelines has been followed by the respondent which is a public authority; it cannot be said that the writ petition is not maintainable either because the impugned notice is a show-cause notice or because an alternative remedy of arbitration is available under the agreement.

18. Having decided the question of maintainability of the writ petition in favour of the petitioner, the next issue to be decided is regarding the guidelines to be followed, to find out whether the procedure has been properly followed while issuing the show-cause notice. Even though the learned senior counsel for the petitioner, Mr.A.R.L.Sundaresan, has relied upon the Marketing Discipline Guidelines issued by the respondent which came into effect from August, 2005 to substantiate his contention that the procedure followed by the respondent in taking nozzle samples is against clause 2.4.4, Mr.Ravi Anantha Padmanabhan, learned counsel for the respondent submitted that there are statutory orders framed by the Government of India in exercise of its powers conferred under section 3 of the Essential Commodities Act, 1955 and in pursuance of such statutory orders, it may not be necessary to refer to the said guidelines and the above said clause is applicable only to mobile laboratories.

19. It is seen that the Government of India in supersession of Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 1998, has passed the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2005, by the exercise of its powers under section 3 of the Essential Commodities Act, 1955, which has come into effect from 19.12.2005. The said statutory order stood amended by Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Amendment Order, 2007. It is by the said amendment which came into existence from 12.1.2007, the abovesaid original order, 2005 stood modified relating to certain aspects introducing marker system by including clause (fl) in section 2 and also introducing a new term, 'test kit' by including clause (ml). That apart, in clause 8 of the Order, 2005 before sub-clause (1), a new clause (1A) was inserted. The term 'adulteration' is defined in clause 2(a) as per Order, as amended by the Amendment Order, 2007, as follows:

" 'adulteration' means the presence of marker in Motor Spirit and High Speed diesel and/or the introduction of any foreign substance into motor spirit or high speed diesel illegally or unauthorisedly with the result that the product does not conform to the requirements of the bureau of Indian Standards specifications number IS2796 and IS1460 for motor spirit and high speed diesel respectively or any other requirement notified by the Central Government from time to time."

Under clause 2(b), 'authorised officer' is defined to mean an officer authorised under the provisions of clause 7. The term, 'authorised officer' as per clause-7, prescribed in Order,2005 has not been changed by the Amendment Order. At this juncture, it is relevant to incorporate clause-7 which is as follows:

"7.Power of search and seizure -

(1) Any Gazetted Officer of the Central Government or a State Government or any police officer not below the rank of Deputy Superintendent of Police duly authorised, by general or special order of the Central Government or a State Government, as the case may be, or any officer of the oil company, not below the rank of sales officer, may, with a view to securing compliance with the provisions of this Order, or for the purpose of satisfying himself that this Order or any order made thereunder has been complied with or there is reason to believe that all or any of the provisions of this Order

have been and are being or are about to be contravened."

Therefore, it is clear that 'authorised officer' explained under clause 2(b) means any Gazetted Officer of the Government of India or the State Government or any police officer not below the rank of Deputy Superintendent of Police duly authorised by general or special order of the Central or State Government as the case may be, or any officer of the oil company not below the rank of sales officer.

20. The term, 'high speed diesel' defined in clause 2(e) of Order, 2005, as amended by the Amendment Order, 2007 means "any hydrocarbon oil, excluding mineral colza oil and turpentine substitute, which meets the requirements of Bureau of Indian Standards specification number IS1460 and also does not contain any traces of marker." After clause 2(f) which defines 'malpractices' a new clause, viz., clause (f1) is introduced defining 'marker' to mean a chemical substance approved by the Central Government from time to time for blending in kerosene and other petroleum products with the objective of preventing their diversion or adulteration of motor spirit or high speed diesel. While defining 'motor spirit' in clause 2(g) of Order 2005 as amended in Amendment Order, 2007, it is stated that it means any hydrocarbon oil, excluding crude mineral oil, which meets the requirements of Bureau of Indian Standards specification number IS2796 and also does not contain any traces of marker.

21. After the definition of 'stock variation' in clause 2 (m) a new clause (m1) had been inserted to define the term 'test kit' which is as follows:

" 'test kit' means a set of equipment used to determine the presence of marker in kerosene, motor spirit, high speed diesel & other petroleum products."

Likewise, in clause 2(t) the term 'sale of off specification product' is defined to mean sale of motor spirit or high speed diesel by dealer of having traces of marker and/or quality not conforming to Bureau of Indian Standards specifications number

IS2796 and IS1460 for motor spirit and high speed diesel respectively.

22. The clause 8 which stood as 'sampling of product' in Order,2005 was changed as 'sampling of product and testing' in the Amendment Order, 2007. Further, under clause 8, before sub-clause (1) a new clause (1A) was inserted as follows:

"(1A) The authorised officer under clause 7 shall draw the sample from the tank, nozzle, vehicle or receptacle, as the case may be, in the test kit and test the product with the aid of test kit, to check whether the product contains any traces of marker. If such traces are found in the product, the authorised officer

shall record the same in triplicate which shall be jointly signed by him and the dealer or transporter or concerned person or his representative, as the case may be, and given one copy of such recording to the dealer or transporter or concerned person or his representative and another copy to the oil company concerned, as the case may be".

Likewise, in clause 8(1), for the words 'the authorised', the words, 'where the product does not contain marker under sub clause (1A), the 'authorised officer' are inserted.

(The underlined portions are effected by the Amendment Order,2007).

23. Therefore, the sampling of product and testing must be done by the authorised officer. As I have enumerated above, under Clause 7 even by the Amendment Order,2007, the term "authorised officer" remains unamended, so as to include any other agent who may be nominated by the Central Government. In the present case, it is the admitted case of the respondent, as it is seen in the impugned order itself that M/s.SGS India Private Ltd., has conducted an audit and tested the nozzle samples of MS and HSD on 14.08.2007 before the nozzle samples were taken for joint marker tests. It cannot be the case of the respondent that the said M/s.SGS India Private Ltd., is an "authorised officer" under the above said Order,2005 as amended by the Amendment Order,2007.

24. After Amendment Order,2007, Clause 8(1A) of the Order makes it very clear that authorised officer under Clause 7 alone shall draw sample from tank nozzle in the test kit and test the product with the aid of test kit and check whether the product contains any traces of marker. Inasmuch as M/s.SGS India Private Ltd., cannot be termed as "authorised officer" as per clause 2(b) of the Order,2005 as amended by the Amendment Order 2007, the marker test stated to have been done by the said M/s.SGS India Private Ltd., on 14.08.2007 in the retail outlet of the petitioner cannot be said to be an authorised one, by any stretch of

25. The contention of the learned counsel for the respondent that M/s.SGS India Private Ltd., is a renowned company in the manufacture of marker and chemicals and it has been engaged by the Government of India throughout, is not a ground for the purpose of validating an invalid act done by a person who is not authorised under the above said statutory orders.

26. In my view, this is sufficient to hold that basically the test done by an outsider cannot be a ground for the purpose of issuing the impugned show-cause notice. If the contention of the respondent that the respondent being the Oil Company, has delegated its powers to M/s.SGS India Private Ltd., for the purpose of conducting the marker test, in the absence of any power to the respondent to delegate and applying the principle of "Delegatus non

potest delegare", such delegation is not permissible in law. In this regard, it is relevant to refer to the judgement of the Supreme Court in State of M.P. v. Bhupendra Singh (2000(1) CTC 554). In that case, the Central Government which is the authority for granting consent under Section 7 the Explosive Substances Act, 1908 has delegated its powers to the District Magistrate and the State Government has further delegated the function of District Magistrate to Additional District Magistrate and in such circumstances, it was held that the State Government is not competent to further delegate to the Additional District Magistrate a power of the Central Government which the Central Government has delegated to the District Magistrate. The operative portion of the judgement is as follows:

"5. It is difficult to accept the submission. The power of granting consent under section 7 of the said Act rests with the Central Government. The Central Government has delegated it to the District Magistrate. It is, in our view, not competent for the State Government to further delegate to the Additional District Magistrate a power of the Central Government which the Central Government has delegated to the District Magistrate.

6. The decision of this Court in Hari Chand Aggarwal v. Batala Engg.Co.Ltd., AIR 1969 SC 483: 1969 Cri LJ 803 is also of some relevance. This Court said that where, by virtue of a notification under section 20 of the Defence of India Act, the Central Government had delegated its powers under section 29 to a District Magistrate, an Additional District Magistrate was not competent to requisition property under section 29 simply because he had been invested with all the powers of a District Magistrate under Section 10(2)."

27. Therefore, even though I am not in agreement with the learned senior counsel for the petitioner that there is violation of Marketing Discipline Guidelines issued by the respondent, on the

factual and legal aspects which I have narrated above, there is absolutely no difficulty to come to the conclusion that the impugned show cause notice which proceeds on the basis of marker tests conducted by M/s.SGS India Private Ltd., who is not authorised under the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order can never stand to the test of law.

In view of the same, the writ petition stands allowed, consequently, the impugned show cause notice is set aside. However, it does not prevent the respondent to take any appropriate action in the manner known to law. No costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

kh

To

The Chief Regional Manager and duly
Constituted Attorney
Hindustan Petroleum Corporation Ltd.
Chennai Retail Regional Office
3rd Floor Thalamuthu Natarajan Building
No.1, Gandhi Irwin Road
Egmore, Chennai 600 008.

+ one cc to Ms. AL Ganthimathi, Advocate, SR.11534

+ one cc to Mr. K. Ravi Anantha Padmanaban, Advocate, SR.11120

VSV(CO)
RP 06.03.08

W.P.No.29561 of 2007

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