Neutral Citation No. - 2023:AHC:175076

RESERVED

Court No. - 5

Case :- WRIT - C No. - 16998 of 2023

Petitioner :- M/S Aliganj Kisan Seva Kendra, Aliganj And Another
Respondent :- Indian Oil Corporation Ltd. And 3 Others
Counsel for Petitioner :- Yash Padia
Counsel for Respondent :- Anand Tiwari

HON'BLE PIYUSH AGRAWAL,J.

1. Heard Shri Yash Padia, learned counsel for the petitioners and Shri Anil Kishore Sharma, learned Senior Advocate, assisted by Shri Anand Tiwari, learned counsel for the respondents - Corporation.

2. The instant writ petition is directed against the impugned order dated 03.05.2023 passed by the respondent no. 2, i.e., Executive Director (Retail Sales N & E), Indian Oil Corporation Limited, Mumbai, by which the appeal preferred by the petitioners has been rejected. A further prayer has been made for resuming the supply to the petitioner.

3. Sri Sharma raised a preliminary objection about the maintainability of the writ petition by submitting that the present writ petition is arising out of non-statutory contract for which a writ petition is not maintainable and it is not a case where this Court may exercise its extra-ordinary jurisdiction under Article 226 of the Constitution of India. He further submits that the petitioners may be relegated to avail its alternative remedy by invoking civil jurisdiction, if so advised.

4. Learned counsel for the respondents, in support of his preliminary objection, has placed reliance upon the judgement of Hon’ble the Apex Court in the case of **Tata Cellular Vs. Union of India, 1994 6 SCC 651** and submitted that there is limited scope of

judicial review in the contractual matter. He submitted that the Court can only see the illegality in the decision making process or commission of any error of law as well as breach of rule of natural justice.

5. He further relied upon the judgement of Hon'ble Apex Court in the cases of **Harbanslal Sahnia and another Vs. Indian Oil Corporation Ltd.& others, 2003 2 SCC 107** and **Mrs. Sanjana M. Wig Vs. Hindustan Petro Corporation Ltd. 2005 (6) Supreme 328** as well as this Court in the case of **M/s ECI SPIC, SMO MCMI (JV) Vs. Central Organization for Railway Electrification Allahabad and another, 2017 0 Supreme (All) 2374** and submitted that there was efficacious alternative remedy of arbitration / civil jurisdiction and writ petition should not be entertained in such matters.

6. Rebutting the said submission leaned counsel for the petitioners submits that this is sixth round of litigation, but the objection with regard to maintainability of the writ petition was never raised earlier. He further submits that the Division Bench as well as the Single Bench of this Court on various occasions, on almost identical set of facts, not only maintained the writ petition, but also directed for resuming the supply of HSD supply to the petitioners therein. In support of his contention, he has placed reliance upon the judgements in ***M/s Kamalkant Automobiles & Another Vs. Hindustan Petroleum Corporation Limited & Others*** [2019 (3) ADJ 307 (DB)], ***M/s Chaudhary Filling Point, Kazipur & Another Vs. State of U.P. & Others*** [2019 (3) ADJ 345 (DB) (LB)] as well as Writ C No. 67004 of 2014 **(M/s Sainik Krishak Sewa Kendra vs. Indian Oil Corporation Ltd. and another**) which was disposed of by this Court on 6.9.2016 after considering various judgements of the Apex Court and submits that the writ petition is maintainable.

7. He further submitted that the present writ petition is the 6th round of litigation and the present writ petition has been filed against the order passed in appeal in terms of clause 8.9 of the Marketing Discipline Guidelines. Therefore, he prays for entertaining the writ petition.

8. After hearing the learned counsel for the parties and considering the various judgements placed before this Court, it would be relevant to discuss the judgements, referred to above.

9. It is a matter of fact in the case in hand this is sixth round of litigation and the present writ petition is being filed with regard to the order passed in appeal as per clause 8. 9 of Marketing Discipline Guidelines.

10. Now, the Court first deals with the individual judgements relied upon by the counsel for the respondents.

11. So far as the law laid down by this Court in the case of **M/s ECI SPIC-SMO-MCMI (JV) (Supra)** is concerned, the Court after considering the material on record in that case has dismissed the petition on the ground of availability of arbitration clause and same view has also been express by the Apex Court in the case of **Harbanslal Sahnia (supra)**.

12. Further in the case of **Mrs. Sanjana M. Wig(supra),** the parties themselves had appeared before the Arbitrator and settled their dispute to pay certain amount in instalments with interest but the appellant committed default in payment for some reasons, therefore, the Court declined to interfere in the matter in exercise of writ jurisdiction.

13. The petitioners in the present case have already availed the remedy of arbitration clause. An award was passed in favour of the petitioners. Thereafter, during pendency of execution application, a deed of settlement was executed on 08.09.2011

between the parties. Therefore, on the facts of the case in hand, the two judgements relied upon by the counsel for the respondent – Corporation in paragraph no. 10 are of no help to them.

14. Similarly, the judgement relied upon by the respondent in paragraph nos. 11 & 12 is entirely distinguishable on the facts of the present case as the case in hand, the respondent is not claiming any settlement were entrered between the parties for payment of any amount which has been defaulted by the petitioners, to which the writ petition is not maintainable.

15. So far as the judgement passed in the case of **Tata Cellular (supra)** is concerned, the Apex Court considered that the tender invited to issue the cellular mobile operating services and on that ground the Apex Court has made certain observations with regard to the allotment of contractual services whether judicial review can be made or not and on that aspect the matter was decided and it was held that the terms of the invitation to tender as well as allotment cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. The decision to accept the tender or award the contract is reached by the process of negotiations through several tiers and such decisions are made qualitatively by experts.

16. Accordingly, the Apex Court decided that there will be a limited judicial review of the matter but the case is hand is entirely different as it is not a case of allotment of retail outlet but running retail outlet has been terminated on the basis of some inspection being made by the respondent - Corporation (which will be dealt later on).

17. In view of above, the judgement relied upon by the counsel for the respondents is of no aid to them.

18. Now, the Court deals with the individual judgements relied upon by the counsel for the petitioner.

19. The Division Bench of this Court in the case of ***M/s Kamalkant Automobiles & Another Vs. Hindustan Petroleum Corporation Limited & Others*** [2019 (3) ADJ 307 (DB)] has held that with regard to the prayer for restoration of the dealership, the only remedy available to the party is by means of the writ petition as neither a civil suit is maintainable, nor there is a remedy available before the Arbitrator appointed in terms of the arbitration clause contained in the agreement and therefore, the writ petition is maintainable and the alternative remedy does not provide for effective and efficacious remedy to the petitioner for the reliefs sought. The relevant paragraph nos. 20, 30, 31, 32, 33, 34 & 35 of the said judgement are quoted below:-

> *20. Based upon the pleadings and the arguments of the petitioners and the respondent-corporation, the following points arise for determination:*
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> > *(1) Whether the order dated 24.7.2017 passed by the Corporation terminating the agreement is perverse and based on no material and contrary to the Marketing Discipline Guidelines?*
> >
> > *(2) Whether this Court should exercise its power under Article 226 of the Constitution of India in view of Arbitration Clause in the agreement?and;*
> >
> > *(3) Whether the petitioner is entitled to restitution of the dealership?*
>
> *30. Learned counsel for the respondents has very strongly urged that in view of the Arbitration Clause contained in the agreement the writ petition is liable to be dismissed whereas the counsel of the petitioners has stressed that availability of alternative remedy is a rule of discretion and not compulsion and the Court will not shirk from exercising the powers under Article 226 of the Constitution of India for setting aside the order, which is perverse and arbitrary and also violating the principles of natural justice. The Hon'ble Supreme Court while considering the maintainability of a writ petition in view of the availability of alternative remedy, relying upon the cherished judgement rendered in the case of Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai & others, 1998 (8) SCC 11 has reiterated the same principle in its judgement rendered in the case of Harbanslal Sahnia (supra). Para 7 of the said judgement is quoted as under:*

> *"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."*

31. The petitioners have also relied upon the judgement of the Hon'ble Supreme Court in the case of E. Venkatakrishna (supra) wherein the Supreme Court has held that the only remedy available to the petitioners by invoking the Arbitration Clause would lead to a finding by the Arbitrator holding the termination as unlawful and for awarding the damages and the arbitrator did not have any jurisdiction for restoration of the fair price shop and thus the arbitration clause would not give any efficacious remedy to the petitioners for the reliefs sought. Reliance is placed upon paragraph 5 and 7 of the said judgement which is as under:

> *"The award was challenged by the respondent in proceedings under Section 30 of the Arbitration Act taken before a learned Single Judge of the Madras High Court. The learned Single Judge rejected the challenge. The respondent preferred an appeal and the Division Bench, in the judgment and order that is impugned be fore us, upheld the challenge. It said:*
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> *"There is considerable force in the contention of the appellant that what is arbitrable under Clause 37 is only the dispute or difference in relation to the agreement. The question of restoration of*

distributorship would not arise under the agreement. Therefore, we have no hesitation in holding that the Arbitrator was in error and in fact had no jurisdiction to direct restoration of distributorship to the 1st respondent."

In our view, the Division Bench was right. All that the Arbitrator could do, if he found that the termination of the distributorship was unlawful, was to award damages, as any civil court would have done in a suit.

We find it difficult to accept the contention on behalf of the appellant that what was referred to the Arbitrator was the issue of restoration of distributorship in the sense that the Arbitrator could direct, upon holding that the termination was unlawful, that the distributorship should be restored. We think that the reference itself contemplated consequential damages for wrongful termination. In any event and assuming that there is any error in so reading the reference, it is difficult to hold that the Arbitrator was thereby vested with jurisdiction to award restoration."

32. The Hon'ble Supreme Court in the case of Union of India and others vs. Tantia Construction Private Limited, (2011) 5 SCC 697 while dealing with the alternative remedy of arbitration has held as under:

"Apart from the above, even on the question of maintainability of the writ petition on account of the arbitration clause included in the agreement between the parties, it is now well established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The various decisions cited by Mr. Chakraborty would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution.

We endorse the view of the High Court that notwithstanding the provisions relating to the arbitration clause contained in the agreement, the High Court was fully within its competence to entertain and dispose of the writ petition filed on

> *behalf of the respondent company. We, therefore, see no reason to interfere with the views expressed by the High Court on the maintainability of the writ petition and also on its merits."*

33. On the other hand, the judgement in case of Hindustan Petroleum Corporation Ltd vs. Pinkcity Midway Petroleums, (2003) 6 SCC 503 relied upon by the counsel for the respondents arose from the facts wherein the Court was considering the scope of the jurisdiction of civil court in view of section 8 of the Arbitration and Conciliation Act. The said judgement arose from the action to the challenge of suspension of supplies by a petroleum company in view of pendency of the statutory authorities exercising their powers under the Essential Commodities Act. The Hon'ble Supreme Court was of the view that the two powers of suspension and the exercise of statutory power under the Essential Commodities Act can co-exist and further it was held that the jurisdiction of the Civil Court is specifically barred under Section 8 of the Arbitration and Conciliation Act. The judgement rendered in the said case has to be viewed in view of specific bar of jurisdiction under section 9 of the CPC wherein the settled position is that the suit would be barred under Section 9, in the event of there being an arbitration agreement which is further fortified by the specific provisions contained in Section 8 of the Arbitration and Conciliation Act. In the present case, the petition has been filed invoking the jurisdiction of this Court under Article 226 of the Constitution of India and thus the restriction as contained in section 9 of the CPC as well as section 8 of the Arbitration and Conciliation Act are not applicable while exercising the extraordinary powers under Article 226 of the Constitution of India. The only limitation being that the Court will be hesitant in invoking the extraordinary powers except on the exceptions as laid down in the case of Whirlpool Corporation (supra).

34. In fact for the prayer of restoration of dealership, the only remedy available to the petitioners is by means of a writ petition as neither a civil suit is maintainable nor is this remedy available before an arbitrator appointed in terms of the arbitration clause contained in the agreement.

35. Thus, this Court is of the view that the writ petition is maintainable and the arbitration clause does not provide for an effective and efficacious remedy to the petitioners for the relief sought in the petition particularly relating to restoration of dealership.

20. The Division Bench of this Court in another case of ***M/s Chaudhary Filling Point, Kazipur & Another Vs. State of U.P. & Others*** [2019 (3) ADJ 345 (DB) (LB)], in paragraph nos. 21, 22, 23, 24, 25 & 46 has held as under:-

> *"21. During the course of arguments, the Counsel for the Corporation has urged that the appeal preferred by the petitioner was not the proper remedy, and the proper course available to him was to initiate arbitration proceedings under Clause 69 of the dealership agreement dated 12.9.2012. This assertion of the respondent has been rebutted with vehemence by the petitioner, who stated that the stand taken by the respondents regarding the applicability of arbitration in view of clause 60 of the dealership agreement dated 12.9.2012 in the case of termination is completely misplaced because of the fact that it is beyond the scope and ambit of arbitral forum to restore a dealership after it is terminated. Therefore, the remedy of arbitration in a case like this is redundant and ineffective and the petitioners cannot be forced to avail a redundant remedy in law.*
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> *22. In this regard, we would like to mention that Clause 8.9 of the MDG provides for remedy of appeal to the Executive Director, Retail in the Headquarter, which has to be decided by him within a period of 90 days from the date of filing of the appeal. Clause 8.9 of the unamended MDG, 2012, reads as under:-*
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> > *"8.9 Appellate proceedings :*
> >
> > *1. In case of orders in critical irregularities, the dealer will have the right to appeal within a period of 30 days from the date of receipt of order, before the appropriate authority who will be empowered to decide the matter and the appeal shall be disposed off preferably within 90 days from the date of filing the appeal in the office of the appellate authority.*
> >
> > *2. For all appeals in case of critical irregularities, except termination in case of SC/ST dealerships, the appellate authority will be the ED (Retail) in the Head Quarters or any other ED level officer at the Head Quarter so nominated by the company. For all cases of termination of SC/ST dealerships, the appellate authority will be a Director other than Director (Mktg.) of the OMC.*
> >
> > *The amended Clause 8.9 of the MDG, which has come into force recently reads as under:-*

"8.9 Appellate proceedings: 1. In case of termination arising out of invocation of MDG, the dealer will have the right to appeal within a period of 30 days from the date of receipt of order, before the Appellate Authority, through the concerned Divisional / Territory / Regional office of the Oil Marketing Company (OMC). The Appellate Authority is empowered to decide the matter and the appeal shall be disposed of preferably within 90 days from the date of filing the appeal in the Divisional / Territory / Regional office of the concerned Oil Marketing Company (OMC).

2. For all appeals in case of termination arising out of invocation of MDG, the Appellate Authority will be the Dispute Resolution Panel (DRP) nominated by the OMC. The Dispute Resolution Panel (DRP) will comprise of the following members:- i) A retired Judge of the High Court - Member 1. ii) A retired Government servant who held post not below the rank of Joint Secretary in Govt. of India or equivalent rank - Member 2. iii) A retired official of PSU Oil Marketing Companies who held the post not below the rank of Director - Member 3. The Retired Judge of the High Court in the Committee will be the Chairperson. The terminated dealer preferring appeal would be required to deposit Non-refundable Appeal fee of Rs.5 lakhs along with their appeal to the concerned OMC. In case of SC/ST dealer, Rs.2 lakhs Non-refundable Appeal fee is required to be paid along with their appeal. However, if appeal results in verdict in restoration of the Dealership, 50% of Appeal fee amount shall be refunded."

23. Therefore, it is wrong to say that preferring an Appeal by the petitioner against the order of termination was unfruitful exercise, is wholly unacceptable. If a forum has been created in the Rules/Guidelines then the proper course would be to exhaust that forum. Moreover, such an objection was not raised by the Corporation at the Appellate Forum and as such, legally, it cannot be raised here.

24. As regard the Arbitration, it has rightly been asserted that the Arbitrator has no power to restore the distributorship, in the event the termination is found unlawful. The Apex Court in the case of IOCL vs. Amritsar Gas Service (1991) 1 SCC 533; E. Venkat Krishna Vs. IOCL and anor (2000)7 SCC 764 and Sanjana M. Wig Vs. HPCL; (2005) 8 SCC 242 has held in explicit words that an arbitration forum does not have the jurisdiction for the restoration of dealership, which was

earlier terminated. All that the arbitrator could do, if he found that the termination of the distributorship was unlawful, was to award damages, as any civil court would have done in a suit. In Civil Misc. Writ Petition No. 51972 OF 2008 M/s Navin Filling Station vs. Indian Oil Corporation Ltd & Ors, this court observed as under:

> *"The presence of the arbitration clause, is not to drive away a genuine grievance arising out of disproportionate action of the Corporation, to the arbitral tribunal which in any case will not have the authority to give an award to restore the dealership. In the present case the Indian Oil Corporation terminated the agreement relying upon the clauses, which were not attracted and on the Marketing Discipline Guidelines framed for facilitating the marketing of the petroleum products on the principles of good governance and excellent customary service. The preamble to the guidelines itself provide that the guidelines need to be constantly updated to meet the customer satisfaction and to the discipline dealership network and for preventing malpractices in the sale of petroleum products."*

25. In these circumstances, we find force in the arguments advanced by the learned Counsel for the petitioner that Arbitration between the parties is not an efficacious and proper remedy in such cases.

46. Taking the holistic view of the matter, the writ petition is allowed and the impugned order of termination dated 14.7.2017 as well as the appellate order dated 14.6.2018 are hereby quashed. The opposite parties are directed to resume supply of the petitioner's RO within a week from today. All miscellaneous pending applications stand closed accordingly."

21. In view of the aforesaid legal proposition, this Court is of the view that the instant writ petition is maintainable and the same is being entertained as neither any civil suit, nor other effective and efficacious remedy, as suggested by the learned counsel for the respondent – Corporation, for the relief sought in the petition, particularly, restoration of the dealership of the petitioner, is available to the petitioners.

22. The brief facts of the case are that the petitioners were appointed as a retail outlet dealer of the Indian Oil Corporation (hereinafter

referred to as '***the Corporation***') in the rural area in the name and style of Kisan Seva Kendra and after due exercise being followed as per the procedure prescribed by the Corporation, the petitioners were given dealership on 30.11.2007 and a letter of intent was issued in their favour. Thereafter on 18.10.2008, the dealership agreement was executed. At the retail outlet of the petitioner, two dispensing units were installed, one for petrol and other for HSD, i.e. diesel, by the respondent – Corportaion. As per the provision, Weights and Measurement Department of the Uttar Pradesh Government puts its seal after due verification as well as by the Corporation. On 9.3.2017, the State as well as Corporation made inspection of the petitioners' outlet, but no discrepancy was found as seals put by both the Departments were intact. On 06.05.2017 the Corporation again made a survey, in which in one of the dispensing units, some discrepancies were found, i.e., mother board appears to be tampered. Thereafter, on 26.6.2017, a fact finding letter was issued by the Corporation to which the petitioner submitted its reply on 29.6.2017.

23. Thereafter, a show cause notice was issued to the petitioners on 30.3.2018 mentioning the shortcomings and impression of extraneous fitting is in violation of Clauses 16, 44 and 58(m) of the dealership agreement in one of the dispensing units to which the petitioners submitted reply on 6.4.2018 requesting to provide report of MIDCO, which was provided on 10.4.2018. Thereafter, the petitioners submitted detailed reply on 16.4.2018. Thereafter, an order was passed on 8.10.2018 terminating the dealership agreement of the petitioners on the ground of violation of Clauses 16, 44 and 58(m) of the agreement. Aggrieved, the petitioner preferred a writ petition being Writ C No. 36452 of 2018, which was dismissed on 11.11.2018 in view of arbitration clause.

24. Thereafter, arbitration proceedings were initiated and an award was passed on 17.9.2019 in favour of the petitioner. The award

was challenged before the District Judge in appeal under section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as, '**the Act**') by the Corporation and the petitioner moved an execution application. During the pendency of the said appeal of the respondent – Corporation and the execution application of the petitioners, a deed of settlement was executed between the parties on 08.09.2021. In view of the settlement deed, pending cases were withdrawn as the Corporation was required to pass a fresh order. The Corporation passed an order dated 1.12.2021 reiterating its earlier order and termination of agreement of the petitioner in view of Clauses 16, 44 & 58(m) of the agreement, against which the petitioners filed Writ C No. 835 of 2022 which was allowed by this Court vide order dated 10.2.2022 holding the impugned order termination of the agreement of the dealership to be a non-speaking order and directed the Corporation to pass a fresh order. Thereafter, an order was passed on 26.4.2022 terminating the dealership agreement in view of Clauses 16, 44, 58(m) of the agreement.

25. Aggrieved, petitioners preferred a writ petition before this Court being Writ C No. 16231 of 2022. In the said writ petition, a counter affidavit was filed with the prayer to bring on record the correct print of the impugned order. The writ petition was withdrawn by order dated 15.11.2022 with the liberty to the petitioners that if an appeal is preferred within two weeks from the date of the order, the same will be decided by the Corporation without taking plea of limitation. The petitioners approached the respondents by way of an appeal, which was rejected vide impugned order dated 03.5.2023 reiterating earlier order terminating the dealership agreement in view of Clauses 16, 44, 58(m) of the agreement. Hence the present writ petition.

26. Learned counsel for the petitioners submits that the proceedings have been initiated against the petitioners on the basis of the

survey report dated 6.5.2017, wherein, in one dispensing unit, alleged defects were found, i.e., mother board was found tampered, to which, fact finding letter was issued stating therein that impression of extraneous fitting is in violation of Clauses 16, 44 and 58(m) of the dealership agreement. He further submits that this is the sole basis for initiating coercive action against the petitioners. **He further submits that dispensing units were not new but the same were reinstalled to which no fitness certificate was ever issued despite several requests being made**. It is further submitted that dispensing unit was given to the petitioners from another petrol pump, i.e., M/s Quality Retail Outlet Sautaiya Khas, Bareilly, which might be having same defects as has been pointed out in the MIDCO test report.

27. He further submits that in the normal course, two seals were being put on the dispensing units, one by the Corporation and other by the District Supply Officer. At the survey on 6.5.2017, both the seals were found intact. **He further submits that when seals of Weight and Measurement Department as well as of the Corporation were found intact, then the alleged allegation of tampering was found in mother board and an impression of extraneous fitting in violation of Clauses 16, 44 and 58(m) of the dealership agreement cannot be accepted**.

28. He further submits that the authorities have passed the orders without considering the submissions made and materials having been brought on record and when the first order was passed terminating the agreement of petitioners' dealership, the petitioners preferred a writ petition which was dismissed and the matter was relegated in view of the arbitration clause. Thereafter, an award was passed holding the termination of the agreement as illegal which was challenged by the Corporation in appeal under section 34 of the Act and in the meantime, on the pressure of the respondents, a compromise deed was entered into between the

parties with the assurance that the dealership will be restored by passing a fresh order. He further submits that the termination of agreement was affirmed without assigning any reason, against which a writ petition was filed and this Court has passed an order quashing the termination order as that was a non speaking order.

29. He further submits that despite direction having been issued by this Court to the Corporation to pass a speaking and reasoned order, the authorities are bent upon to pass the same order without assigning any reason therein referring violation of agreement clauses of 16, 44 and 58(m). No reason has been assigned in the impugned order or in the previous orders as to how and under what circumstances, they justify the allegations made in the survey report dated 6.5.2017. He further submits that the order impugned is a non speaking order and has been passed without assigning any reason, which deserves to be quashed by this Court and supply be restored.

30. Learned Senior Counsel for the respondent – Corporation submits that against the termination of dealership order dated 08.10.2018 and after dismissal of the writ petition vide order dated 01.12.2018, the petitioners, preferred an arbitration appeal under clause 8.9 of the Marketing Discipline Guidelines, 2013, in which vide award dated 17.09.2019, the termination of dealership order was set aside. Against the award dated 17.09.2019, the respondent – Corporation preferred an appeal under section 34 of the Act before the District Judge, Gautam Buddha Nagar and during the pendency of the said appeal, the petitioner and the respondent – Corporation decided to resolve the dispute mutually and a settlement deed was executed between the parties on 08.09.2021. The parties agreed that the respondent – Corporation shall pass a fresh order and if either of the parties are not agreed, against the order of reconciliation, they shall refer the dispute in terms of the dealership agreement dated 18.10.2008 to an

Arbitrator. In pursuance thereof, an order was passed by the respondent – Corporation on 01.12.2021 rejecting the representation of the petitioner dated 28.10.2021. Against the order dated 01.12.2021, the petitioners preferred Writ C No. 835 of 2022 before this Court, which was allowed by this Court vide order dated 10.02.2022 by directing the respondent – Corporation to pass a fresh order. Thereafter, on 26.04.2022, the respondent – Corporation rejected the claim of the petitioners confirming the termination order dated 08.10.2018, against which a petition was filed being Writ C No. 16231/2022 by the petitioners, but the same was withdrawn by the petitioners on 25.11.2022 in order to avail alternative remedy of appeal. Pursuant thereto, the petitioners preferred an appeal under clause 8.9 of the Marketing Discipline Guidelines challenging the termination order dated 08.10.2018, which has been rejected by the respondent – Corporation vide impugned order dated 03.05.2023.

31. Learned Senior Counsel further submits that the petitioners have not assailed the order dated 26.04.2022 and therefore, the present writ petition is not maintainable. He further submits that once, at the time of inspection, some marks were found on the mother board of the oil dispensing unit, the same is clear-cut violation of clause 5.14 of the Marketing Discipline Guidelines, 2013. He further submits that even if a tampering is found with the dispensing unit, it amounts to likely to manipulate the delivery of the product. He further submits that a show cause notice was issued against the petitioners calling upon them to reply and represent their case, in which the petitioners submitted reply and some inquiry was conducted. In compliance thereof, vide letter dated 10.04.2018, a test report, referred as MIDOC/PR/MED 339 dated 23.12.2017, was given where it has been mentioned "control card is not found in conformity with the MIDOC standard design as per visual inspection test", but the petitioners failed to submit any positive reply thereof and therefore, the

action taken against the petitioners was as per the Marketing Discipline Guidelines, 2013. The proceedings have rightly been initiated against the petitioners and the termination order was rightly passed.

32. Rebutting to the submission of the counsel for the respondent that the order dated 26.04.2022 was not challenged, counsel for the petitioners submits that the said order was assailed in appeal as per clause 8.9 of the Marketing Discipline Guidelines and the impugned order dated 03.05.2023 is under challenge in the present writ petition. He prays for allowing the writ petition as well as restoring the supply of the petitioners' retail outlet.

33. Heard learned counsel for the parties and perused the records.

34. Admittedly, this is the sixth round of litigation before this Court. The petitioner no. 2 was allotted retail outlet dealership on 18.10.2008. Since 2008 till the survey was conducted on 06.05.2017, no discrepancy, whatsoever, was found in the retail outlet of the petitioners and the same was operating smoothly. On 06.05.2017, a survey was conducted by the respondent – Corporation at the retail outlet and it was found that there appears some marks on the mother board of one of the dispensing units, which made the basis for the respondent – Corporation for initiating proceedings against the petitioners. The Corporation termed the same as violation of clauses 16, 44 & 58(m) of the dealership agreement and therefore, terminated the dealership agreement and suspended the supply.

35. It is also not in dispute that the dispensing unit, which was installed by the Corporation was not new, but the same was second hand as the dispensing unit was earlier installed at the petrol pump, i.e., M/s Quality Retail Outlet Sautaiya Khas, Bareilly, from where the units have been reinstalled at the petitioner's retail outlet. It is also not in dispute that the fitness

certificate was not given to the petitioners despite several requests. No material contrary to it has been brought on record to show that the dispensing unit installed at the petitioners' retail outlet was new and not used as alleged by the petitioners by Quality Retail Outlet. It is also not in dispute at any stage that at the time of survey by the respondent – Corporation on 06.05.2017, two seals were tampered. It is not the case of either of the parties that the Weight & Measurement Department of the State ever found any discrepancies in the dispensing unit of the petitioners' retail outlet prior to 06.05.2017. It is also nobody's case that no external or extra wire or any adverse material was found at the time of survey dated 06.05.2017 in the mother board of the dispensing unit.

36. The only allegation of the respondent – Corporation was that there are some marks on the mother board, which appears to be tampered; meaning thereby, the respondent – Corporation was not sure whether actually any tampering has been done or not. When neither any extra body, nor any attachment nor any wire was found at the time of survey dated 06.05.2017, nor any such report thereafter points out any attachment or material was found on the mother board of the dispensing unit submitted for further investigation and the only report suggest some marks found in the mother board. On the said premise, the impugned orders have been passed.

37. In the first round of litigation against the termination order dated 08.10.2018, the same was relegated for alternative remedy of arbitration and the arbitral award was passed on 17.09.2019 in favour of the petitioners, against which the respondent – Corporation preferred an appeal, but instead of pursuing the arbitration appeal, the respondent – Corporation entered into a settlement with the petitioners on 08.09.2021. In pursuance thereof, an order was passed on 01.02.2021 again terminating the

dealership of the petitioner, against which the petitioners filed Writ C No. 835 of 2022, which was allowed by this Court vide order dated 10.2.2022 holding the impugned order termination of the agreement of the dealership to be a non-speaking order and directed the Corporation to pass a fresh order.

38. Thereafter, an order was passed on 26.4.2022 terminating the dealership agreement in view of Clauses 16, 44, 58(m) of the agreement reiterating the stand of termination. Thereafter, the petitioners preferred Writ C No. 16231 of 2022, in which the respondent – Corporation took a stand that the impugned order filed along with the writ petition was not correct and in the counter affidavit, the respondent – Corporation prayed for bringing on record the correct print of the impugned order. When the correct copy of the impugned order was brought on record, the writ petition was withdrawn by order dated 15.11.2022 with the liberty to the petitioners that if an appeal is preferred within two weeks from the date of the order, the same will be decided by the Corporation without taking plea of limitation. The petitioners approached the respondents by way of an appeal, which was rejected vide impugned order dated 03.5.2023 reiterating earlier order terminating the dealership agreement in view of Clauses 16, 44, 58(m) of the agreement.

39. Therefore, the submissions made by the learned Senior Counsel that the petitioners have not assailed the order dated 26.04.2022 are misconceived and have no legs to stand on as the impugned order has been passed in pursuance thereof in appeal.

40. For appreciating the controversy involved in the writ petition, it would be apt to quote relevant clauses 16, 44 & 58(m) of the dealership agreement, which is as follows:-

> *"16. No repairs to the outfit shall be done by the Dealer unless preciously authorized by the Corporation in writing. The Dealer shall not interfere with or attempt to adjust the*

outfit or any apart thereof but shall notify the Corporation immediately of the necessary of any repair or adjustment and thereby ensure that the outfit is in proper working order and delivering full and proper, measure at all times. The Dealer shall not operate the outfit while it is out of order.

44. The Dealer undertakes faithfully and promptly to carry out, observe and perform all direction or rules given or made from time to time by the Corporation for the proper carrying on of the Dealership of the Corporation. The Dealer shall scrupulously observe and comply with all laws, rules regulations and requisitions of the Central/State Governments and of all authorities appointed by there or either of them including in particular the Chief Controller of Explosive, Government of India, and/or any other local authority with regard to the storage and sale of such petroleum products.

58(m). If the Dealer shall either by himself or by his servants or agents commit or suffered to be committed any act which in the opinion of the General Manager of the Corporation for the time being in NOIDA whose decision shall be final, is prejudicial to the Interest or good name of the Corporation or its products, the General Manager shall not be bound to give reasons for such decision."

41. It would also be apposite to quote the relevant clause 5.1.4 of the Marketing Discipline Guidelines, 2013, which reads as under:-

5.1.4. Additional/Unauthorized Fittings/Gears found in Dispensing Units/Tampering with Dispensing Unit:-

Any mechanism/fittings/gear found fitted in the dispensing unit which is likely to manipulate the delivery.

Addition, Removal, replacement or manipulation of any part of the Dispensing Unit including any mechanism, gear, microprocessor chip/electronic parts/OEM software will be deemed as tampering of the dispensing unit.

In such cases, views and independent opinion of the original equipment manufacturer would be obtained and suitable decision taken.

In case of this irregularity, sales from the concerned dispensing unit to be suspended, DU sealed. Samples to be drawn of all the products and sent to lab for testing.

42. Perusal of clause 16 of the agreement shows that no repairs will be carried out by the petitioners without prior writing or permission of the Corporation. The Dealer shall not interfere with or attempt

to adjust the outfit or any apart thereof but shall notify the Corporation immediately of the necessary of any repair or adjustment and thereby ensure that the outfit is in proper working order and delivering full and proper, measure at all times. Clause 44 of the said agreement provides that the Dealer shall faithfully and promptly to carry out, observe and perform all direction or rules given or made from time to time by the Corporation for the proper carrying on of the Dealership of the Corporation. The Dealer shall scrupulously observe and comply with all laws, rules regulations and requisitions of the Central/State Governments and of all authorities appointed by there or either of them including in particular the Chief Controller of Explosive, Government of India, and/or any other local authority with regard to the storage and sale of such petroleum products. Further, Clause 58(m) provides that if the Dealer either by himself or by his servants or agents commit or suffered to be committed any act which in the opinion of the General Manager of the Corporation for the time being in NOIDA whose decision shall be final, is prejudicial to the Interest or good name of the Corporation or its products, the General Manager shall not be bound to give reasons for such decision.

43. Bare perusal of the aforesaid clauses clearly stipulate that no manipulation or tampering should be made and if any addition, removal or manipulation of any part of the dispensing unit or its mechanism like software is done, the same will be deemed to be tampering with the dispensing unit and appropriate decision will be taken accordingly.

44. Bare perusal of the impugned order reveals that it is not a case of either of the parties that any mother board of one of the dispensing units alleged to be manipulated and only impression was found. Neither any attachment, nor any extra wire or extra body was found and not a word has been whispered in the impugned order. Only references have been made with regard to

clause 5.14 of the Marketing Discipline Guidelines of 2013. In absence of any extra body or wire having been found or any report submitted by the OEM, the impugned order cannot be sustained in the eyes of law.

45. It is also evident from the perusal of the impugned order that it is admitted to the parties that the dispensing unit was not a new unit. It is also not in dispute that the dispensing unit installed at the petitioners' retail outlet was earlier used by Quality Retail Outlet and in the running condition, the same was installed at the petitioners' retail outlet, which was dispensing oil till the date of survey, i.e., 06.05.2017 without any discrepancy.

46. It is admitted fact between the parties that the dispensing unit installed at the petitioners' retail outlet was not new and it is also not in dispute that before reinstalation of dispensing unit of the petitioner site any certificate was issue certifying the fact that the mother board was not tampered or any repair was being undertaken by the Corporation or its agencies. Further before reinstalling the dispensing unit at the petitioners' retail outlet a certificate was ever issued duly certifying the fact that control card was in confermity with the MIDOC standard design.

47. It is also not in dispute that at the time of survey, the dispensing unit was not in working condition or it was not dispensing oil. Therefore, negative onus cannot be fastened upon the petitioners as alleged by the Corporation.

48. Bare reading of the relevant clauses of the dealership agreement and the Marketing Discipline Guidelines, presumption will be drawn against the petitioners that some manipulation has been done, but the presumption has to be proved by the Corporation by cogent materials to show that there was irregularity in dispensing unit, but the report submitted by the OEM does not say so. In

absence of such finding against the petitioner, the impugned termination order cannot be sustained in the eyes of law.

49. In the impugned order, only references have been made with regard to execution of the agreement, terms of the agreement and clauses of the agreement, but no finding of fact has been recorded against the petitioners to show that there was an infirmity in dispensing of oil from the dispensing unit. Not a word has been whispered or reference has been made by any of the reports showing that short-supply of oil being made by the petitioners through the dispensing unit.

50. It is not out of place to mention here that once it is admitted by the respondent – Corporation that the dispensing unit was reinstalled, which was earlier used at some other retail outlet and neither any certificate of fitness nor non-tampering of mother board / any repair done before reinstallation nor material to show that control card was in conformity with the MIDOC standard design, the adverse inference can not legally be drawn against the petitioners.

51. On a similar set of facts, this Court, in the case of ***M/s Modern Service Station Vs. IOC & Others*** (Writ C No. 13514/2022 decided on 18.05.2023) has allowed the writ petition and reinstated the retail outlet of the petitioner therein.

52. It is admitted fact that the dispensing units are being sealed by the respondent – Corporation as well as by the Weight & Measurement Department but neither any discrepancies, whatsoever, have been pointed out at any stage with regard to any manipulation in the sealing of the dispensing unit, nor the sealing was found to be tampered or broken at any stage. Once the sealing was not found to be tampered or broken, no adverse inference can legally be drawn against the petitioners.

53. In view of the aforesaid facts & circumstances of the case, the impugned order cannot be sustained in the eyes of law. The

impugned order dated 03.05.2023 passed by the respondent no. 2, i.e., Executive Director (Retail Sales N & E), Indian Oil Corporation Limited, Mumbai is hereby quashed. The termination orders are also hereby quashed.

54. The writ petition succeeds and is allowed.

55. The respondent – Corporation is directed to resume the supply of the petitioners' retail outlet in question within a period of one week from the date of production of a certified copy of this order.

Order Date :-**04/09/2023**
Amit Mishra