

THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

Writ Petition No.26413 of 2017

ORDER:

This writ petition, under Article 226 of the Constitution of India, is filed seeking verbatim the following relief:

‘..to issue a writ, order or direction, particularly one in the nature of Writ of Mandamus, declaring the order dated 18.07.2017 in Ref.No.VR/SKLM/Raja SS passed by the 4th respondent whereby terminating the dealership of the petitioner to deal with MS and HSD on the ground that the sample drawn on 30.06.2015 failed to meet both BIS specification and reproducibility limits in HSD and also the sample tested on 21.09.2015 the sample retained by the Field Officer failed to meet BIS specification and reproducibility limits in respect of HSD with respect to supply location sample, as illegal, arbitrary and violative of Article 19(G) of the Constitution of India, consequently to set aside the order, dated 18.07.2017 and restore the supply of MS and HSD to the petitioner retail outlet, and to pass such other order or orders as this Hon’ble Court may deems fit just and proper in the circumstances of the case.’

2. I have heard the submissions of *Sri P.Kamalakar*, learned counsel appearing for the petitioner; of *Sri Krishna Mohan*, learned Assistant Solicitor General of India; and, of *Sri Sanjay Suraneni*, learned Standing Counsel appearing for the respondents 2 to 4. I have perused the material record.

3. The case of the petitioner, in brief, is this: ‘The 2nd respondent appointed the petitioner as its dealer in the year 1993. The petitioner established the subject retail outlet at Keshavaraopeta, S.M.Puram, Srikakulam District; and was carrying on the business in Motor Spirit (MS), High Speed Diesel (HSD) and lubricants under the licence issued by the Joint Collector, Srikakulam. The business is thus being carried out from the date of appointment without any complaint till the illegal

termination. The 3rd respondent, on 30.06.2015, had drawn samples of MS and HSD from the retail outlet of the petitioner. Samples, one each of MS & HSD were sent for testing to Indian Oil Corporation Laboratory, Visakhapatnam. *Vide* letter, dated 09.07.2015, the 3rd respondent, while enclosing lab reports, informed the petitioner as follows: 'MS: Retail Outlet (RO sample) sample does not meet reproducibility limits in respect of distillation test with respect to supply location sample. HSD RO sample does not meet BIS specification. Hence, as per Marketing Discipline Guidelines, 2012 (MDG), sales and supplies are stopped immediately as per advice from Visakha Divisional Office.' The test reports, dated 02.07.2015, of MS & HSD were attached to the said letter. Further, pursuant to the said letter, supplies were stopped. The petitioner, while disputing the correctness of the test reports in respect of both MS & HSD, submitted a requisition, dated 14.07.2015, to the 2nd respondent requesting to send the samples for analysis. There was no response. Hence, the petitioner addressed another application, dated 23.07.2015, requesting to send the other set of samples for analysis. Being aggrieved of the inaction on the part of the respondents, the petitioner filed W.P.no.24068 of 2015. The said writ petition was disposed of, on the respondents 2 & 3 filing a counter affidavit stating that the petitioner's said request was accepted by the 2nd respondent, on 28.07.2015, subject to approval of the competent authority and that the competent authority, by proceedings, dated 10.08.2015, also accepted the request of the petitioner for retesting the retention sample as per the procedure laid down under MDG 2012. After conducting the retest of the retention samples, the respondents did not supply the copy of the

test report, dated 21.09.2015, to the petitioner. The said report, which was later supplied, disclosed that both the retention samples of MS & HSD met the BIS specifications; the samples of both MS & HSD drawn from the outlet on 30.06.2015 met BIS specifications; but the retention samples of HSD retained by the Sales Officer did not meet the BIS specifications. It is also stated in the report that the retention sample of the retail outlet did not meet the reproducibility test when compared to supply location sample. The report, dated 02.07.2015, furnished by the Corporation, is obviously not correct in view of the contents of the re-test report, dated 21.09.2015. The test report, dated 21.09.2015, in respect of HSD discloses that all tests of BIS specifications were met. Similarly, the retention sample of MS met all the specifications. The samples of both MS and HSD drawn from the petitioner outlet, on 30.06.2015, met with BIS specifications. Therefore, it is clear that the petroleum products were not adulterated; and, therefore, no penal action can be initiated against the petitioner outlet. After receipt of re-test report, dated 21.09.2015, a show cause notice, dated 23.11.2016, was issued more than one year after drawal of the samples and the petitioner was called upon to explain as to why the dealership should not be cancelled. The petitioner submitted a detailed explanation to the Show-cause notice, dated 23.11.2016. The contents of the explanation were not appreciated and the dealership was terminated by the impugned order, dated 18.07.2017. In the termination proceedings, it is stated as follows:

‘It may be recalled that the above referred Show Cause Notice was issued after it had come to our notice that the samples of MS and HSD drawn from your RO by our Field

Officer during his inspection on 30.06.2015 failed to meet both BIS Specification and reproducibility limits in HSD whereas it failed to meet reproducibility limits in MS with respect to supply location sample.

Also during the retesting of the retention samples as per your request, conducted on 21.09.2015, HSD sample retained with the Field Officer did not meet BIS specifications. Also HSD sample retained by you failed to meet reproducibility limits with respect to supply location sample.

This is against the policy guidelines of the Corporation and violation of standard dealership agreement executed between Indian Oil Corporation Limited and you as partner of the RO under the name and style of M/s Raja Service Station.

In view of the above, it is evident that you have committed breach of the terms, conditions, covenants and stipulations contained *inter alia* under various clauses of the aforesaid Dealership Agreement dated 11.02.1993.'

The Corporation conducted tests on 02.07.2015 and 21.09.2015 on the samples drawn on 30.06.2015. The test conducted, on 21.09.2015, by the Corporation with reference to the retention sample of the petitioner showed that both BIS specifications in respect of MS & HSD are met. The sample of MS also met the reproducibility limits. But, the sample of HSD failed to meet reproducibility limits with reference to the supply location sample. Section 20 of the Petroleum Act, 1934, A.P. Petroleum Product Order, 1980 and clause 2.5.E of the MDG, 2012 gives right to the dealer to make an application for re-testing of samples within 7 days from the date of receipt of intimation about the result of the test, that is, within seven days from 09.07.2015. The application of the petitioner was

considered and a re-test was conducted by the Corporation, on 21.09.2015. The subsequent test report, dated 21.09.2015, will prevail over the earlier test. There was no adulteration of petroleum products. As such no penal action can be initiated against the petitioner. The petitioner, after submitting explanation to the show-cause notice, submitted a representation, dated 04.01.2017, requesting the authorities to stop further action and to permit to resume sales & supplies. No action has been taken. However, the 4th respondent terminated the dealership on the ground of failure to meet the reproducibility test with reference to the retention sample of the supply location and that therefore, it amounts to adulteration. Under law, adulteration means mixture of any foreign material. The test reports disclose that the petroleum products sold from the retail outlet of the petitioner are not adulterated. The failure to meet the reproducibility test of HSD with reference to the supply location sample does not warrant termination of dealership. The density of the petroleum products, that is, MS and HSD varies from one tanker to another tanker. The underground tankers of MS and HSD of the petitioner outlet contained mixture of various supply tankers of MS and HSD, which contain different density points. The only question for consideration is as to whether the petroleum products offered to be sold from the retail outlet are adulterated or not. When the samples met with BIS specifications showing thereby that they are not adulterated, no penal action can be initiated against the retail outlet of the petitioner. The respondents failed to take into consideration, the test report, dated 21.09.2015. The order of termination does not even consider the contents of the explanation of the petitioner. It is simply

stated in the termination order that the petitioner's reply, dated 04.01.2017, in response to the show-cause notice is perused and the explanation furnished is unsatisfactory and is unacceptable. The respondents have not applied their mind while considering the explanation of the petitioner. There was no fairness and transparency in the entire process. On the above grounds, the termination order is liable to be set aside. In view of the variation in the first and the second reports, the petitioner cannot be held responsible. The petitioner cannot be made responsible for not meeting the reproducibility limits. The samples were drawn in the presence of the petitioner, on 30.06.2015, and they were taken and sealed in his presence and were sent for analysis. Whereas, the samples drawn at supply location point were drawn in the absence of the petitioner. It is not known whether the same sample drawn at the supply location point at the retail outlet of the petitioner was compared with the retention sample of the petitioner outlet. The termination of the dealership of the petitioner by the impugned order on the ground that the reproducibility limit was not met in respect of HSD when compared to the supply location sample is illegal, arbitrary and violative of Article 19(g) of the Constitution of India. The petitioner has been carrying on business for the last more than thirty years. If the impugned order is not set aside, the petitioner suffers serious and irreparable loss. The 4th respondent issued letter, dated 27.07.2017, directing the petitioner to be present at the retail outlet, on 03.08.2017, for handing/taking over the properties belonging to the Corporation. The 4th respondent or his officials did not visit the retail outlet on 03.08.2017 for taking the properties of the Corporation.

The respondent Corporation is not justified in taking over the retail outlet of the petitioner when the petitioner is disputing the correctness of the termination of the dealership. Hence, the respondents may be directed not to take over the retail outlet of the petitioner pending disposal of the writ petition. Hence, the present writ petition is filed.

4. A counter affidavit is filed by the 4th respondent-Deputy General Manager (RS) of the Indian Oil Corporation, on behalf of respondents 2 to 5. The averments in the said counter, in brief, are as follows:

The writ petition is not maintainable either in law or on facts. The writ petitioner has approached the Court with unclean hands by suppressing several material facts and hence, the writ petition is liable to be dismissed. Earlier also, certain irregularities have taken place in the petitioner's retail outlet. As irregularities and illegalities were committed by the petitioner retail outlet, the respondent Corporation has initiated action against the petitioner and challenging the said action, the petitioner filed W.P.no.3517 of 2006. The respondent Corporation is contesting the said writ petition and the same is pending adjudication. It is clearly mentioned in the letter, dated 09.07.2015, of the 3rd respondent that MS sample of the retail outlet does not meet the reproducibility limit in distillation test with respect to supply location sample and HSD sample of the outlet does not meet BIS specification. This is the finding of the lab test report, which has been duly communicated to the retail outlet dealer, vide letter, dated 09.07.2015, while advising for suspension of sales and supplies with immediate effect. The request of the petitioner for retesting of the samples was

entertained and after failing to turn up at a prefixed date on 08.09.2015, the next date for retesting of retention sample was fixed on 21.09.2015 in line with the request from the petitioner. Retesting of the retention sample on 21.09.2015 revealed the similar report as that of original test report wherein MS sample of retail outlet as well as the one retained by field officer failed to meet the reproducibility test. However, HSD sample retained by the dealer passed in BIS specifications; but the counter sample retained by Field Officer failed to meet BIS specifications. Moreover, retail outlet sample of HSD failed to meet the reproducibility limit, thereby, re-establishing the case of adulteration of MS and HSD at the petitioner's retail outlet. Show Cause notice was issued to the petitioner after getting approval from the competent authority and subsequent clearance by Law Department. The sample obtained from the petitioner's outlet failed during initial testing, on 02.07.2015, and again, during re-testing of the sample on 21.09.2015. MS sample has failed in reproducibility test and HSD samples have failed to meet the BIS specification on both the occasions. The claim of the petitioner that retention sample by the retail outlet dealer passed in BIS specifications during retesting is contradicted by the fact that the counter sample retained by the Field Officer has failed to meet BIS specifications. Moreover, even the HSD sample retained by the outlet dealer has failed in reproducibility test during retesting of sample, on 21.09.2015. In the Marketing Discipline Guidelines applicable to all Oil Companies Dealers, Clause 2.10 deals with Sample Testing and Results. It read as follows: '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 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.’ It is proved beyond doubt that both MS and HSD samples of the retail outlet failed to meet the specifications and it is a clear case of adulteration of product. Therefore, termination of the dealership of the petitioner’s retail outlet is justified and the same is within the frame work of law. The High Court, vide orders, dated 08.08.2017, in WPMP no.32764 of 2017 in this writ petition, granted an interim direction to these respondents not to take over the retail outlet of the petitioner on the ground that *prima facie* the record discloses that the petitioner is the owner of the property. The said finding is not correct in view of the fact that the land on which the petitioner’s retail outlet was established, is not owned by the petitioner and the same is obtained on lease by the 2nd respondent from third parties, under a registered lease deed, dated 25.06.2002, bearing document no.1069 of 2002, registered in the office of the Sub Registrar, Ponduru, Srikakulam District. There is no illegality or irregularity in the termination order passed by these respondents. Hence, the petitioner is not entitled for any reliefs sought for in the writ petition. The petitioner suppressed the material facts before this Court at the time of passing of the interim order, dated 08.08.2017. The respondent Corporation has taken over possession of the subject retail outlet on 03.08.2017 itself, after following due process of law and under the cover of panchanama. Prior to taking over possession, the respondent Corporation issued letter, dated 27.07.2017, to the petitioner

and others intimating about the termination and calling upon them to be present personally at the retail outlet on 03.08.2017 by 11 AM for handing/taking over properties and belongings of the Corporation to its authorized personnel. In spite of the same, none were present on behalf of the petitioner, on 03.08.2017. Even the representatives of the petitioner, though contacted over phone, were not available. Having left with no other option, the representatives of the respondent Corporation proceeded with taking over of the petitioner's retail outlet and properties/belongings of the Corporation at the retail outlet, on 03.08.2017, as scheduled, under the cover of panchanama, dated 03.08.2017. As on today, the possession of the said retail outlet is with the representative of the respondent Corporation though sales not have commenced. In view of the same, the interim orders of this Court have no effect. Taking advantage of the interim orders of this Court, dated 08.08.2017, the petitioner is trying to interfere with the possession of the respondent Corporation over the subject matter of the retail outlet. Under the said circumstances, unless this Court vacates the interim order, dated 08.08.2017, the respondents will suffer grave and irreparable loss, which cannot be compensated. There are no merits in the writ petition and the writ petition is liable to be dismissed.'

6. Though the vacate stay petition is listed for hearing before this Court, learned counsel for either side requested to hear & dispose of the writ petition itself. Hence, as desired, submissions are heard in the writ petition.

7. I have perused the material record.

8. Both the learned counsel advanced arguments in line with the pleadings of the parties, which are referred to supra, in detail. To arrive at a just decision, it is necessary to refer to the contents of the two test reports.

9. The relevant contents of the first test report, dated 09.07.2015, are as follows:

‘MS: Retail Outlet (RO sample) sample does not meet reproducibility limits in respect of distillation test with respect to supply location sample.

HSD: RO sample does not meet BIS specification.’

9.1 The relevant contents of the subsequent test report, dated 21.09.2015, admittedly disclose the following results: Retesting of retention sample revealed that MS sample of RO as well as the one retained by the Field Officer failed to meet the reproducibility limits; however, HSD sample retained by the dealer passed in BIS specifications; but, the counter sample retained by the Field Officer failed to meet the BIS specifications; further, retail outlet sample of HSD failed to meet reproducibility limit.

10. From the above contents of the reports, it is discernible that MS RO sample met with BIS specifications; though HSD RO sample as per the first test report did not meet the BIS specification, yet, it passed the test insofar as BIS specifications when retested, though the HSD counter sample retained by the Field Officer failed to meet the BIS specifications. In the considered view of this Court, since the HSD RO sample passed the test insofar as the BIS specifications when retested,

the benefit of doubt can be extended to the petitioner. Therefore, it is possible to hold that both the RO (MS & HSD) samples met BIS specifications. Be that as it may. Nonetheless, MS retail outlet sample did **not meet reproducibility limits** in respect of distillation test with respect to supply location sample even according to the first report. Further, retesting of retention sample revealed that MS sample of RO as well as the one retained by the Field Officer failed to meet the reproducibility test; moreover RO sample of HSD also failed to meet the reproducibility limit. Thus, from the reports, it is clear that both MS & HSD samples failed to meet the reproducibility limits.

11. In this backdrop of test results, the petitioner contends that since BIS specifications are met with and as the samples failed to meet the reproducibility limits only, it cannot be said that the products being sold at the outlet are adulterated as adulteration means mixture of any foreign material and that it is not possible to say from the test reports that there is adulteration of MS & HSD at the outlet by mixture of any foreign material. He further relied upon the following decisions in support of the contentions. In the decision in **Premodaya Bharat Petroleum Dealers, Buchireddy Palem, Nellore v. Bharat Petroleum Corporation Ltd, Labbipet, Vijayawada**¹, it was held as follows: 'A petroleum product can be said to be adulterated only when there is introduction of any foreign substance into petroleum product, which again results in the product not conforming to the requirement and specification in the schedule I. The definition contains the word 'means'. The definition has to be interpreted strictly and it is not

¹ 2008 (6) ALD 670

possible to expand the purport or scope of the definition. The above decision was referred to in the decision in **P.T.Gopalachari & Sons v. Bharat Petroleum Corporation Ltd.**², wherein it was held that there is no basis for the allegation that adulteration as defined under clause 2(a) of the Control order has taken place and that the termination order was passed without considering the explanation offered by the petitioner therein to the notice.

12. Per contra, the case of the respondents is that the results of the test reports related to the retail outlet samples of both MS & HSD disclosed that the samples failed to meet the reproducibility limits and that as per the Marketing Discipline Guidelines, 2012 and the definition of adulteration of product, the termination order is legal and valid. In the said guidelines, Chapter-5, Clause 5.1 deals with MS/HSD and Clause 5.1.1 deals with adulteration of product. The said definition reads as under:

“‘Adulteration’ means the introduction of any foreign substance into motor spirit/high speed diesel illegally or unauthorisedly with the result that a product does not conform to the requirements of bureau of Indian Standards specification no.IS:2796 and IS:1460 for Motor Spirit and High Speed Diesel respectively and amendments thereon, and/or If the observations on the sample under scrutiny and the reference sample do not fall within reproducibility/permissible limits of the test method for which the samples are examined, and/or Any other requirement for the purpose to identify adulteration, issued by the competent authority from time to time.”

² W.P.no.23479 of 2002, dated 23.06.2009 (T&AP HC)

13. The above definition is an inclusive definition and mandates that if the observations on the sample under scrutiny and the reference sample do not fall within reproducibility/permissible limits of the test methods for which the samples are examined would also mean 'adulteration'. Therefore, the contention that the failure to meet the reproducibility test does not amount to adulteration needs no countenance. Though a feeble contention is raised in the writ petition that the samples drawn at supply location point were drawn in the absence of the petitioner, the sanctity of such samples for subjection to tests along with retail outlet samples is not disputed in the explanation offered by the petitioner to the show cause notice. Therefore, the contention now raised in the writ petition as an afterthought is of no significance.

14. In view of the test results and the above definition, this Court is of the considered view that the termination order on the grounds mentioned therein, which are referred to supra, cannot be termed as illegal and arbitrary as it appears from the test results that the results are against the policy guidelines of the Corporation and the terms, conditions, covenants and stipulations contained *inter alia* under various clauses of the dealership agreement.

15. Admittedly, the land is a leasehold premises taken on lease by the respondents and the possession of the outlet was already taken under panchanama, dated 03.08.2017.

16. In the result and for the aforesaid reasons, this Court finds no merit in the contentions of the petitioner warranting interference in the matter.

17. Accordingly, the Writ Petition is dismissed.

There shall be no order as to costs.

Pending miscellaneous petitions, if any, shall stand closed.

M. SEETHARAMA MURTI, J

30th September, 2019

Note:- Issue CC by 30.10.2019
(B/o)
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THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

Writ Petition No.26413 of 2017

30.09.2019

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