Civil Appeal

Present: The Hon'ble Mr. Justice Bhaskar Bhattacharya
And
The Hon'ble Mr. Justice Prasenjit Mandal

M.A.T. No.818 of 2009
With
C.A.N.8369 of 2009

Judgment on: 8th April, 2010.

M/s. Friend's HP Station & Anr

Versus

The Senior Regional Manager (Retail),
Hindustan Petroleum Corporation Ltd. & Ors

POINTS:

RETESTING-Result of the first test against the dealer-Application for retesting-Failure only in respect of RON test conducted after 60 days-Oil Company violated its own norms of testing within 30 days-Time limit whether merely for maintaining discipline-Oil Company, whether correct to terminate the dealership on the basis of the result of the first RON test-Constitution of India, Article 226.

FACTS:

This Mandamus-Appeal is at the instance of The unsuccessful writ-petitioners filed an appeal against an order passed by a learned Single Judge of this Court by which His Lordship dismissed a writ-application filed by the appellants in which they challenged an order passed by the Senior Regional Manager (Retail), Hindustan Petroleum Corporation Ltd. terminating the dealership of the writ-petitioner No.1 which is a partnership firm of which the writ-petitioner No.2 is a partner.

HELD:

If the result of the first test goes against the dealer, he has a right to apply for retesting and if such an application is made, it is the duty of the Oil Company to consider such application with impartiality and generally, not to refuse such prayer. The prayer for retesting should be allowed almost as a matter of course and only in exceptional cases such prayer should be refused by giving sufficient reason for rejection of such prayer. Para-15

Out of six tests conducted, there was failure only in respect of RON test inasmuch as the minimum required percentage of RON was 91% whereas from the sample taken, 83.6% was recorded in the first test. The difference was, therefore, only of 6.5%. When the petitioners passed through other five tests but only failed to clear the RON test, the Oil Company acted arbitrarily in refusing to retest on the mere ground that, in the first test held, the difference was found to be of 6.5% which according to the Oil Company was “huge” although the violation of time limit of testing on its own part which was done 61 days after taking the sample instead of 30 days fixed by the general norms was ignored. The reason assigned by the Oil Company in refusing the prayer of retesting was on the face of it arbitrary. Para-16

After taking into consideration the fact that the Oil Company itself violated its own norms of testing within 30 days from the date of taking sample which itself was in violation of the Government Order and the further fact that even after committing violation of its own norms, the Oil Company refused the prayer of retesting, the Court is of the view that the decision of the Oil Company to terminate the dealership on the basis of the result of the first test by which the writ-petitioner could not clear the requisite RON percentage by only 6.5% was patently erroneous.

Para-19

The submission that the time limit specified in the Rules was merely for maintaining the discipline and does not affect the quality of the oil after the expiry of 30 days cannot be accepted. Para-20

CASES CITED:

1) Harbanslal vs. Indian Oil Corporation Limited, 2003(2) SCC 107

2) Ramana Dayaram Shetty vs. The International Airport Authority of India And others, AIR 1979 SC 1628

3) Vitarelli v. Seaton (1959) 359 US 535: 3 L Ed 2d 1012

4) A. S. Ahluwalia v. State of Punjab (1975) 3 SCR 82: AIR 1975 SC 984

5) Sukhdev v. Bhagatram, (1975) 3 SCR 619: AIR 1975 SC 1331

For the Appellants: Mr. Saktinath Mukherjee,
Mr. Kalimuddin Mondal,
Mr. Sankar Biswas,
Mr. Aniket Mitra.

For the Respondents: Mr. Dilip Kumar Kundu,
Mrs. Soumya Ghosh,
Ms. Saswati Sengupta.

THE COURT:

1) This Mandamus-Appeal is at the instance of the unsuccessful writ-petitioners and is directed against an order dated July 30, 2009 passed by a learned Single Judge of this Court by which His Lordship dismissed a writ-application filed by the appellants in which they challenged an order dated 26th February, 2009 passed by the Senior Regional Manager (Retail), Hindustan Petroleum Corporation Ltd. (hereinafter referred to as the HPCL) terminating the dealership of the writ-petitioner No.1 which is a partnership firm of which the writ-petitioner No.2 is a partner.

2) Being dissatisfied, the writ-petitioners have come up with the present mandamus-appeal.

3) The facts giving rise to filing of the writ-application may be summed up thus:

(a) On August 27, 2008, an inspection was conducted at the petrol pump run by the writ-petitioners at Purba Bishnupur in the District of 24-Parganas (South). Samples were drawn and sent to the laboratory for testing. By a letter dated 10th November, 2008, the test-report was conveyed to the writ-petitioners which indicated that the ingredient RON in the motor spirit BS III was found to be 83.6 whereas the minimum requirement was 91.

(b) On the above basis, by a letter dated 10th November, 2008, the sales and supplies from the aforesaid retail outlet was suspended and the writ-petitioners were asked to offer their explanation. By a letter dated November 19, 2008, the writ-petitioners replied the said letter by insisting on re-testing of the NOZZLE sample as also TT sample retained at the outlet.

(c) By a letter dated 12th January, 2009, the HPCL refused to accede to the prayer of re-testing on the ground that there existed huge gap between the required RON and the actual percentage of RON found on analysis and consequently, they were of the view that it was a clear case of adulteration.

(d) By the aforesaid letter, the writ-petitioners were called upon to show cause as to why necessary action should not be taken against them. The writ-petitioners by their letter dated 28th January, 2009 replied reiterating their demand of retesting and the HPCL by the letter dated 26th February, 2009 terminated the dealership which was the subject-matter of challenge.

4) At the time of hearing of the aforesaid writ-application, it was contended on behalf of the writ-petitioners that although the sample was drawn on August 27, 2008 and it was received by the laboratory on August 30, 2008, yet, the test was made on October 27, 2008 and as such, the long delay in testing the sample was the reason for the deficiency complained by the respondents. According to the writ-petitioners, the delay in testing the sample was in violation of the guidelines which required that the sample should be sent to the laboratory within 10 days of the draw of the specimen and should be tested within the next 20 days from the date of arrival the specimen. In support of such contention, the writ-petitioners relied upon the decision of the Supreme Court in the case of Harbanslal vs. Indian Oil Corporation Limited reported in 2003(2) SCC 107.

5) The respondents, on the other hand, opposed the aforesaid contention and contended that the delay in conducting the test did not vitiate the report by relying upon Article 2.5 Clause (I) of the guidelines. It was pointed out that the purpose of maintaining time-frame for various activities *e.g.* sending samples to laboratory within 10 days etc. was to streamline the system and was in no way related to quality of the product or the result of the test.

6) The respondents further contended that the writ-petition was not maintainable because of the existence of an arbitration clause in the agreement between the parties.

7) The learned Single Judge on consideration of the aforesaid contention of the respective parties held that the case of Harbanslal (supra) relied upon by the writ-petitioner had no manner of application to the facts and circumstances of the case and further, the refusal to accede to the prayer of retesting was supported by adequate reason and according to the learned Single Judge, the delay in conducting the test, even according to the guideline, did not affect the result as regards the quality of the sample which has been tested. The learned Single Judge further concluded that at every stage, opportunity was given to the writ-petitioners to explain their conduct and except for making a prayer for retesting which was refused for sufficient reason the writ-petitioners could not adduce any sufficient reason for the deficiency. The learned Single Judge further held that the question whether the result of testing was correct or not could not be adjudicated by the Writ-Court and in such circumstances, the writ-petitioners should have approached the arbitrator.

8) Consequently, the learned Single Judge dismissed the writ-application.

9) Being dissatisfied, the writ-petitioners have come up with the present appeal.

10) Mr. Mukherjee, the learned senior advocate appearing on behalf of the appellants, by relying upon the decision of the Supreme Court in the case of Harbanslal (supra), contended before us that the learned Single Judge erred in law in ignoring the decision of the Supreme Court on the selfsame point. According to Mr. Mukherjee, in the said decision the Supreme Court has specifically stated that the quality of oil varies with the expiry of time and, thus, the time period of 30 days should be strictly followed.

11) Mr. Mukherjee further contends that his client having specifically prayed for retesting and the agreement having also provided that the dealer can pray for re-testing in the event any adverse result is shown at the first test, there was no justification for refusing the prayer. Mr. Mukherjee contends that the reason given by the respondents for refusing to accede to the prayer of re-testing was arbitrary. Mr. Mukherjee, therefore, prays for setting aside the order passed by the learned Single Judge.

12) Mr. Kundu, the learned advocate appearing on behalf of the respondents, has, on the other hand, opposed the aforesaid contention of Mr. Mukherjee and has contended that, as would appear from the guidelines of the company, mere delay in testing does not have any impact on the quality of the petrol and, thus, the learned Single Judge rightly dismissed the writ-application. Mr. Kundu further submits that his client has exercised just discretion in refusing the prayer of retesting in view of huge amount of difference from the minimum requirement required under law. Mr. Kundu, therefore, prays for dismissal of the appeal.

13) Therefore, the only question that arises for determination in this appeal is whether the learned Single Judge was justified in dismissing the writ-application in the facts of the present case.

14)Before entering into the merit, it will be profitable to refer to the provision of retesting at the instance of the dealer in case of failure at the test as provided in sub-clause D of clause 2.5 of the agreement which is quoted below:

> *D. In case of Sample failure, in the event of request for testing by the dealer, the same to be considered on the merit by the State Office/Regional/ General Manager of the concerned oil company, if approved by the 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 guidelines, preferably in the presence of the field officer, RO dealer/representative and a representative of QC Dept. of the oil company after due verification of the samples. All the 3 samples should be tested only in the same lab; and a possible by the same person to ensure repeatability and the reproducibility. The expenditure incurred for such testing should be recovered from the dealer. The decision of the GM, which could be based on the test results of all the 3 samples, would be decisive and binding on all.

15) A plain reading of the aforesaid provision makes it abundantly clear that if the result of the first test goes against the dealer, he has a right to apply for retesting and if such an application is made, it is the duty of the Oil Company to consider such application with impartiality and generally, not to refuse such prayer. In other words, the prayer for retesting should be allowed almost as a matter of course and only in exceptional cases, such prayer should be refused by giving sufficient reason for rejection of such prayer. In the case before us, the only reason assigned by the Oil Company for rejecting the prayer for retesting is that due to the huge difference of test results showing a failure of the sample specifications, the prayer for retesting was not considered.

16) We find from the materials on record that out of six testes conducted, there was failure only in respect of RON test inasmuch as the minimum required percentage of RON was 91% whereas from the sample taken, 83.6% was recorded in the first test. The difference was, therefore, only of 6.5%. In our opinion, when the petitioners passed through other five tests but only failed to clear the RON test, the Oil Company acted arbitrarily in refusing to retest on the mere ground that in the first test held the difference was found to be of 6.5% which according to the Oil Company was “huge” although the violation of time limit of testing on its own part which was done 61 days after taking the sample instead of 30 days fixed by the general norms was ignored. The reason assigned by the

Oil Company in refusing the prayer of retesting was on the face of it arbitrary. The prayer of retesting, it is needless to mention, is made only on failure and thus, the failure on the part of the writ-petitioners in the first test having failed to secure the minimum amount of RON percentage by 6.5% cannot justify rejection of the prayer of retesting. We cannot lose sight of the fact that the wife of the writ-petitioner No.2 for the purpose of getting the dealership executed a lease-deed of 30 years in favour of the Oil Company at a paltry amount of monthly rental of Rs.700/-and if the dealership is terminated the lease will continue in favour of the Oil Company for the balance period to its advantage.

17) We, therefore, hold that the decision of the Oil Company in rejecting the prayer of retest has occasioned failure of justice and caused irreparable injury to the writ-petitioners.

18) We also find substance in the contention of Mr Mukherjee, the learned senior advocate appearing on behalf of the writ-petitioners that the delay in sending the sample for examination has resulted incorrect result as would appear from the following observations of the Supreme Court in the case of Harbanslal vs. Indian Oil Corporation Limited reported in 2003(2) SCC 107:

> *"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 a 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 record 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 the 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 of the Court to an order dated 24-10-2002 passed by the Commissioner, Nainital in an appeal preferred against the suspension of the 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."*
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> (Emphasis supplied).

19) Thus, after taking into consideration the fact that the Oil Company itself violated its own norms of testing within 30 days from the date of taking sample which itself was in violation of the Government Order as noticed by the Apex Court in the above judgement and the further fact that even after committing violation of its own norms, the Oil Company refused the prayer of retesting, we are of the view that the decision of the Oil Company to terminate the dealership on the basis of the result of the first test by which the writ-petitioner could not clear the requisite RON percentage by only 6.5% was patently erroneous.

20) We are not at all impressed by the submission of Mr. Kundu, the learned advocate appearing on behalf of the Oil Company, that the time limit specified in the Rules was merely for maintaining the discipline and does not affect the quality of the oil after the expiry of 30 days. Apart from such assertion made in the booklet of the respondent, no scientific proof of such claim has been

produced before us to show that the observation of the Supreme Court mentioned above was not based on any scientific reason or that the Government without any scientific cause fixed such restriction on time limit of testing.

21) At this juncture, we may appropriately refer to the following observations of the Apex Court in the case of Ramana Dayaram Shetty vs. The International Airport Authority of India and others reported in AIR 1979 SC 1628 where the said Court at paragraph 10 of the judgement stressed on necessity of rigorous compliance of the norms set up the executive agency in performance of its administrative acts:

> *"It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr. Justice Frankfurter in Vitarelli v. Seaton (1959) 359 US 535 : 3 L Ed 2d 1012 where the learned Judge said :*
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> *"An executive agency must be rigorously held to the standards by which it professes its action to be judged. ..... Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. .....This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword."*
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> *This Court accepted the rule as valid and applicable in India in A. S. Ahluwalia v. State of Punjab (1975) 3 SCR 82 : (AIR 1975 SC 984) and in subsequent decision given in Sukhdev v. Bhagatram, (1975) 3 SCR 619 : (AIR 1975 SC 1331), Mathew, J., quoted the above-referred observations of Mr. Justice Frankfurter with approval. It may be noted that this rule, though supportable also as emanating from Article 14, does not rest merely on that article. It has an independent existence apart from Article 14. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority. If we turn to the judgment of Mr. Justice Frankfurter and examine it, we find that he has not sought to draw support for the rule*

from the equality clause of the United States Constitution but evolved it purely as a rule of administrative law. Even in England, the recent trend in administrative law is in that direction as is evident from what is stated at pages 540-41 in Prof. Wade's Administrative Law 4th Edition. There is no reason why we should hesitate to adopt this rule as a part of our continually expanding administrative law. Today with tremendous expansion of welfare and social service functions increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the State, the power of the executive government to affect the lives of the people is steadily growing. The attainment of socio-economic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with State power-holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise. Whatever be the concept of the rule of law, whether it be the meaning given by Dicey in his "The Law of the Constitution" or the definition given by Hayek in his "Road to Serfdom" and "Constitution of liberty" or the exposition set forth by Herry Jones in his "The Rule of Law and the Welfare State", there is, as pointed out by Mathew, J., in his article on "The Welfare State, Rule of Law and Natural Justice" in Democracy, Equality and Freedom "substantial agreement in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found". It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affection of some right or denial of some privilege."

22) The other point raised by Mr. Kundu regarding existence of an arbitration clause as an alternative remedy prohibiting entertainment of the writ-application is equally devoid of any substance. In the above decision of the Supreme Court in the case of Harbanslal vs. Indian Oil

Corporation Limited (supra), the abovementioned point was specifically taken and the Supreme Court answered the same in the following words:

> *"So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See Whirlpool Corpn. v. Registrar of Trade Marks 1.) The present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."*

23) Thus, on consideration of the entire materials on record, we find that the learned Single Judge erred in law in rejecting the writ-application filed by the appellants. This is a fit case where the order of termination of dealership should be set aside as the respondents arbitrarily terminated the dealership by not following its own norms and at the same time, even the opportunity of retesting was refused without any sufficient ground.

24) The writ-application is allowed and the order impugned is set aside. The respondent is free to proceed against the appellants from the stage of retesting if they so desire; but in that event both the samples of the appellants and that of the respondents should be tested for comparison as the normal time of testing has expired. The appeal is thus allowed.

25) In the facts and circumstances, there will be, however, no order as to costs.

26) In view of disposal of the appeal itself, the connected application has become infructuous and the same is disposed of accordingly.

(Bhaskar Bhattacharya, J.)

27) I agree.

(Prasenjit Mandal, J.)