IN THE HIGH COURT OF JUDICATURE AT CALCUTTA

CIVIL APPELLATE JURISDICTION

APPELLATE SIDE

RESERVED ON: 20.01.2025
DELIVERED ON:11.03.2025

CORAM:

THE HON'BLE MR. CHIEF JUSTICE T.S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

MAT NO. 1735 OF 2023

WITH

I.A. NO. CAN 1 OF 2023

INDIAN OIL CORPORATION LIMITED AND OTHERS

VERSUS

SAUMAJIT ROY CHOWDHURY

Appearance:-
Mr. Pushpendu Chakraborty, Adv.
Mr. Amadipta Sengupta, Adv.

.....For the Appellants

Mr. Pingal Bhatacharyya, Adv.
Mr. Rajdeep Sinha, Adv.

.....For the Respondent/Writ Petitioner

JUDGMENT

(Judgment of the Court was delivered by T.S. Sivagnanam, CJ.)

1. This intra court appeal by the Indian Oil Corporation Limited hereinafter referred to as the IOCL is directed against the order dated 07.08.2023 in WPA No. 7674 of 2023. The said writ petition was filed by the respondent herein for issuance of a writ of mandamus to rescind/cancel the order of termination dated 24.02.2023 issued by the fourth appellant as well as the show cause notice which was issued earlier dated 25.11.2022 issued by the sixth appellant and to prohibit the appellant from giving effect to the order of termination.

2. The learned Single Bench allowed the writ petition and set aside the show cause notice dated 25.11.2022 and the order of termination dated 24.02.2023 and directed the appellant to resume supply of Motor Spirit (MS) and High Speed Diesel (HSD) and other petroleum products if any to the writ petitioner's retail outlet namely M/s. Krit Filling Station within a time frame. Aggrieved and being dissatisfied with the said order IOCL have preferred the present appeal.

3. We have elaborately heard the learned advocates for the parties and carefully perused the materials placed on record.

4. The following facts would be germane to decide as to the correctness of the order and direction passed by the learned Single Judge.

5. On March 02, 2023, an inspection was done by the officials of the appellant in the retail outlet of the respondent and no irregularity in the nature of positive stock variation of the products was found. Yet another inspection was conducted in the retail outlet on 24.09.2022 and during

such inspection positive stock variation beyond permissible limits had been observed in both the products since last inspection dated March 02, 2022 and the variation beyond permissible limit in MS and HSD was 17919 ltr and 17302 ltr respectively. Copy of the inspection report was drawn and furnished to the respondent and photograph taken during the inspection was also attached to the report. A fact finding letter was issued to the dealer dated 24.09.2022 by referring to the findings recorded during the inspection together with the summary of irregularity, calling upon the dealer to explain within a period of ten days on the proposal as to why supplies to the dealer should not be suspended. The dealer was informed that if they fail to submit a reply within stipulated time and/or the explanation given is not found satisfactory the appellant will be constrained to take action as deem fit in accordance with the relevant clause of the dealership agreement, Marketing Discipline Guidelines 2012, MDG and/or any other laws. The dealer submitted his reply dated October 01, 2022 reporting about the nozzle lock defects on several occasion and that they did not have canopy as this might cause variation of stock and no adverse inference can be drawn on the sales which are done in an online condition of automation.

6. Further it was stated that they strictly follow the instructions given by the appellant and that the observation made in the fact finding letter shows that the seals are intact and it is not tampered and that no mistake has been committed by them. Tests report dated 08.10.2022 was issued on the samples which were drawn during inspection that the product taken for the testing meets the specification with regard to the test done. In terms of the relevant guidelines, a Committee was formed for further analysis of the

matter and the Committee submitted their report dated October 26, 2022 pursuant to which show cause notice dated 25.11.2022 was issued dealing with the reply given by the dealer to the fact finding letter and also referring to the relevant clauses and the dealer was called upon the show cause why action should not be taken as per clause 8.2(vi) of the amended MDG 2012 and clauses 3,29,30,34,39(a) and 42 of the Dealership Agreement executed by the dealer for violation mentioned in the show cause notice. Prior to issuance of the show cause notice the same was approved by the competent authority by approval dated November 18, 2022. The dealer did not submit his reply and the appellant sent a reminder letter dated December 14, 2022. Immediately thereafter on December 20, 2022 a writ petition was filed. The appellant issued notice dated January 13, 2023 pointing out that despite sufficient time being granted to submit reply to the show cause notice followed by reminder dated December 14, 2022 the dealer has not submitted any reply and with a view to afford an opportunity, the appellant decided to provide personal hearing in accordance with clause 8.6 of MDG 2012. The dealer was requested to attend the personal hearing before the fourth appellant on January 27, 2023 at 11:00 AM and in the event they fail to attend hearing it will be presumed that they have nothing further to submit in the matter and the appellant shall be at liberty to proceed in the matter in accordance with law. Soon after the notice of personal hearing was issued the dealer through his advocate sent letter dated January 27, 2023 mentioning about the filing of the writ petition and on account of the court remaining closed for two days on account of Saraswati Puja followed by two holidays being Saturday and Sunday and sought for adjournment of the

hearing scheduled to be held on January 27, 2023. Though such was the stand taken by the dealer in the letter sent through the advocate, the sole proprietor of the dealer Shri Soumajit Roy Chowdhury appeared before the fourth appellant for the personal hearing fixed on January 27, 2023. The submissions made by the dealer were recorded and the minutes of the meeting was recorded in writing and signed by both the parties and copy delivered to the dealer. Subsequently the fourth appellant passed the order dated February 24, 2023 terminating the retail outlet dealership granted to the respondent writ petitioner. This order was impugned in the writ petition in which the petitioner had also challenged the show cause notice dated November 25, 2022.

7. The appellants during the course of their submission before the learned Writ Court specifically raised a plea regarding the maintainability of the writ petition in the light of the remedy provided under the dealership agreement, MDG 2012 which provided for appellate remedy and also remedy by way of arbitration. The learned Writ Court opined that refusing to entertain the writ petition when efficacious alternate remedy is available is a rule of self-impose limitation and/or restriction. It is the rule of discretion and not rule of jurisdiction and there cannot be a blanket ban. Whether or not extraordinary jurisdiction will be invoked is to be decided in the context of the facts and circumstances at hand. The decision of the Hon'ble Supreme Court were referred to and the court proceeded to hold that the principles of natural justice are very flexible principles and the same cannot be applied in any straight jacket formula and if the court finds the authority has acted in an arbitrary manner and with a closed mind, the court can extend the

compass of judicial review to render justice. Further the learned Writ court observed that rule of law cannot afford to tolerate arbitrariness, unreasonableness that judicial review of an administrative action is intended to prevent arbitrariness, irregularity, unreasonableness, bias and malafides. The learned Writ Court after referring to the decision of the Hon'ble Supreme Court in ***Oryx Fisheries Private Limited Versus Union of India and Others*** [1] held that on a reading of the show cause notice a person against whom it has been issued must have confidence that if he can show acceptable and/or satisfactory cause, he can prove innocence but if he finds the submissions of the show cause would be a mere empty formality the authority has already made up his mind then based upon such show cause notice a fair proceeding cannot be concluded. The learned Writ Court proceeded to hold that the show cause notice was issued with a pre-conceived mind which would vitiate the proceeding and action initiated basing upon such show cause notice. The learned Writ Court then proceeded to hold that the burden to establish that there was positive stock variation is on IOCL and not on the dealer since IOCL has come up with positive assertion and hence ordinarily burden rests with IOCL. In other words, dealer cannot be asked to prove the negative.

8. Further the learned Writ Court commented upon the effect of the MDG by holding that it was only a guideline and in the absence of any circular, notification or rule, the guideline cannot have statutory force. Further the learned Writ Court held that the punishment of termination of dealership was not commensurate/proportionate more particular when positive stock

[1] (2010) 13 SCC 427

variation was detected in the dealer retail outlet for the first time and therefore the decision to terminate the dealership cannot be sustained.

9. The appellant would contend that the learned Writ Court had applied wrong tests while passing the impugned order and rendered findings beyond the scope and ambit of the writ petition and therefore the impugned order is liable to be set aside. That the learned Writ Court ought not to have noted that the principles of natural justice was adhered to and that the dealer participated in the personal hearing which was conducted by the fourth appellant. Further the learned Writ Court failed to appreciate that the dealer is duty bound to act in strict consonance that MDG as notified by the oil marketing companies, as the same has been framed for ensuring high bench mark customer service apropos the dealer and the impugned order seeks to dilute the said MDG and therefore the impugned order is liable to be set aside.

10. Further the application of doctrine of proportionality, with regard to the punishment imposed on the dealer would not be applicable to the facts and circumstances of the case in the light of the terms and conditions of the dealership agreement read along with MDG 2012 (as amended). Further the learned Writ Court erred in shifting the burden of proof on the appellant when the burden of proof squarely rests on the dealer to substantiate the reasons behind positive stock variation of a substantial quantity namely 17697 lts of MS and 13607 lts of HSD which the dealer miserably failed to do so despite multiple opportunity. The learned counsel relied on the decision of the Hon'ble Supreme Court in ***Hindustan Petroleum***

Corporation Limited Versus Dharamnath Singh and Others[2]. Further it was submitted that the writ petition was not maintainable in the light of the efficacious alternate remedy available to the dealer to which the dealer has agreed while entering into the dealership agreement and therefore the writ petition ought not to have entertained.

11. The learned advocate appearing for the respondent writ petitioner submitted that largely three issues would arise for consideration namely whether the writ petition was maintainable, secondly on whom the burden of prove lies and thirdly whether the show cause notice was issued with a pre-determined mind. It is submitted that the learned Writ Court after taking into consideration the decision of the Hon'ble Supreme Court in ***Whirlpool Corporation Versus Registrar of Trade Marks, Mumbai and Others*** [3] and the decision in ***Unitech Limited and Others Versus Telangana State Industrial Infrastructure Corporation (TSIIC) and Others*** [4] had rightly held that the writ petition was maintainable. For the same proposition reliance was also placed on the decision of the Hon'ble Supreme Court in ***Madhya Pradesh High Court Advocates Bar Association and Another Versus Union of India and Another*** [5]. Reliance was placed on the decision of the Division Bench of this court in ***Indian Oil Corporation Limited Versus Bimala Gas Service and Others*** in MAT No. 1493 of 2018 dated 27.03.2019 by which the appeal filed by the oil company was dismissed affirming the order passed in WPA 12206(W) of 2014 dated 05.10.2018 by which the writ petition filed challenging the order of

[2] MANU/SC/0453/2024
[3] (1998) 8 SCC 1
[4] 2021 SCC Online SC 99
[5] 2022 SCC Online SC 639

termination of LPG distributorship was set aside. Further supporting the impugned order in which it has been held that the show cause notice was pre-determined and the appellant pre-decided the issue, reliance was placed on the decision in ***Oryx Fisheries Private Limited*** (supra).

12. By way of a reply it is submitted that the writ petition which was filed by the appellant challenging the show cause notice in WPA 28450 of 2022 was withdrawn and the same was dismissed as withdrawn on 13.03.2023.

13. By way of a rejoinder it is submitted that the learned writ court in WPA 76741 of 2024 granted an interim order on 05.04.2023 staying order of termination in which it is observed that the respondent was compelled to withdraw the earlier writ petition since the authority proceeded to adjudicate the show cause notice despite being informed that the writ petition is to be heard immediately after Saraswati Puja holidays.

14. After elaborately hearing the learned advocate for the parties we find that the following issues would arise for consideration:-

(1) Whether the IOCL pre-decided the matter while issuing the show cause notice.

(2) Whether there has been violation of principles of natural justice

(3) Whether the writ petition was maintainable when the appeal remedy as well as remedy by way of arbitration has been provided under the Dealership Agreement.

(4) Whether the Marketing Discipline Guideline would be binding on the writ petitioner

(5) On whom the burden lies to prove that there were no stock variations.

(6) Whether termination of the dealership of the respondent could be termed to be disproportionate.

15. In the preceding paragraphs we have noted the factual position and we will proceed to answer the issues which fall for consideration in seriatim.

16. The learned Writ Court came to the conclusion that the show cause notice was pre-conceived and the authority pre-decided the matter. Prior to issuance of the show cause notice there was a fact finding letter issued to the dealer dated September 24, 2022. The fact finding letter referred to the inspection conducted in the retail outlet on September 24, 2022. The writ petitioner does not deny and cannot deny such inspection which was done in their presence nor earlier inspection. During the second inspection, several violations found of which one concerned the nozzle and other positive stock variation, for beyond permissible limits. In the fact finding letter the alleged violation as per amended MDG 2012 were set out and the sales and supplies to the dealer was suspended and simultaneously giving an opportunity to the dealership to submit their explanation. The dealer received the fact finding letter and submitted their explanation dated October 01, 2022. In the said letter, the dealer did not raise any objection with regard to the allegations contained in the fact finding letter nor set up valid defence except to state that they were following the instructions given by the appellant. Further the writ petitioner unequivocally assured their best services and agreed to maintain all the data as well as the discipline as per MDG. After receiving the said reply the show cause notice was issued. Show cause notice once again referred to the report by the Multi Disciplinary Team which inspected the retail outlet on September 24, 2022

and the alleged violation of the various clauses in MDG 2012 as amended and the Dealership Agreement. In the show cause notice reply given by the dealer to the fact finding letter was noted under each of the points namely positive stock variation beyond permissible limit; non-availability of reference density at the time of the inspection; non-maintenance of Stock/Sales and density records; short delivery of products with weights and measures seal intact beyond permissible limits; non-production of clear toilet facilities (gents) and ladies toilet door locked; non-maintenance of customer complaint book; non-maintenance of hydrometer and thermometer's calibration certificate etc; driveway salesman at RO not in uniform /wearing badges and poor housekeeping.

17. After referring to replies given by the appellant on the aforementioned points the show cause notice proceeds by referring to the various clauses in the dealership agreement dated 31.12.2015 namely clause 3,29,30,34,39(a) and 42. With these facts and figures the dealer was directed to show cause. Thus, on a reading of the show cause notice dated November 25, 2022 it cannot be stated that there has been any pre-determined mind or that the authority has pre-decided the matter since the show cause notice should contain full particulars, the authority was duty bound to disclose all facts in the show cause notice more particularly when the show cause notice after the fact finding report was drawn on which the dealer was given an opportunity to submit reply which reply was also submitted by the dealer. Therefore we have no hesitation to hold that the show cause notice has been validly issued. Accordingly, the issue no. 1 is answered in favour of the appellant.

18. The next issue is whether there has been violation of principles of natural justice. This aspect of the matter has to be considered taking note of the facts and circumstances of each case and as held by the Hon'ble Supreme Court in several decisions that there cannot be any straight jacket formula. What is required to be seen is the conduct of parties and how the parties understood the manner in which the proceedings were initiated and proceeded with. The respondent cannot wriggle of its obligations under the dealership agreement. The dealership agreement provides for stringent conditions since the products dealt by the respondent dealer, is a controlled, commodity which is meant for the distribution to the public. The appellant is a public sector oil company which is duty bound to ensure that quality and quantity of the fuel dispensed with by that dealer to the public meeting the requisite standards. Apart from that since the product is the regulated product, checks and balances have been put in place to ensure that there is no pilferage or any other illegality committed which could also include the positive stock variation. This aspect of the matter is very crucial because the products which have been supplied by the appellant to its dealer/the respondent petitioner is a controlled item and the product is supplied or indent raised by the dealer and there cannot be any excess or shortage of the supplies affected. In this background, the appellant was afforded an opportunity to show cause. The appellant did not file their reply to the show cause notice but filed a writ petition challenging the show cause notice which was subsequently withdrawn. The appellant though gave a letter through his advocate dated January 27, 2023 to defer the personal hearing, the sole proprietor of the respondent dealer participated in the personal

hearing held on January 27, 2023. The minutes of the personal hearing which has been reduced to the writing, has been signed by the respondent writ petitioner and copy of which has also been served upon them. Therefore, it will be too late in the day for the writ petitioner to contend that there has been a violation of the principle of natural justice. Therefore issue No. 2 is answered against the writ petitioner and in favour of the appellant.

19. The next aspect is whether a writ petition was maintainable. The Hon'ble Supreme Court in ***Whirlpool*** has held that the power to issue prerogative writs under Article 226 of the Constitution of India is plenary in nature and is not limited by any other provisions of the Constitution. It was further held that under Article 226 of the Constitution, the High Court, having regard to the facts of the case has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions, one of which is that even effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction; but the alternative remedy has been consistently held by the court not to operate as a bar in at least 3 contingencies namely when the writ petition was filed for enforcement of any fundamental rights or where there has been violation of principle of natural justice or where the order or proceedings are wholly without jurisdiction or where the vires of an Act is challenged.

20. The Hon'ble Supreme Court in ***Unitech Limited*** after taking note of the decision in ***State of Uttar Pradesh Versus Sudhir Kumar Singh***[6], the decision in ***Popatrao Vynkatrao Patil Versus State of Maharashtra***[7] and

[6] (2020) SCC Online SC 847
[7] Civil Appeal No. 1600 of 2020 (Supreme Court of India)

the decision in ***ABL International Limited Versus Export Credit Guarantee Corporation of India***[8] held that the plenary power under Article 226 must be used with circumspection when other remedies have been provided by the contract. But as a statement of principal the jurisdiction under Article 226 is not excluded in contractual matters. It was further held that if the state instrumentality violated the constitutional mandate under Article 14 to act fairly and reasonably, relief under the plenary powers of the article 226 of the constitutional mandate. The Court also took note of the observations made in ***Whirlpool Corporation*** to the effect that plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the state or its instrumentalities of Article 14 or for other valid and legitimate reasons for which the court thinks it necessary to exercise the said jurisdiction. Therefore, to examine as to whether the writ petition was maintainable, it has to be seen as to whether the case would fall within the contingencies which were carved out by the Hon'ble Supreme Court in ***Whirlpool***. Firstly, the right which is exercised by the respondent as the dealer of the appellant oil company is a right flowing from the dealership agreement entered into between the respondent writ petitioner and the appellant oil corporation. Therefore, it cannot be stated that the appellant is enforcing a fundamental right by way of a writ petition. The respondent enjoys the fruits of the dealership pursuant to a dealership agreement entered into between the parties where conditions have been imposed. Therefore, it is clear that the respondent has no vested right to

[8] (2016) 2 SCC 82

claim that he is entitled to continue as a dealer as such right is regulated by the terms and conditions of the dealership agreement coupled with the stipulation under the MDG 2012 as amended. The second aspect to be seen is whether there has been violation of principles of natural justice. In the preceding paragraph we have analysed the issue and held against the writ petitioner. The third issue is whether the proceedings are wholly without jurisdiction. The respondent writ petitioner can hardly bring his case within the fold of this contingency as the dealership agreement provides for action being taken against the dealer in case of violation and therefore, this exception also will not apply to the writ petitioner's case. Apart from that the respondent has not challenged the vires of the Act in the writ petition. Thus, the appellant's case would not fall in any other contingencies which have been carved out in ***Whirlpool*** and it has to be necessarily held that the writ petition was not maintainable, more particularly when the agreement provides for efficacious alternate remedy.

21. The dealership agreement in Clause 30 states that the dealer shall not purchase, obtain or otherwise acquire possession from any person, firm or company other than the corporation, any product used, stocked or sold by the dealer or in connection with the dealer's business with the products without the previous consent of the corporation which consent the corporation may refuse, vary and withdraw at any time or from time to time in its entire discretion. From this clause it is evidently clear that the dealer is required to purchase the products only from the appellant and not from anywhere else and if at all it has to be done it should be with the prior concern in writing by the appellant. Clause 62 of the dealership agreement

deals with arbitration. There are several sub clauses making the clause very exhaustive and the respondent writ petitioner has unequivocally accepted the said terms and conditions. In the light of the above discussion wherein we have held that the writ petitioner has not brought his case within any of the four contingencies carved out as an exception in ***Whirlpool*** coupled with a fact that there is a binding arbitration agreement between the parties, we have to necessarily hold that the writ petition was not maintainable. Accordingly this issue is answered against the respondent writ petitioner.

22. The next issue is whether this MDG would be binding on the respondent writ petitioner. We are not in agreement with the views expressed by the learned Single Bench as regards the effect of MDG 2012 (as amended). The Learned Writ Court opined that the same being in the form of guidelines does not have any statutory force. What is important to be seen is the nature of agreement between the parties. The respondent was appointed as a dealer by the appellant oil company which is a Government of India Enterprise to deal with products marketed by the appellant. The MDG was formulated for the first time in 1981-82 which helped the oil manufacturing companies to maintain discipline in the operation of retail networks and provide high customer service standards. The MDG has been periodically reviewed and the guideline which was invoked is the guideline which was amended on 3/8/2018 with effect from 8th January 2013. The MDG is exhaustive and made applicable to all dealers of petroleum products and other products throughout the country. The respondent writ petitioner was well aware of the binding nature of the MDG which is evident from the reply given by the appellant to the fact finding letter wherein the appellant

has undertaken to strictly abide by the terms and conditions of the MDG. The MDG read along with the terms and conditions of the dealership agreement cast irrevocable responsibility on a respondent dealer to sell products of correct quality and quantity and provide excellent customer service. The MDG also provides for an appellate remedy under Clause 8.9 in case of termination of the dealership which will be referred to a Dispute Resolution Panel nominated by the oil marketing company. Therefore, it is also one other embargo for entertaining the writ petition. That apart the MDG being implemented on pan India basis by all public sector oil marketing companies with a view to maintain discipline in the operation of retail network and provide high customer service standard is binding on the respondent writ petitioner. This issue is accordingly answered against the respondent.

23. The next issue is regarding the burden of proof. The learned Writ Court came to the conclusion that the writ petition cannot be asked to prove negative and that the burden of proof is on the appellant. To examine this issue we are required to take note of certain clauses of the MDG. We have to take note of Clause 5.1.11 of the MDG. This Clause deals with stock variation of MS / HSD (beyond permissible limits) fuel**.** In terms of the said clause stock reconciliation should be carried out and variation, if any, established after taking into account the normal operational variation of 4% of tank stock and after considering the fact such as evaporation / handling losses in MS; handling losses in HSD; shrinkage losses and temperature variation losses, the reconciliation has to be done.

24. Clause 4 states that in case of positive stock variation beyond the permissible limits samples will be withdrawn and sent to laboratory for testing. Sales and supplies of all products to be suspended immediately. Study is to be carried out to identify the reasons for stock variation. If the sample passes but some other irregularity like unauthorised purchase etc. and action to be taken accordingly. Positive stock variation is defined to be as one where the quantity of the fuel or the products supplied by the appellant is found in the hands of the dealer in excess of the quantity supplied. This undoubtedly is a serious matter since the minimum quantity/ sales target has been fixed in the dealership agreement in Clause 10. Clause 30 of the dealership agreement places an embargo on the dealer not to purchase, obtain or otherwise acquire possession from any person, firm or company other than the corporation (appellant), any product used / stocked or sold by the dealer or in connection with the dealer's business with the products without the previous consent in writing of the corporation. Therefore, if the dealer is found to possess an excess quantity of the products over and above the quantity supplied to them, the burden/ onus of proof is squarely on the dealer and cannot be shifted to the appellant. If the dealer had a plausible explanation for such positive stock variation then the same is required to be decided by the appellant for its correctness. Probably at that stage the burden of proof may or likely to shift on the appellant.

25. In the instant case the variation beyond permissible limits in MS is 17919 litres and HSD was 13702 litres. In the reply given by the respondent/writ petitioner to the fact finding letter dated October 1, 2022 the explanation given was that there was maximum number of nozzle issues

and they do not have a canopy. In the instant case the charge against the appellant is not negative stock variation but positive stock variation namely possessing excess quantity of stock than what was supplied to the dealer. Therefore it is clear that on merits, the writ petitioner did not have any explanation. During the course of personal hearing the sole proprietor of the respondent claimed that the stock variation is on account of unloading of load allocated to another filling station of which also the respondent is the sole proprietor which was done on January 30, 2021. The respondent claimed that this was based on the verbal advice of the then IOCL officers of Durgapur divisional office. Thus, taking into consideration the said submission the fourth appellant has come to the conclusion that the respondent has committed violation of the conditions in the dealership agreement and MDG in the light of the stand taken by them during the personal hearing and the authority noted that during the personal hearing the respondent admitted that 4kl MS and 8 kl HSD was unloaded at the retail outlet however he failed to explain the variation of 13kl MS and 5kl HSD and therefore, unauthorised purchase is the only logical explanation of such high positive stock variation beyond permissible limit. This is precisely the reason that there was a specific clause namely the clause 39 (a) which mandates that the dealer shall keep and maintain such records of stock, sales etc. as being prescribed by the corporation from time to time and submit the same for inspection on demand by any officer of the corporation and shall submit to the corporation such records on such intervals as the corporation made from time to time specify in writing. Therefore, we hold that the learned writ Court was not right in shifting the burden of proof on

the appellant to establish the positive stock variation when the burden is on the respondent dealer in the light of the conditions contained in the dealership agreement read along with MDG 2012 as amended. Accordingly this issue is answered in favour of the appellant.

26. The next issue is with regard to the punishment of termination imposed on the respondent. The Learned Writ Court opined the same to be disproportionate. The question of importing the principle normally applied in service jurisprudence to proportionality of punishment would not and cannot automatically apply in cases where the right accrues to a person pursuant to an agreement or a contract. The instant case is clearly a right granted to the respondent by virtue of an agreement which was entered into between the appellant and the respondent and the right enjoyed by the respondent is circumscribed by the conditions contained in the agreement coupled with a stipulation in MDG 2012 as amended. Therefore, what is required to be seen is as to what the parties agreed and how to deal with irregularities. Chapter 5 deals with types of irregularities on retail outlets dealerships. Clause 5.1.6 deals with unauthorized purchase/sale of MS / HSD or any other product which could be used as substitute of these products. In terms of the said clause dealer should purchase only those petroleum products authorised by oil company from the retail outlet. Purchase of product from sources other than those authorised by oil company would be treated as unauthorised purchase. Any sales of MS / HSD other than through the dispensing units or that retail outlet would be treated as unauthorised sales. Chapter 8 deals with action to be taken by the oil marketing company in cases of irregularities Chapter 8.1 states that

all irregularities mentioned in chapter 5 are classified in three categories namely critical, major and minor. Unauthorized purchase/sale of products (Clause 5.1.6) has been classified as critical irregularities in Clause 8.2 and the action to be taken is termination at the first instance. Sub-Clause (iv) of clause 8.3 deals with major irregularities and stock variations beyond the permissible limits but sample passing quality test (5.1.11) is classified as a major irregularity. Clause 45 of the dealership agreement commences with a non obstante clause and states that notwithstanding anything to the contrary with the dealership agreement, the purchaser shall be at liberty at its entire discretion to terminate the appellant anytime after happening of any of the following events namely-

> *45.a) If the Dealer shall commit a breach or default of any of the terms, conditions, covenants and stipulations contained in this Agreement.*
>
> *l) If the Dealer does not adhere to the instructions/ guidelines issued from time to time by the Corporation in connection with marketing Discipline and/ or safe practices to be followed by him in the sale or supply and storage of the Corporation's products or otherwise;*
>
> *m) if the Dealer shall contaminate/adulterate or tamper with the quality of any of the products supplied by the Corporation."*

27. The termination of the dealership was on account of committing an irregularity which has been classified as a critical irregularity apart from violations of the other clauses as noted above.

28. Thus, when the agreement between the parties as well as the MDG provide for certain penalties to be imposed qua the type of irregularity the question of incorporating the theory of proportionality in punishment would

not arise as the right flows under the agreement and it shall be governed by the terms and conditions of the agreement. Therefore we are to hold the question of considering whether the punishment was proportionate or otherwise would not arise in the fact and circumstances of this case. Accordingly this issue is answered in favour of the appellant.

29. Before we proceed to decide the last issue we need to point out that the decision in the case of ***Bimala Gas Service*** in MAT 1493 of 2018 dated 27.3.2019 is factually distinguishable as the court in the said case found that there was breach of principles of natural justice apart from that one Sujit was not a party to the arbitration agreement and reference of the dispute to an arbitrator without Sujit could have been incomplete. The Indian Oil Corporation filed appeal before The Hon'ble Supreme Court in special leave petition (C Diary no. 31111 of 2019) and by order dated 27.9.2019 the special leave petition was dismissed however the question of law was kept open. Apart from there being factual difference between the case on hand and that of ***Bimala Gas Agency*** and the question of law having been left open the said decision does not render any support to the case of the respondent writ petitioner.

30. The next and the last issue is whether the writ petitioner should be relegated to avail the alternate remedy. While answering the 6 issues as mentioned above we have made certain observations touching upon the merits of the matter as the writ petitioner had invited an order on merits before the learned Writ Court and also made elaborate submissions before us to sustain the findings of the learned writ Court. Therefore we were left with no option except to touch upon the merits of the matter at a few places

while answering the above issues. However, taking note of the fact that the agreement between the parties provides for arbitration, we do not propose to foreclose such remedy for the respondent writ petitioner if he is desirous of availing such remedy. Therefore, we leave it open to the respondent to avail the remedy of arbitration, if so advised, and in such an event the arbitration proceeding shall be done without being in any manner influenced by the observations / findings recorded this judgment or by the learned Single Bench. This issue is accordingly answered.

31. In the light of the above reasons the appeal is allowed.

(T.S. SIVAGNANAM, CJ.)

I Agree.

(HIRANMAY BHATTACHARYYA, J.)

(P.A.- SACHIN/PRAMITA)