IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL NO. 473 of 2010

In SPECIAL CIVIL APPLICATION NO. 9548 of 2009
With
CIVIL APPLICATION NO. 2787 of 2010
With
LETTERS PATENT APPEAL NO. 474 of 2010
In
SPECIAL CIVIL APPLICATION NO. 9548 of 2009
With
CIVIL APPLICATION NO. 2806 of 2010
In
LETTERS PATENT APPEAL NO. 474 of 2010

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI

and
HONOURABLE MR.JUSTICE A.G.URAIZEE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BHARAT PETROLEUM CORPORATION LIMITED....Appellant(s)

Versus

MEGHAL R THAKKAR , PROPRIETOR OF SHREE VASUDEV TRANSPORT & 3....Respondent(s)

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Appearance In LPA No. 473 of 2010:

MR PC KAVINA, SENIOR COUNSEL WITH MR BIJAL CHHATRAPATI & MR AM HAWA, ADVOCATES FOR SINGHI & CO for the Appellant(s) No. 1

MR MIHIR THAKORE, SENIOR COUNSEL WITH MR JAL SOLI UNWALA, ADVOCATE for the Respondent(s) No. 1

MR KK PUJARA, ASST GOVT. PLEADER for Respondent No. 2

MR IH SAIYED, ASST GOVT. PLEADER for Respondent No. 3

Appearance In LPA No. 474 of 2010:

MR MIHIR THAKORE, SENIOR COUNSEL WITH MR JAL SOLI UNWALA, ADVOCATE for the Appellant(s) No. 1

MR KK PUJARA, ASST GOVT. PLEADER for Respondent No. 1

MR PC KAVINA, SENIOR COUNSEL WITH MR BIJAL CHHATRAPATI & MR AM HAWA, ADVOCATES FOR SINGHI & CO for the Respondent(s) No. 2

MR IH SAIYED, ASST GOVT. PLEADER for Respondent No. 3

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CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**
and
HONOURABLE MR.JUSTICE A.G.URAIZEE

Date : 31/03/2014

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. We have heard Mr. P.C Kavina, learned Senior Counsel appearing with Mr. Bijal Chhatrapati & Mr. A.M. Hawa, learned advocates for Bharat Petroleum Corporation Ltd. - original respondent no. 2, Mr. Mihir Thakore, learned Senior Counsel appearing with Mr. Jal Soli Unwala, learned advocate

for Shree Vasudev Transport - original petitioner, Mr. I.H. Saiyed, learned advocate appearing for Union of India.

2. Letters Patent Appeal No. 473 of 2010 has been filed by Bharat Petroleum Corporation Ltd. - original respondent no. 2 (hereinafter referred to as 'the Corporation') whereas Letters Patent Appeal No. 474 of 2010 has been filed by Mr. Meghal Thakkar, Proprietor of Shree Vasudev Transport – original petitioner (hereinafter referred to as 'the original petitioner'). These intra-court Letters Patent Appeals under Clause 15 of the Letters Patent have been filed assailing the judgement and order dated 03/04.02.2010 passed by the learned Single Judge in Special Civil Application No. 9548 of 2009 whereby the learned Single Judge allowed the writ petition and directed the Corporation to reconsider the matter and take appropriate decision in light of the observations made therein above and in accordance with law within a period of four weeks from the receipt of the order passed in the writ petition.

3. The original petitioner had preferred writ petition before the learned Single Judge challenging the order dated 04.09.2009 in connection with the show cause notices dated 01.08.2006, 07.12.2006 & 24.05.2007 pursuant to which the Corporation terminated the licence agreement with immediate effect and further restrained the original petitioner from entering upon or making any attempt to enter the retail outlet.

4. The facts of the case, in a nutshell, as pleaded before the learned Single Judge are as follows:

4.1 The original petitioner – Shri Meghal Thakkar who is the Proprietor of Shree Vasudev Transport purchased land being Plot No.4/A, situated at Akota, Taluka Vadodara from one Jasumatiben Chandrakant Shah as well as Jayshree Dilip Sheth on 27.11.2003. He was granted licence on 20.11.2005 by the Corporation and based on the said licence, an agreement was entered into pursuant to which the original petitioner was doing business of distribution of petrol and diesel and other items.

4.2 On 26.05.2006, sample was drawn from petrol pump (popularly known as "retail outlet") run by the original petitioner and sent to the laboratory for testing. The said sample did not meet with the requisite standard of RON (Research Octane Number) for minimum requirement of 88 and in the report dated 10.07.2006, it was found as 83.0. The Corporation, therefore, issued show-cause notice for taking action. It also appears that thereafter, on the basis of the request made by the original petitioner, another sample which was retained by the Territory Manager was sent for laboratory testing and as per the report dated 01.11.2006, it was found that the RON found was that of 87 as against the minimum requirement of 88. Based on the report, an explanation was called for from the original petitioner by the Corporation. Thereafter, third part of sample which was retained by the original petitioner was sent to the laboratory for testing and vide report dated 25.04.2007, the said RON was found to be 87.6 as against the minimum requirement of 88.

4.3 The Corporation also called for the explanation of the

original petitioner based on the third report. The original petitioner submitted explanation in response to the show cause notices as well as the further correspondences entered into by the Corporation based on the subsequent reports. Ultimately, the respondent Corporation vide decision dated 04.09.2009, communicated to the original petitioner for termination of the contract entered into as per the agreement with immediate effect. It is under these circumstances, that the original petitioner approached the learned Single Judge of this Court by way of writ petition, order of which is impugned in the present appeal.

5. Mr. P.C. Kavina, learned Senior Counsel appearing for the Corporation submitted that the learned Single Judge ought to have appreciated that respondent no. 1 had acted against the terms and conditions of the dealership agreement and therefore the dealership was liable to be terminated. He submitted that the contract itself is terminable and under the provisions of the Specific Relief Act it is not enforceable and that the only remedy for termination would be to sue for damages.

5.1 Mr. Kavina submitted that the learned Single Judge failed to appreciate that it is now well settled law that in exercising writ jurisdiction in contractual matters, this Court should normally desist from giving any findings in the matter which involve highly technical issues and complicated questions of fact and instead ought to have relegated the original petitioner to avail remedy by way of civil proceedings.

5.2 Mr. Kavina contended that when there is a contractual

dispute with a public law element and a party chooses the public law remedy by way of a writ petition instead of a private law remedy of a suit, he could not have got a full fledged adjudication of his contractual rights but only a judicial review of the administrative action.

5.3 Mr. Kavina contended that the order was passed by the Corporation after considering the reply filed on 15.06.2007 pursuant to the notice issued by the Corporation. He has taken this Court to the irregularities referred in the order dated 04.09.2009 and submitted that on the basis of the irregularity found the Corporation arrived at the conclusion that the appropriate penalty would be to terminate the license agreement. The irregularity as mentioned in the order dated 04.09.2009 is reproduced hereunder:

> "
>
> **(III) <u>IRREGULARITIES</u>**
>
> During routine inspection of Retail Outlet on 26th May 2006 by our PFS Mobile Lab in the presence of your available representative one Shri Bharat the sample of Motor Spirit was drawn which upon testing has failed to meet specification in terms of RON. The test result of the MS sample with respect to RON is also not comparable with the tank lorry retention sample and is beyond permissible limits. A copy of test report was enclosed."

5.4 Mr. Kavina has also drawn the attention of this Court to the impugned judgement and order passed by the learned Single Judge, more particularly paragraphs 7 to 10, 22 & 23 and submitted that the learned Single Judge has erred in quashing and setting aside the termination order when all the three samples did not match with the requirement. In support

of his submissions, Mr. Kavina has relied upon a decision of the Apex Court in the case of **Kisan Sahkari Chini Mills Ltd. & Others vs. Vardan Linkers and Others reported in AIR 2008 SC 2160**, more particularly para 17 which reads as under :

> "17. If the dispute was considered as purely one relating to existence of an agreement, that is, whether there was a concluded contract and whether the cancellation and consequential non-supply amounted to breach of such contract, the first respondent ought to have approached the Civil Court for damages. On the other hand, when a writ petition was filed in regard to the said contractual dispute, the issue was whether the Secretary (Sugar), had acted arbitrarily or unreasonably, in staying the operation of the allotment letter dated 26.3.2004 or subsequently cancelling the allotment letter. In a civil suit, the emphasis is on the contractual right. In a writ petition, the focus shifts to the exercise of power by the authority, that is whether the order of cancellation dated 24.4.2004 passed by the Secretary (Sugar), was arbitrary or unreasonable. The issue whether there was a concluded contract and breach thereof becomes secondary. In exercising writ jurisdiction, if the High Court found that the exercise of power in passing an order of cancellation was not arbitrary and unreasonable, it should normally desist from giving any finding on disputed or complicated questions of fact as to whether there was a contract, and relegate the petitioner to the remedy of a civil suit. Even in cases where the High Court finds that there is a valid contract, if the impugned administrative action by which the contract is cancelled, is not unreasonable or arbitrary, it should still refuse to interfere with the same, leaving the aggrieved party to work out his remedies in a Civil Court. In other words, when there is a contractual dispute with a public law element, and a party chooses the public law remedy by way of a writ petition instead of a private law remedy of a suit, he will not get a full

> fledged adjudication of his contractual rights, but only a judicial review of the administrative action. The question whether there was a contract and whether there was a breach may, however, be examined incidentally while considering the reasonableness of the administrative action. But where the question whether there was a contract, is seriously disputed, the High Court cannot assume that there was a valid contract and on that basis, examine the validity of the administrative action. "

5.5 The observations of the learned Single Judge in paragraphs 7 to 10, 22 & 23 as relied upon by Mr. Kavina are reproduced hereunder:

> "7. The law on the subject is by now well settled. It is true that the relationship of the petitioner and the respondent Corporation are governed by the agreement and also governed by the terms and conditions of the agreement. But, at the same time, it is also undisputed position that the the respondent Corporation is a 'State' within the meaning of Article 12 of the Constitution on account of the deep and pervasive control as well as the financial stake involved of the Government of India. If the State or any other agency of the State enters into contract with any private citizen, it would be expected for the State or such agency to act in a just, fair and reasonable manner. If the citizen who is party to the agreement is to invoke the right as per the agreement, the remedy may be available to such citizen to approach before the competent civil court or to the proceedings of the arbitration as per the agreement. However, if the action is to be assailed of the State or such agency under Article 226 of the Constitution, as a public law remedy, the judicial scrutiny shall be available to the extent of testing the action on the touchstone of arbitrariness or unreasonableness. At this stage, the reference may be made to the decision of this Court in the case of M.S. Desai & Co. Vs. Hindustan Corporation reported in 2002(4) GLR 6312, wherein the Division bench of this Court

did reiterate the same principles as were laid down by the Apex Court in the case of Tata Cellular Vs. Union of India reported at AIR 1996 SC 11 and observed for the scope and ambit of the power of judicial review at para 18 inter alia, which reads as under:

> **"The principle of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, as observed by the Supreme Court in Tata Cellular (supra)there are inherent limitations in exercise of that power of judicial review. Duty of the Court is to confine itself to the question of legality. Its concern should be: whether a decision making authority has (1) exceeded its powers, (2) committed an error of law, (3) committed a breach of the rules of natural justice, (4) reached a decision which no reasonable Tribunal would have reached; or (5) abused its powers."**

8. At this stage, reference may also be made to the decision of the Apex Court in the case of Kisan Sahakari Chini Mills Ltd. & Ors. Vs. Vardan Linkers and Ors. reported at AIR 2008 SC 2160. The question had arisen before the Apex Court for considering the scope and ambit of the remedy available to a party for the breach of the contract and the scope and ambit of the power of the Civil Court in such matters and the public law remedy by way of writ petition under Article 226 of the Constitution. The Apex Court inter alia observed at para 15 onwards concluded at para 17, relevant of which reads as under:

> **"In exercising writ jurisdiction, if the High Court found that the exercise of power in passing an order of cancellation was not arbitrary and unreasonable, it**

should normally desist from giving any finding on disputed or complicated questions of fact as to whether there was a contract, and relegate the petitioner to the remedy of a civil suit. Even in cases where the High Court finds that there is a valid contract, if the impugned administrative action by which the contract is cancelled, is not unreasonable or arbitrary, it should still refuse to interfere with the same, leaving the aggrieved party to work out his remedies in a Civil Court. In other words, when there is a contractual dispute with a public law element, and a party chooses the public law remedy by way of a writ petition instead of a private law remedy of a suit, he will not get a full fledged adjudication of his contractual rights, but only a judicial review of the administrative action. The question whether there was a contract and whether there was a breach may, however, be examined incidentally while considering the reasonableness of the administrative action."

9. Therefore, the facts of the present case and the impugned decision is required to be examined in light of the aforesaid limited scope of judicial scrutiny testing the decision in a contractual matter by an agency which is a State within the meaning of Article 12 of the Constitution as a public law remedy in writ powers of this Court under Article 226 of the Constitution.

10.It appears from the facts referred to hereinabove and if such facts are considered in light of the aforesaid 5 undisputed positions to the Court while exercising the judicial power, the other facts would not be of much relevance since there is no factual foundation for the same except that whether a decision reached by the authority which no reasonable authority would have reached and

thereby, can it be said that the authority has exceeded in its power. Had it been a case where the aforesaid variance of the RON contents found in the sample was considered by the respondent Corporation and thereafter, having considered the said material, the decision was taken, it could be termed as a conscious decision taken by the respondent Corporation after taking into consideration the ground relevant and germane to the exercise of the power and such might stand on different footing. But as observed earlier, it is undisputed position that neither in the impugned decision nor even by the affidavit in reply filed, any explanation is coming on record for consideration of such material and its impact there on the decision. It is true that this Court while exercising the power under Article 226 of the Constitution can neither sit in appeal over the decision nor can express view as an expert body, but the action is to tested by applying the decree of reasonable prudence to the facts before it and ultimate decision making process is to be examined in that light reaching to a particular decision.

22.It is true that the observance of the principles of natural justice cannot be applied by way of straight jacket formula, but may vary from facts to facts. If in a given case, there is eminent danger or an immediate damage to be caused, the pre-decisional hearing may not be given at all and the action may be taken immediately. In a case where there is no such emergent requirement, in normal circumstance, if the adverse consequence is to follow which may have wide civil repercussions, the predecisional hearing or prior opportunity of hearing would be required to be given. Hearing does not mean in every case that the opportunity to reply to the show-cause notice and also opportunity of oral hearing. But such may also vary from facts to facts. It is true that in the present case, the opportunity of submitting reply has been given at all point of time by the respondent Corporation to the petitioner after the second, first and third sample test result, but in view of the peculiar circumstances on the factual aspects, as referred to hereinabove, that not only there is variance in the

3 test reports of the laboratory of different portions of the same sample, but if the highest figure is considered, the question was required to be taken into consideration by the respondent Corporation as to whether the rounding of the figure to 88 as per the Indian standard method for test of petroleum and its product was required or not and whether even if the figure of 87.6 is considered as the highest RON contents of the petrol, could it be said to be off-specification or adulteration, since there is difference of 0.4, between standard specification of 88 and the contents found of 87.6. Further, it is undisputed position that after the sample was drawn in the month of May 2006, the impugned action is taken in the month of September 2009, i.e. 04.09.2009, roughly after 3 years, therefore, if the opportunity of hearing was given, no prejudice could have been caused but rather would have enabled the Corporation to take a considered decision on the aspects of termination of the agreement or otherwise, more particularly when there is question to be considered of adulteration or off-specification in any case. The aforesaid is coupled with the contention of the petitioner that for the period after the sample was drawn in May 2006, till the impugned decision taken on 04.09.2009, umpteen number of times, samples were drawn during such period of 3 years and they were found to be meeting with the specification and not a single irregularity or illegality was found. Therefore, the Corporation could have considered the question of lesser penalty keeping in view the principles of proportionality of punishment and the difference of the RON contents and the subsequent conduct of the petitioner.

23.It appears to the Court that it is not necessary for this Court to express any final view on the said aspects and suffice it to state that the matter may be considered by the Corporation in its wisdom on the aspects of proportionality of punishment, but it does appear that it was a case where the opportunity of oral hearing would have enabled the Corporation to take considered view of the matter."

6. Per Contra, Mr. Mihir Thakore, learned Senior Counsel

appearing for the original petitioner contended that the learned Single Judge in para 10 of the impugned judgement and order categorically observed that 'it is undisputed position that neither in the impugned decision nor even by the affidavit-in-reply filed any explanation is coming on record for consideration of such material and its impact thereon the decision'. He submitted that in this view of the matter, the learned Single Judge ought not to have directed the Corporation to re-decide the matter inasmuch as all the points which the Corporation had not considered in its decision dated 04.09.2009 was infact considered by the learned Single Judge.

6.1 Mr. Thakore has drawn the attention of this Court to para 11 of the impugned judgement and order passed by learned Single Judge, relevant portion of which reads as under:

> "11.Applying the principles of reasonable prudence, it appears to the Court that the variance in the contents of RON has remained unexplained in the whole process of decision making by the respondent Corporation. If the matter is examined on the basis of the reasonable prudence keeping in view the petrol or the motor spirit as perishable commodity, each portion of the sample which is from the same lot should contain the same RON, if tested at a time. If such samples are tested at thelater period, i.e. one after another at the interval of reasonable period, then the quality of the petrol or the motor spirit unless properly sealed and preserved would get deteriorated. Even if it is properly sealed and preserved, it would not contain the higher value which in the present case is RON than any other portion thereof which has been tested at the first instance. The facts as

> referred to hereinabove, goes to show that the contents of RON was 83 at the first instance when the sample was sent for testing on 12.01.2006 after having drawn from the retail outlet on 26.05.2006. The second one was sent for testing on 01.11.2006, i.e. roughly after about a period of more than 4½ months, where the contents of RON in the different portion of the very sample has increased from 83 to 87. Not only that, but in the third portion of the same sample, which was sent for laboratory testing on 04.04.2007, roughly after a period of about more than 4 months, the RON contents has further increased to 87.6. Therefore, it is not clear as to whether the decision is taken after taking into consideration the variance in the contents of the RON and if yes, whether such could be possible and if possible, valid basis thereof. Applying of principles of reasonable prudence, it is not possible for anyone to conceive a situation of increase in the contents of RON of the different portions sealed separately of the same sample…."

6.2 In this regard Mr. Thakore submitted that having once come to the aforesaid conclusion by the learned Single Judge, the learned Single Judge ought to have allowed the petition in its entirety instead of directing the Corporation to take a fresh decision especially when the learned Single Judge has categorically held that even if the samples are properly sealed and preserved, it would not contain the higher value which in the present case is TON than any other portion thereof which has been tested at the first instance. He submitted that therefore the learned Single Judge ought not to have remanded the matter for a fresh decision.

6.3 Mr. Thakore contended that on 12.09.1994 the Government of India, Ministry of Petroleum has categorically issued certain directions to the Secretary, Department of

Foods and Civil Supplies to the Government of all States directing inter alia that in the interest of natural justice the inspecting officials will test the product for quality and density at the retail outlet itself in the presence of the dealer and only if the density is not found in order then in such cases the samples would be drawn and sent to the laboratory for test purposes immediately and latest within 10 days of the drawals thereof. He submitted that it is also directed that this time limit has been fixed under the Order and is emphasized in order to obviate the chances of error in the test results due to the loss of lighter fractions of the products with passage of time. He has also drawn the attention of this Court to the Marketing Discipline Guidelines – 2005 more particularly clause 2.5 sub clause (I) which reads as under:

> **"2.5 GENERAL POINTS TO BE OBSERVED IN ALL CASES**
>
> * * *
>
> I) The purpose of mentioning time frame for various activities ego sending samples to lab preferably within 10 days etc. is to streamline the system and is no way related to quality/result of the product.
>
> * * *"

6.4 Mr. Thakore drew the attention of this Court to the Indian Standard Method of test for Petroleum and its products, a copy whereof is produced at page 800 of the appeal, more particularly clause 13.2 and submitted that if there is any interpolation in the figure and if the figure is that of 0.50 it is to be rounded to the nearest even number. He

submitted that the RON contents found in the third test report was 87.6 and if such contention is accepted it could be said that it was meeting with the requisite specification and in any case beyond treating the same as adulterated. He submitted that the learned Single Judge has categorically observed that if the principles of rounding is to be applied as contended with the support of Indian Standard Method for the test of petroleum and its products it would come to 88 i.e. at par with the requisite specification and consequently effect would be that the foundation of the decision would be lost. He submitted that therefore the learned Single Judge ought to have allowed the writ petition in its entirety. He has also relied upon Clause 14 of the said Indian Standard Method of test which is reproduced hereunder:

> **14. PRECISION**
> 14.1 Extensive data from independent laboratories over a. number of years for many samples of conventional motor gasolines have shown a standard deviation of 0.5 octane number (an average deviation of about O-4 octane number). Based on this standard deviation, the number of tests required to yield a rating of desired accuracy is given below:
>
> | **ACCURACY DESIRED, OCTANE NUMBER,** | **NUMBER OF TESTS REQUIREI) TO OBTAIN THE DESIRED ACCURACY** | | |
> |---|---|---|---|
> | Plus or Minus | 9 times out of 10 | 19 times out of 20 | 99 times out or 100 |
> | 1-O | 1 | 1 | 2 |
> | 0.5 | 3 | 4 | 7 |
> | 0.3 | 8 | 11 | 18 |
>
> This table shows that a single rating is normally expected to be within A I-0 octane number of the true value in about 19 cases out of 20. On the other

> hand, if an accuracy of ± O-3 octane number is desired with a certainty of 90 percent (9 times out of 10) it is necessary to obtain an average of eight ratings in eight different engines (preferably in eight independent laboratories).
>
> Although the above degree of reproducibility applies to conventional motor gasolines when careful attention is given to the details of test procedure and engine condition, it does not necessarily apply to fuels which differ materially from finished motor gasolines. In such cases, the reproducibility is likely to be lower and result in higher standard deviations."

6.5 Mr. Thakore further submitted that the date of sampling was 26.05.2006 and the date of receipt of R.O Sample is 12.06.2006 whereas the date of preparing the test report in 10.07.2006. In this regard he has drawn the attention of this Court to the provisions of Section 8 of The Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Mal Practices) Order, 2005 (hereinafter referred to as 'the Order') more particularly sub sections (4), (5) and (6). He submitted that the Corporation clearly and blatantly violated the mandatory provisions of sub section (4), (5) and (6) of Section 8 of the Order as the samples and the test report were not sent within the prescribed time.

6.6 Mr. Thakore contended that it would also be necessary to go through the definition of the words 'adulteration' and 'malpractices' in the context of the facts and circumstances of the present case and submitted that at no point of time had the Quality Control Laboratory at Kandla or the authorities come to the conclusion or a subjective satisfaction and neither it is stated in the report at any point of time that the company

is guilty of any malpractice or that the level of RON did not match with the specified standards because of any malpractice at the end of the petitioner. He submitted that even all the three show cause notices issued by the Corporation to the Company speak of only about some breach on the part of the petitioner but do not state a word regarding any malpractice carried out by the petitioner which would include adulteration as defined under the Order.

6.7 Mr. Thakore contended that the Corporation has very heavily relied upon the procedure which they follow as per the Order but unfortunately the Corporation does not follow the said prescribed procedure. He has drawn the attention of this Court to clauses 2.4.4, 2.5(K), 2.10 and 6.2.1 which are reproduced hereunder:

> **"2.4.4. <u>DRAWAL OF SAMPLES BY MOBILE LABORATORIES</u>**
>
> 1. Mobile laboratories will draw nozzle samples of MS and HSD from all the tanks at the retail outlets and will carry out clinical tests as applicable for Mobile laboratories on these samples. If the sample passes no further action will be taken.
> 2. If any of the samples fails. the mobile lab will draw the following samples:
>
> **MS** : 6x1 litre samples for each of the concerned tanks where product has failed. (2 with dealer: 2 to concerned Oil Company for retention. 2 to concerned Oil Company for testing)
>
> **HSD** : 3 x 1 litre samples for each of the concerned tanks where the product has failed (1 with dealer, 1 to concerned Oil company for retention, 1 to concerned oil company for

testing).
The mobile lab will collect the relevant tank lorry retention sample from the retail outlet and will hand over the same along with the relevant RO sample (mentioned above) to the concerned Oil company representative preferably within the next 5 days. He should also inform the concerned Supply location immediately on telephone, so that depot sample can be retained. The Division should ensure that all samples i.e. RO/tank lorry/depot samples reach the respective laboratories for testing preferably within 10 days of the collection of the samples.

Appropriate action will be taken by the concerned Oil Company based on the test results.

NOTE

In case it is found during the inspection that the 'Tank Lorry Retention Sample" is not available at the Retail Outlet and has been sent for testing earlier, the test results of the same will be used by the concerned Oil Company while testing the RO sample (drawn by the mobile lab) and supply point sample. For this purpose, a specific noting should be made by the mobile laboratory so that this aspect is taken care of by the concerned Oil Company.
Payment for samples drawn may be made by the Mobile Lab officers for the dealer.

2.5 General Points To Be Observed In All Cases
In all cases where the samples are found to off-spec, a subsequent sample should be drawn from the same RO within 3 months from the date of test report of the earlier sample.

2.10 SAMPLE TESTING AND RESULTS :

The test to be carried out for MS/HSD samples drawn from dealers premises are given in Annexure S-4.

All samples should reach the labs preferably within 10 days from the date of drawal and lab should test the samples preferably within the next 20 days. Results are to be communicated to the dealer by the concerned Oil Company preferably within the next 5 -days (from receipt of test reports).

While in general. above procedure should be strictly followed and the time frame as stipulated above to be adhered to however during special drives, in view of the large number of samples, the labs may accept the samples upto 15 days after drawal and the testing should be completed preferably within 30 days of the receipt of the sample.

All test reports are to be signed by authorized officers only.

Interpretation of results- Samples are deemed to have failed if the test results of sample under scrutiny and the reference sample do not fall under the reproducibility/ permissible limit of test method.

The tests to be conducted on MS / HSD (as given in Annexure-S-4) will conform to the latest IS: 2796 specifications of Motor Spirit and IS: 1460 specifications of High Speed Diesel.

The tests will be carried out as per standard test methods as given in the Bureau of Indian Standard Specification, IS: 1448:P - methods of tests for petroleum products and Standards applicable at the time of inspection.

The test results on the sample taken from the Retail Outlet and Tank Lorry should be within the reproducibility limits of the test method when compared to the reference sample at dispatching location.

Reference for density would, however, be that recorded in the dispatch document upto decanting of Tank Lorry at the Retail Outlet. Thereafter, for samples collected from Retail Outlet, reference

density would be density of the composite product in Storage tank, recorded after receipt of product after dispensing at least 50 litres of product through the pump.

6.2.1 SAMPLING PROCEDURE

3 samples (of 750 ml each) will be drawn. One will be left with the dealer, one with the company and the third will be sent to the respective Oil Company laboratory for testing. For the sample kept with the dealer, proper acknowledgement will be obtained and the dealer will be instructed to preserve the sample in his safe custody till the testing/investigations are completed. Details of the sampling procedure and the label to be pasted on the sample containers are given in Chapter – 2.

Samples thus drawn are to be sent to the respective Oil Company laboratory for testing. If the laboratory test report indicates that the sample found to be off-spec, a show-cause notice would be issued to the concerned dealer. If the explanation received from the dealer in response to the show-cause notice is found to be satisfactory, no further action is to be taken. In case, however, the explanation from the dealer is not satisfactory, penal action to be taken as given in Appendix – II.

Note
Dealer shall remove off-spec product from the premises. Oil Companies will ensure that the off-spec product is suitably destroyed.

In all cases where the samples are found to be off-spec, a subsequent sample should be taken from the same dealer within 2/4 months from the date of the test report of the earlier sample."

6.8 Mr. Thakore submitted that the impugned action on the part of the authorities is nothing but a colourable exercise of

powers without any justification and promptness inasmuch as the efficacy of the order is clearly lost only on one count that the order has been passed on 04.09.2009 in connection with a show cause notice dated 01.08.2006 and for the period between 01.08.2006 and 04.09.2006 the petitioner had been carrying out business with all honesty, dedication and integrity and without any cause of complaint and without any sample testing resulting negative though on number of occasions during this period the Corporation had taken samples for testing and have not found the so called adulteration or sub-standard samples.

6.9 Mr. Thakore submitted that it may be noted that the first show cause notice was issued on 01.08.2006 which was replied to. The second show cause notice was issued on 07.12.2006 and the same was also replied to. The third show cause notice was issued on 24.05.2007 which was also replied to by the company. He submitted that the Corporation sat tight over the issue and did not act upon the notices and from 26.05.2006 till 04.09.2009 the company had been carrying on the business and is still in possession of the petrol pump without any cause of complaint to the Corporation. He submitted that all of a sudden on 05.09.2009 the company received a termination order of the dealership stating that they have taken an extreme view of the breaches committed by the company. Mr. Thakore has drawn the attention of this Court to the three reports and submitted that if all the three reports are carefully scrutinized there is a variation not only in the level of Octane which is found by the Laboratory but there is also inconsistency in all the three reports with respect to the level of Octane which has been found in all the three

reports respectively. He submitted that in fact this inconsistency in all the three reports in the absence of any finding regarding malpractice or adulteration should have been sufficient for the authority not to initiate the impugned action and pass the impugned order that too after a belated period of three years and more from the date of sampling.

6.10 Mr. Thakore contended that even after having found the so called breach alleged to have been committed by the company, the Corporation continued to supply petrol to the company and in order to fortify and substantiate the say of the company he has drawn the attention of this Court to the statement of total sale which took place in the month of May 2006 to September 2009 for motor spirit, speed petrol, high speed diesel and diesel respectively.

6.11 Mr. Thakore contended that in all the sampling reports as well as the inspection reports for the period from 2006 to 2009 the respondent authorities have not found any breach or any malpractice other than the one for which the impugned action has been taken. He submitted that the very delay on the part of the respondent authorities is fatal inasmuch as assuming for the sake of argument without admitting that there was any so called breach as alleged by the Corporation as on 26.05.2006, then the Corporation ought to have taken the impugned action immediately within a reasonable period of time rather than after three years. He submitted that the penalty imposed is on higher side in view of the guidelines issued and therefore also the impugned order is required to be quashed and set aside.

6.12 Mr. Thakore also contended that even if it is assumed for the sake of argument without admitting that there was any so called breach as alleged by the Corporation, in view of Clause 2.5 (D) of the guidelines which is reproduced hereinafter, the competent authority is the General Manager for issuance of such termination order and not the Territory Manager as is in the present case. He submitted that the impugned order deserves to be quashed and set aside on this ground also.

> 2.5 **GENERAL POINTS TO BE OBSERVED IN ALL CASES**
>
> * * *
>
> (D) In case of sample failure, in the event of request for testing by the dealer, the same to be considered on merits by the State Office / Regional/Zonal General Manager of the concerned Oil Company. If approved by GM, the sample of retail outlet retained by the dealer along with the counter sample retained with the Field Officer/Oil company are to be tested as per the guidelines, preferably in presence of the Field Officer, RO dealer / representative & representative of QC Dept of the Oil co. after due verification of the samples. All the 3 samples should be tested only in the same lab, and if possible by the same person to ensure repeatability and reproducibility. The expenditure incurred for such testing should be recovered from the dealer**. The decision of the GM which would be based on the test results of all the 3 samples would be decisive and binding on all.**
>
> [Emphasis Supplied]

6.13 Mr. Thakore has relied upon clause 2.10 of the Guidelines reproduced hereinbelow and submitted that the test was not carried out as per the standard test methods as given in the Bureau of Indian Standard Specification, IS: 1448:P – methods of tests for petroleum products and Standards as applicable at the time of inspection.

2.10 SAMPLE TESTING AND RESULTS :

The test to be carried out for MS/HSD samples drawn from dealers premises are given in Annexure S-4.

All samples should reach the labs preferably within 10 days from the date of drawal and lab should test the samples preferably within the next 20 days. Results are to be communicated to the dealer by the concerned Oil Company preferably within the next 5 -days (from receipt of test reports).

While in general. above procedure should be strictly followed and the time frame as stipulated above to be adhered to however during special drives, in view of the large number of samples, the labs may accept the samples upto 15 days after drawal and the testing should be completed preferably within 30 days of the receipt of the sample.

All test reports are to be signed by authorized officers only.

Interpretation of results- Samples are deemed to have failed if the test results of sample under scrutiny and the reference sample do not fall under the reproducibility/ permissible limit of test method.

The tests to be conducted on MS / HSD (as given in Annexure-S-4) will conform to the latest IS: 2796 specifications of Motor Spirit and IS: 1460

specifications of High Speed Diesel.

The tests will be carried out as per standard test methods as given in the Bureau of Indian Standard Specification, IS: 1448:P - methods of tests for petroleum products and Standards applicable at the time of inspection.

* * * "

6.14 In order to fortify and substantiate his submissions, Mr. Thakore relied upon the following decisions of the Apex Court:

(i) Harbanslal Sahnia and Another vs. Indian Oil Corporation Ltd. and Others reported in (2003) 2 SCC 107;
(ii) Allied Motors Limited vs. Bharat Petroleum Corporation Limited reported in (2012) 2 SCC 1;
(iii) Jitendra Kumar vs. State of Haryana reported iin (2008) 2 SCC 161;
(iv) Moni Shankar vs. Union of India and Another reported in (2008) 3 SCC 484;
(v) Union of India and Another vs. G. Ganayutham reported in (1997) 7 SCC 463.

6.15 Mr. Thakore submitted that on a perusal of the definitions of the terms 'Adulteration' and 'Malpractice', it cannot be said that the company had indulged in any malpractice or adulteration. He submitted, without admitting, that at the most it could be termed as 'sale of off-specification product'. He has drawn the attention of this Court to Appendix -I to the guidelines which lists the penal actions for malpractices / irregularities at retail outlets – MS/HSD. He

submitted that going by the penal actions listed against the specific irregularity, more particularly Sr. No. 15, the penalty imposed in the present case is on higher side. He submitted that at the first default, as in the present case, fine of Rs. 25000/- & suspension of sales and supplies of all products for 15 days would have met the ends of justice. He submitted that the penalty of termination is on higher side and grossly arbitrary when there is no other incident of so called malpractice or adulteration found during the course of any inspection for these many years.

7. Mr. Kavina, learned Senior Counsel in his rejoinder submitted that in view of the expert decision which has been taken after scrutinizing various facts and the policies, it cannot be said that there are procedural lapses. He submitted that the company has tried to misconstrue Clause Clause 2.5(I) & (K) wherein it is specifically stated that the purpose of mentioning time frame for various activities e.g. sending samples to lab preferably within 10 days etc. is to streamline the system and that it is no way related to quality/result of the product.

7.1 Mr. Kavina submitted that the company has adulterated and committed malpractice as per the definition of the terms ‘malpractice’ and ‘adulteration’ mentioned in the Order. He submitted that the requirements of the Bureau of Indian Standards specification number IS 2796 is minimum 88 Research Octane Number to which all the three samples drawn from the retail outlet on 26.05.2006 have failed to meet this minimum criteria. He submitted that in all the three test reports it is clearly mentioned that the samples have failed to

meet the minimum requirements of the Research Octane Number whereas supply location/ depot sample and tank lorry sample meet the minimum requirement of RON. He submitted that if the samples do not meet the minimum requirements, it leads to only one irresistible conclusion that the company has adulterated and committed malpractice.

8. At the outset it shall be pertinent to mention the fact that so far as Letters Patent Appeal No. 473 of 2010 is concerned, though no contention in this regard has been raised by the other side, all the parties which were before the learned Single Judge are not joined as parties in the appeal. This Court could have dismissed the appeal on the ground of non-joinder of necessary parties but we are not inclined to dismiss the appeal on the said technicality, more particularly, as Letters Patent Appeal No. 474 of 2010 and 473 of 2010 are being heard together and the party has already been joined as respondent no. 4 in Letters Patent Appeal No. 474 of 2010.

9. So far as the merits of the case are concerned, certain undisputed facts need to be re-enumerated. On 26.05.2006, sample was drawn from the petrol pump run by the original petitioner and sent to the laboratory for testing. The said sample did not meet with the requisite standard of RON for minimum requirement of 88 and in the report dated 10.07.2006, it was found as 83.0. Thereafter, on the basis of the request made by the original petitioner, another sample which was retained by the Territory Manager was sent for laboratory testing and as per the report dated 01.11.2006, it was found that the RON was that of 87. Thereafter, third part of sample which was retained by the original petitioner

was sent to the laboratory for testing and vide report dated 25.04.2007, the RON was found to be 87.6 as against the minimum requirement of 88.

9.1 The difference of RON in the first sample was of about 5 points and in the second sample which was retained with the territory manager it had reduced to 1 point whereas the third sample which was retained with the original petitioner showed a difference of 0.4 points. In this regard it shall be relevant to peruse Clause 13 which relates to the reporting of results as per the Indian Standard Method of test for Petroleum and its products which reads as under:

> **"13. REPORTING OF RESULTS**
>
> **13.1** Average the knockmeter readings obtained in accordance with 12.3 for the sample and for each of the reference fuel blends. Find :he research octane number by interpolation from the averages so obtained.
>
> **13.2** Report the octane number to nearest integer. **When the interpolated figure ends with O-50, round off to the nearest even number; for example, report 99.50 as 100, not 99."**
>
> [Emphasis Supplied]

9.2 Considering the aforesaid guidelines, when the interpolated figure ended with 0.60 as in 87.6, it was required to be rounded off to the nearest even number which comes to 88 in the present case. The learned Single Judge has also observed in this regard in the impugned order as under:

> "11.Applying the principles of reasonable

prudence, it appears to the Court that the variance in the contents of RON has remained unexplained in the whole process of decision making by the respondent Corporation. If the matter is examined on the basis of the reasonable prudence keeping in view the petrol or the motor spirit as perishable commodity, each portion of the sample which is from the same lot should contain the same RON, if tested at a time. If such samples are tested at the later period, i.e. one after another at the interval of reasonable period, then the quality of the petrol or the motor spirit unless properly sealed and preserved would get deteriorated. Even if it is properly sealed and preserved, it would not contain the higher value which in the present case is RON than any other portion thereof which has been tested at the first instance. The facts as referred to hereinabove, goes to show that the contents of RON was 83 at the first instance when the sample was sent for testing on 12.01.2006 after having drawn from the retail outlet on 26.05.2006. The second one was sent for testing on 01.11.2006, i.e. roughly after about a period of more than 4½ months, where the contents of RON in the different portion of the very sample has increased from 83 to 87. Not only that, but in the third portion of the same sample, which was sent for laboratory testing on 04.04.2007, roughly after a period of about more than 4 months, the RON contents has further increased to 87.6. Therefore, it is not clear as to whether the decision is taken after taking into consideration the variance in the contents of the RON and if yes, whether such could be possible and if possible, valid basis thereof. Applying of principles of reasonable prudence, it is not possible for anyone to conceive a situation of increase in the contents of RON of the different portions sealed separately of the same sample. This being an important and crucial aspect, has direct bearing to the decision making process of the respondent Corporation as to whether it could be said that MS/HS found adulterated or not or could it be said to be off specification when the contents of RON is less by 0.4, if the highest figure is considered, keeping in view the minimum requirement of 88. The aforesaid is coupled with the contention of the

> petitioner that as per the Indian standard methods of test for petroleum and its product, copy whereof is produced on page 810, if there is any interpolation in the figure and if the figure is that of 0.50, it is to be rounded to the nearest even number, which would come to 88 since the RON contents found in the 3rd test report was 87.6 and if such contention is accepted, it could be said that it was meeting with the requisite specification and in any case, beyond treating the same as adulterated. Further, the additional aspect in view of this factual scenario which was required to be considered as directly germane to the exercise of the power for termination of the contract or otherwise was that if the RON was found as that of 87.6 as against the minimum requirement of 88, could it be termed as adulteration or could it be termed as off specification. It may be recorded that the aforesaid consideration would have not only direct bearing in the decision making process, whether to terminate the contract or not, but if such is not considered, it could be said that the decision is vitiated by non-consideration of the aspects which was germane to the exercise of the power.

9.3 We are in complete agreement with the aforesaid view taken by the learned Single Judge. Not only has the Corporation failed in offering plausible explanation with regard to the variance in the RON of three different samples but when there is an interpolated figure of RON at 87.6, which ought to have been rounded off to 88 – the desired RON, the stand of the authorities in terminating the dealership seems to be very arbitrary and on higher side.

10. The date of sampling in the present case is 26.05.2006; date of receipt of R.O sample is 12.06.2006 and date of preparing the test report is 10.07.2006. In this regard the provisions of Section 8 of The Motor Spirit and High Speed

Diesel (Regulation of Supply, Distribution and Prevention of Mal Practices) Order, 2005, more particularly sub sections (4), (5) and (6) will have to be taken into consideration and the same are reproduced hereunder:

> **8. Sampling of Product :-**
>
> (1) The authorized under clause 7 shall draw the sample from the tank, nozzle, vehicle or receptacle, as the case may be, in clean aluminum containers, to check whether density and other parameters of the product conform to the requirements of Bureau of Indian Standard specifications number IS 2796 and IS 1460 for motor spirit and high speed diesel respectively. Where samples are drawn from retail outlet, the relevant tank-truck sample retained by the dealer as per clause 3(b) would also be collected for laboratory analysis.
> (2) The authorized officer shall take and seal six samples of 1 litre each of the motor spirit or three samples of 1 litre each of the high-speed diesel. Two samples of motor spirit or one of high speed diesel would be given to the dealer or transporter or concerned person under acknowledgement with instruction to preserve the sample in his safe custody till the testing or investigations are completed. Two samples of Motor Spirit or one of High Speed Diesel shall be kept by the concerned oil company or department and the remaining two samples of Motor Spirit or one of High Speed Diesel would be used for laboratory analysis;
>
> (3) The sample label shall be jointly signed by the authorized officer who has drawn the sample, and the dealer or transporter or concerned person or his representative and the sample label shall contain information as regards the product, name of retail outlet, quantity of sample, date, name of the authorized officer, name of the dealer or transporter or concerned person or his representative;
>
> (4) The authorised officer shall **forward the**

> **sample of the product taken within ten days to any of the laboratories mentioned in Schedule III** or to any other such as laboratory when it may be notified by he Government in the Official Gazette for this purpose,for analysing with a view to checking whether the density and other parameters of the product conform to the requirements of Bureau of Indian Standard specifications No. IS 2796 and IS 1460 for motor spirit and high speed diesel respectively.
>
> (5) The laboratory mentioned in sub -clause(4) shall **furnish the test report to the authorised officer within twenty days of receipt of sample** at the laboratory.
>
> (6) The authorised officer shall **communicate the test result to the dealer or transporter or concerned person and the oil company, as the case may be, within five days of receipt of test result** from the laboratory for appropriate action.
>
> [Emphasis Supplied]

10. As can be seen from the above, the samples were not sent within the prescribed time limit and the test result was also not furnished within the time limit. Even the correspondence dated 12.09.1994 addressed by Government of India, Ministry of Petroleum gives directions to the Secretary, Department of Foods and Civil Supplies to the Government of all States that in the interest of natural justice the inspecting officials will test the product for quality and density at the retail outlet itself in the presence of the dealer and only if the density is not found in order then in such cases the samples would be drawn and sent to the laboratory for test purposes immediately and latest within 10 days of the drawals thereof.

10.1 In this regard we would also like to reproduce the definitions of ‘Adulteration’ and ‘Malpractice’ which have been alleged to have been done by the original petitioner. The Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2005 is a statutory enactment passed by virtue of the powers conferred under section 3 of the Essential Commodities Act, 1955 by the Central Government. In the said Order, Clause 2(a) defines 'adulteration' as follows:

> “(a) 'adulteration' means 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 IS 2796 and IS 1460 for motor spirit and high speed diesel respectively or any other requirement notified by the Central Government from time to time.”

> 2(f) 'malpractices' shall include the following acts of omission and commission in respect of Motor Spirit and High Speed Diesel:
> (i)Adulteration,
> (ii)Pilferage,
> (iii)stock variation,
> (iv)unauthorised exchange,
> (v)unauthorised purchase,
> (vi)unauthorised sale,
> (vii)unauthorised possession,
> (viii)over-charging,
> (ix)sale of off-specification product, and
> (x)short delivery".

> 2(t) 'sale of off specification product' means sale of

> motor spirit or high speed diesel by dealer of quality not conforming to Bureau of Indian Standards specifications number IS 2796 and IS 1460 for motor spirit and high speed diesel respectively."

10.2 There is no clause within the remit of the guidelines or the Order warranting an inference that whenever the requirements/specifications fail to conform to the standards of petroleum products, that product is adulterated. On a perusal of the aforesaid definition of adulteration, a petroleum product can be said to be adulterated only when there is introduction of any foreign substance into petroleum product, which results in the product not conforming to the requirements and specifications as per the Order. The definition has to be interpreted strictly and it is not possible to expand the purport or scope of the definition. It is not the case of the petroleum company that the petitioner by introducing foreign substance offered petrol for sale, which does not conform to the requirements and specifications. It is only inferentially based on the value of RON (when the specification is 88, RON was found to be varying in three different tests of the same samples and the nearest one was 87.6 which was ideally required to be rounded off to 88) that the Territory Manager came to the conclusion that MS is adulterated.

10.3 In that view of the matter the sampling and testing assume great importance. While passing the impugned order of termination, it was incumbent upon the Corporation to come to a subjective satisfaction and further state in the impugned order as well as the show cause notices that the

original petitioner was engaged in any malpractice in the nature of adulteration and if found so, the Corporation ought to have stated the nature of adulteration and the details thereof.

11. Even if it is assumed that the RON did not conform to the requirement of 88, it cannot be said to be adulterated in absence of any finding with regard to introduction of foreign substance in the same. At the most, the case of the original petitioner could have fallen under section 2(t) which relates to sale of off specification product which falls under sub clause (ix) of 'Malpractice'. Sale of off specification product means sale of motor spirit or high speed diesel by dealer of quality not conforming to Bureau of Indian Standards specifications number IS 2796 and IS 1460 for motor spirit and high speed diesel respectively. Therefore, even if the Corporation came to the conclusion that the original petitioner had indulged in malpractice by trying to sell off-specification product, the penalty of termination of retail outlet is grossly on higher side. Appendix – I to the Marketing Discipline Guidelines 2005 lays down the penal actions for malpractices and irregularities at retail outlets – MS/HSD. Sr. No. 15 of the said appendix lays down the punishment for non-observance of Govt. regulations as under :

SL. NO	**NATURE OF IRREGULARITY**	**MDG 2005**		
		PENAL ACTION		
		1st	2nd	3rd
	*	*	*	*

15	Non-observance of Govt. regulations	Fine of Rs. 25,000 & suspension of sales and supplies of all products for 15 days	Fine of Rs.50,000 of sales and supplies of all products for 30 days	Termination

11.1 It is also required to be noted that the Corporation also carried out periodical inspection on the retail outlet of the original petitioner and going by the inspection reports for the period from 2006 to 2009 carried out by the Corporation which is placed on record, it is clear that no other incident of adulteration or malpractice was found or recorded by the Corporation. Therefore, admittedly this is the only incident since the grant of dealership of the outlet wherein the Corporation had found to have irregularities. Therefore, even if the said irregularity is attributed on the part of the original petitioner, it would be the first one which would call for a penalty of fine of Rs. 25000/- and suspension of sales and supplies of all products for 15 days. The penalty of termination ought to have been resorted to only on reporting of the third irregularity. It is also required to be noted that when a person invests huge amount in purchasing land, gives it on lease, gets licence and runs his business, such step of immediate termination of licence will in a way amount to civil death and the action is grossly disproportionate to the alleged illegality/irregularity.

11.2 In the case of Harbanslal Sahnia (supra), the Apex Court has observed as under:

> "5. It is submitted by Shri. P. Malhotra, the learned senior counsel for the appellants that the dealership has been terminated on irrelevant and non-existent grounds and, therefore, the order of termination is liable to be set aside. The Government of Uttar Pradesh have issued directions to all the District Magistrates of the State in the matter of taking of samples and carrying out tests. There are two Government Orders issued namely No. 1459/29-7-97-731-PP dated 25.4.1997 and No. 2722/29-7-2000-PP/2000. The orders state inter alia that the strength frictions of petrol and diesel change after ten days and therefore time limit of ten days is fixed for testing of such products. It is also emphasized that in the interest of natural justice, the inspecting officials should test the sample for quality and density at the retail outlet itself in the presence of the dealer with necessary equipments such as filter paper, hydrometer, thermometer, jar and the conversion table which are available at the retail outlets and recorded density thereat only in the presence of the dealer. These government orders were violated in respect of the sample taken on 11.2.2000. Firstly, the test was not carried out at the retail outlet itself and, secondly, the time gap between the sample taken and lab test carried out is of about a month which is capable of causing marginal variation as detected. The learned senior counsel for the appellants invited attention the Court to an order dated 24.10.2002 passed by the Commissioner, Nanital in an appeal preferred against the suspension of petitioners licence which too was founded on the test report of the sample taken on 11.2.2000. Impressed by non-compliance with the instructions contained in the government orders and the delay in carrying out the lab tests, also keeping in view the previous performance of the petitioners, the learned Commissioner has allowed the appeal and set aside the suspension as also the fine imposed on the petitioners. The learned counsel is right in submitting that in view

of the abovesaid facts, the failure of the sample taken from the appellants outlet on 11.2.2000 becomes an irrelevant and non- existent fact which could not have been relied on by the respondent-Corporation for cancelling the appellants licence.

6. As already stated, the cancellation is founded solely on the failure of the appellants' sample. Non-cooperation and discourteous behavior of the appellants has been alleged in a very general way without specifying what was non-cooperation and what was the discourtesy shown to the officers of the respondent-Corporation. The deficiency in sales is also generally stated without particularising he same. So is the case with deficiency in maintaining the records. Be that as it may, these are the grounds which formed the subject matter of the earlier show cause notice which was not persuaded. In all probability, the respondent-Corporation felt satisfied with the explanation furnished by the appellants. The order of termination is certainly not founded on these grounds and, therefore, this aspect need not be pursued further. It may be stated that the appellants have volunteered to file a statement made on affidavit during the course of hearing before this Court, expressing regrets for any incident of departure from normal behavior and courtesy expected of the appellants towards the officials of the respondent-Corporation and submitting that it might have happened inadvertently but in future the appellants would be more careful and shall show full regard to the visiting officials of the respondent-Corporation and extend their full cooperation in their dealings with the respondent.

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, 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 v. Registrar of Trade Marks, Mumbai and Ors., (1998) 8 SCC 11. The present case attracts applicability of 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."

11.3 In the case of Allied Motors Limited (supra), the Apex Court has observed as under:

> "7. The appellant urged that the samples taken in this raid were in complete violation of the mandatory procedural provisions of law as provided under the Motor Spirit and High Speed Diesel (Regulation of Supply and Distribution and prevention of Malpractices) Order, 1999 (hereinafter referred to as "Order"). The appellant while reproducing the relevant provisions of law has submitted as under:-(a) Clause 4 of the said Order provides for power of search and seizure. Sub-Clause (A) of the section authorizes any police officer not below the rank of the Deputy Superintendent of Police (for short, DSP) duly authorized or any Officer of the concerned Oil Company not below the rank of Sales Officer to take samples of the products and/or seize any of the stocks of the product which the officer has reason to believe has been or is being or is about to be used in contravention of the said Order.
>
> 8. In the present case, however, the samples were collected in complete violation of the aforesaid provisions. The Police official who had conducted the raid and collected the samples 4was admittedly below the rank of DSP. This is also

recorded in the Metropolitan Magistrate's order dated 27.5.2002 passed in FIR No.193 of 2000 wherein it is stated as under:

> "In the present case the search and seizure was conducted by an unauthorized police officer of the rank of Inspector which is totally contrary to the mandatory provisions of the said Clause 4."
>
> (b) Sub-Clause (B) of Clause 4 of the said Order provides that
>
> "**4. (B)** While exercising the power of seizure under Clause 4 (A)(iv) the authorised officer shall record in writing the reasons for doing so, a copy of the which shall be given to the dealer...."

10. The appellant urged that in the present case, samples were allegedly taken from 6 sources. Therefore, the respondent Corporation as per the provision should have taken 36 samples (6 samples from each of the source) and handed over 12 samples (2 from each of the 6 sources) to the appellant, being the dealer, under acknowledgement. The respondent Corporation however, neither took 36 samples, nor did it hand over the prescribed number of 12 samples to the appellant. This is clear from the counter affidavit filed by the respondent in Writ Petition (C) No.7382 of 2001 placed on record.

16. According to the appellant, it is clear that the samples were collected in violation of mandatory procedure of law as provided under the said Order and therefore the termination order passed on the basis of test reports of samples so collected is completely illegal and liable to be set aside.

59. In the instant case, the haste in which 30 years old dealership was terminated even without giving show-cause notice and/or giving an opportunity of hearing clearly indicates that the entire exercise was carried out by the respondent Corporation non-existent, irrelevant and on extraneous considerations. There has been a total violation of the provisions of law and the principles of natural justice. Samples were collected in complete

> violation of the procedural laws and in non-adherence of the guidelines of the respondent Corporation.
>
> 60. On consideration of the totality of the facts and circumstances of this case, it becomes imperative in the interest of justice to quash and set aside the termination order of the dealership. We, accordingly, quash the same. Consequently, we direct the respondent-Corporation to handover the possession of the petrol pump and restore the dealership of petrol pump to the appellant within three months from the date of this judgment."

11.4 Thereafter, in the case of Jitendra Kumar and Others (supra), the Apex Court has laid down the principles of doctrine of proportionality and reasonableness. The relevant paragraphs are reproduced as under:

> "61. Dr. Dhawan has laid strong emphasis on the doctrine of proportionality and reasonableness, drawing sustenance from the dicta of this Court laid down in Teri Oat Estates (P) Ltd. v. U.T., Chandigarh and Others [(2004) 2 SCC 130], State of U.P. v. Sheo Shanker Lal Srivastava and Others [(2006) 3 SCC 276] and Bombay Dyeing & Mfg. Co. Ltd. (3) (supra)]
>
> 62. Our attention has also been drawn to the following passage of Sir William Wade's Administrative Law, Ninth Edition, pages 371-372:
>
> > "Goodbye to Wednesbury?
> >
> > The Wednesbury doctrine is now in terminal decline, but the coup de grace has not yet fallen, despite calls for it from very high authorities. Lord Slynn said in the Alconbury case, with reference to proportionality:
> >
> > > 'I consider that even without reference to the Human Rights Act 1998 the time has come to recognize that this principle is part of English administrative law not only when judges are dealing with

> Community acts but also when they are dealing with acts subject to domestic law. Trying to keep the Wednesbury principle and proportionality in separate compartments seems to me to be unnecessary and confusing.'

and in the Daly case Lord Cooke said:

> 'I think that the day will come when it will be more widely recognized that Associated Provincial Picture Houses Ltd v. Wednesbury Corpn was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation.'

Although quoting and sympathizing with these weighty opinions, and acknowledging that 'the Wednesbury test is moving closer to proportionality', the Court of Appeal has held that 'it is not for this Court to perform the burial rites'. That task must be left to the House of Lords, and meanwhile the law as laid down by the House in the Brind case, in which proportionality was rejected as part of English law, must linger on.

Lord Irvine LC has suggested, in a human rights context, that 'there is a pro-found difference between the Convention margin of appreciation and the common law test of rationality', and has raised the question, 'how long the courts will restrict their review to a narrow Wednesbury approach in non-Convention cases, if used to inquiring more deeply in Convention cases?' The difference that he observes is in substance the same as that detected by the House of Lords, and his question is whether it will be eliminated by 'spill-over effect' from human rights and EU law. This is exactly the kind of convergence which European influences are likely to bring about. It is evident already in the numerous

> references to proportionality which judges are making freely, and which are paving the way for its general acceptance."
>
> We, with greatest respect, do not have any such problem. This Court not only has noticed the development of law in this field but applied the same also.
>
> 63. The fact that in some jurisdictions, doctrine of unreasonableness is giving way to doctrine of proportionality is beyond any dispute. [See Indian Airlines Ltd. v. Prabha D. Kanan, (2006) 11 SCC 67 and State of U.P. v. Sheo Shanker Lal Srivastava and Others (2006) 3 SCC 276] But, the development of law in this field could have been applied only if a case was made out. If the State is right in its contention that the selection process being in cloud, no appointment can be made, the court by invoking any doctrine cannot ask the State to do so unless it arrives at a positive and definite finding that the State's stand is fraught with arbitrariness. We do not find any arbitrariness in its act."

11.5 Similarly in the case of Moni Shankar (supra), the Apex Court has held as under:

> "17. The departmental proceeding is a quasi judicial one. Although the provisions of the Evidence Act are not applicable in the said proceeding, principles of natural justice are required to be complied with. The Court exercising power of judicial review are entitled to consider as to whether while inferring commission of misconduct on the part of a delinquent officer relevant piece of evidence has been taken into consideration and irrelevant facts have been excluded therefrom. Inference on facts must be based on evidence which meet the requirements of legal principles. The Tribunal was, thus, entitled to arrive at its own conclusion on the premise that the evidence adduced by the department, even if it is taken on its face value to be correct in its entirety, meet the requirements of burden of proof, namely preponderance of probability. If on such evidences,

> the test of the doctrine of proportionality has not been satisfied, the Tribunal was within its domain to interfere. We must place on record that the doctrine of unreasonableness is giving way to the doctrine of proportionality. (See - State of U.P. v. Sheo Shanker Lal Srivastava : (2006)) 3 SCC 276 and Coimbatore District Central Cooperative Bank vs. Coimbatore Distarict Central Cooperative Bank Employees Association."

11.6 The Apex Court has analysed the doctrine of reasonableness, proportionality and rationality in the case of G. Ganayutham (supra) as well. In the said decision, the Apex Court has observed as under:

> "16. In R vs. Goldstein [1983 (1) WLR 151 (157)], Lord Diplock said: "This would indeed be using a sledge-hammer to crack a nut....". Sir John Laws (Judge of the Q.B. Division) has described 'proportionality' as a principle here the Court is
>
> > "concerned with the way in which the decision-maker has ordered his priorities; the very essence of decision making consists surely, in the attribution of relative importance to the factors in the case, and here is my point: This is precisely what proportionality is about"
>
> He further says:
>
> > "What is therefore needed is a preparendness to hold that a decision which overrides a fundamental right without sufficient objective justification will, as a matter of law necessarily be disproportionate to the aims in view... The deployment of proportionality sets in focus the true nature of the exercise; the elaboration of a rule about permissible priorities".
>
> de Smith, Woolf and Jowell, (Judicial Review of Administrative Action (1995 5th ed., para 13.085 pp.601-605) point out that 'proportionality' used in human rights context involves a balancing test and

> the necessity test. The 'balancing test' means scrutiny of excessive onerous penalties or infringements of rights or interests and a manifest imbalance of relevant considerations. The 'necessity test' means that infringement of human rights in question must be by the least restrictive alternative.
>
> Brind (HL)(1991) - administrative law - proportionality - debatable in India in cases not involving fundamental freedoms: Tata Cellular (SC) (1994) and McDowell (SC) (1996)
>
> 17. From 1985, we proceed to the next decision rendered in 1991 by the House of Lords in. R. v. Secretary for Home Dept. Ex.p. Brind [1991 (1) AC 6961. That decision stated that even by 1991. proportionality had not still become part of the Administrative law in England. This was because the European Convention of Human Rights and Fundamental Freedoms had not been expressly incorporated into English law as yet (See Lord Bridge (p.748); Lord Roskill (p.750); Lord Templeman (p.751) and Lord Ackner (p.763). It is sufficient to refer to what Lord Ackner stated:
>
> > "Unless and until Parliament incorporates the Convention into democratic law, a course which it is well known has a strong body of support, there appears to me to be at present no basis upon which proportionality doctrine applied by the European Courts can be followed by the Courts in the Country".

11.7 Thus, from the above decisions, it is clear that courts, while deciding such matters, have to keep in mind the principle of proportionality and the test of necessity. It is well settled that under the principle of proportionality, the Court will see that the legislature and the administrative authority maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the

rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve. In our view, it must be kept in mind that if the law contemplates drastic action leading to cancellation of dealership, then it is pertinent that the law and the procedure prescribed has to be scrupulously followed and there should be no scope for doubt or dispute. In the present case, as three reports themselves demonstrate that RON changes rapidly, in the view of this Court, this cannot be a safe method for taking such a punitive action. The contemporaneous samples were tested at three different locations, at three different times and has given three different readings. In our view, that cannot be a ground of drastic puntive action leading to cancellation of dealership. These test results cannot be conclusive of adulteration.

12. From the above discussion, the points which have weighed with us are enumerated as under:

(I) The Corporation did not follow the time limit as prescribed under the guidelines so far as the date of sampling, sending to the laboratory and preparing test report is concerned thereby clearly violating the mandatory provisions of sub section (4), (5) & (6) of Section 8 of the Order.

(II) RON at supply level as per three different reports of the same sample show variations. There is no plausible explanation coming forth with regard to the variation found in the laboratory test report of the same sample showing different RON content.

(III) On the contrary, the third sample showed presence of 87.6 RON which when rounded off to 88 (as per the principles of rounding in view of Indian Standard Method for the test of petroleum and its products) which is at par with the requisite specification.

(IV) There is no evidence coming on record so as to conclude that the level of RON did not match with the specified standards because of any adulteration or malpractice as defined under the Order. In fact there is no mention of the nature and extent of adulteration in the show cause notices by the Corporation.

(V) For the sake of assumption, even if the case of the original petitioner is considered as 'sale of off-specification product' the penalty of termination is grossly on higher side.

(VI) In all the sampling reports as well as the inspection reports for the period from 2006 to 2009 the respondent authorities have not found any breach or any malpractice other than the one for which the impugned action has been taken.

(VII) There is a delay of around three years in issuing the dealership termination order.

13. In that view of the matter, we are constrained to hold that cancellation of dealership is on non est ground and is arbitrary and grossly disproportionate to the alleged illegality/irregularity. The impugned order passed by learned Single Judge is quashed and set aside. The order of cancellation of dealership is also set aside. Consequently, we direct the Corporation to restore the dealership of petrol

pump as on 2009 to the original petitioner – Meghal R Thakkar within thirty (30) days from the date of this judgement.

13.1 In the result, the appeal filed by the original petitioner being Letters Patent Appeal No. 474 of 2010 is allowed. Letters Patent Appeal No. 473 of 2010 is accordingly dismissed. Civil Applications stand disposed of accordingly.

14. At this stage, Mr. Chhatrapati has requested stay of the present judgement. We think that when we have concluded that the original petitioner has been wrongly penalised, staying of this order shall only add to the penalty which is inuring since 2009. Therefore, we do not wish to add to the woes of the original petitioner by staying this judgement. Even otherwise, we have granted thirty days time to the Corporation to restore the dealership which is sufficient for the Corporation to take further judicial recourse, if desired. Hence, request for stay is rejected.

(K.S.JHAVERI, J.)

(A.G.URAIZEE,J)

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