

VERDICTUM.IN

1

WA Nos 503, 504 and 505 of 2022

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.S.DIAS

&

THE HONOURABLE MR.JUSTICE BASANT BALAJI

FRIDAY, THE 6TH DAY OF MAY 2022 / 16TH VAISAKHA, 1944

WA NO. 503 OF 2022

AGAINST THE INTERIM ORDER DATED 13.4.22 IN WP(C) 9414/2022 OF THE HIGH COURT OF

KERALA

APPELLANT/S:

INDIAN OIL CORPORATION LTD, REGISTERED OFFICE INDIAN OIL BHAVAN, G-9, ALI YAVAR JUNG MARG, BANDRA EAST, MUMBAI, MAHARASHTRA - 400051, REPRESENTED BY ITS COMPANY SECRETARY.

BY ADVS.

M.GOPIKRISHNAN NAMBIAR

K.JOHN MATHAI

JOSON MANAVALAN

KURRYAN THOMAS

PAULOSE C. ABRAHAM

RAJA KANNAN

PARAG.P.TRIPATHI (SR)

RESPONDENT/S:

- 1 KERALA STATE ROAD TRANSPORT CORPORATION (KSRTC), TRANSPORT BHAVAN, EAST FORT, THIRUVANANTHAPURAM - 695023, REPRESENTED BY ITS CHIEF LAW OFFICER (IN CHARGE) HENA P.N.
- 2 UNION OF INDIA, MINISTRY OF PETROLEUM & NATURAL GAS, A-WING SHASTRI BHAVAN ROAD, IP ESTATE, NEW DELHI - 110002, REPRESENTED BY ITS SECRETARY.
- 3 BHARAT PETROLEUM CORPORATION LTD, BHARAT BHAVAN, 4 AND 6 CURRIMBOY ROAD, BALLARD ESTATE, MUMBAI, MAHARASHTRA - 400001, REPRESENTED BY ITS MANAGING DIRECTOR.
- 4 HINDUSTAN PETROLEUM CORPORATION LIMITED, PETROLEUM HOUSE 17, JAMSHEDJI TATA ROAD, CHURCHGATE, MUMBAI, MAHARASHTRA - 400020, REPRESENTED BY ITS MANAGING DIRECTOR,
- 5 PETROLEUM & NATURAL GAS REGULATORY BOARD, FIRST FLOOR, WORLD TRADE CENTRE, BARBER ROAD, NEW DELHI - 110001, REPRESENTED BY ITS CHAIRPERSON.

BY ADV MANU S., ASG OF INDIA

BY ADV DEEPU THANKAN, SC, KSRTC

BY ADV DUSHYANT DAVE (SR), KSRTC

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 26.4.22, ALONG WITH WA.504/2022 AND 505/2022, THE COURT ON 6.5.22 DELIVERED THE FOLLOWING:

VERDICTUM.IN

2

WA Nos 503, 504 and 505 of 2022

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.S.DIAS

&

THE HONOURABLE MR.JUSTICE BASANT BALAJI

FRIDAY, THE 6TH DAY OF MAY 2022 / 16TH VAISAKHA, 1944

WA NO. 504 OF 2022

AGAINST THE INTERIM ORDER DATED 13.4.22 IN WP(C) 9414/2022 OF THE HIGH COURT OF

KERALA

APPELLANT/S:

HINDUSTAN PETROLEUM CORPORATION LIMITED, PETROLEUM HOUSE, 17,
JAMSHEDJI TATA ROAD, CHURCHGATE, MUMBAI, MAHARASHTRA - 400 020,
REPRESENTED BY ITS MANAGING DIRECTOR.

BY ADVS.

M.GOPIKRISHNAN NAMBIAR

K.JOHN MATHAI

JOSON MANAVALAN

KURRYAN THOMAS

PAULOSE C. ABRAHAM

RAJA KANNAN

PARAG.P.TRIPATHI (SR)

RESPONDENT/S:

- 1 KERALA STATE ROAD TRANSPORT CORPORATION (KSRTC), TRANSPORT BHAVAN,
EAST FORT, THIRUVANANTHAPURAM - 695023, REPRESENTED BY ITS CHIEF
LAW OFFICER (IN CHARGE) HENA P.N.
- 2 UNION OF INDIA, MINISTRY OF PETROLEUM & NATURAL GAS, A-WING SHASTRI
BHAVAN ROAD, IP ESTATE, NEW DELHI - 110002, REPRESENTED BY ITS
SECRETARY.
- 3 INDIAN OIL CORPORATION LTD., REGISTERED OFFICE INDIAN OIL BHAVAN,
G-9, ALI YAVAR JUNG MARG, BANDRA EAST, MUMBAI, MAHARASHTRA -
400051, REPRESENTED BY ITS COMPANY SECRETARY.
- 4 BHARAT PETROLEUM CORPORATION LTD, BHARAT BHAVAN, 4 AND 6 CURRIMBOY
ROAD, BALLARD ESTATE, MUMBAI, MAHARASHTRA - 400001, REPRESENTED BY
ITS MANAGING DIRECTOR.
- 5 PETROLEUM & NATURAL GAS REGULATORY BOARD, FIRST FLOOR, WORLD TRADE
CENTRE, BARBER ROAD, NEW DELHI - 110001, REPRESENTED BY ITS
CHAIRPERSON.

BY ADV MANU S., ASG OF INDIA

BY ADV DEEPU THANKAN, SC, KSRTC

BY ADV DUSHYANT DAVE (SR), KSRTC

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 26.4.22, ALONG WITH
WA.503/2022 AND 505/2022, THE COURT ON 6.5.22 DELIVERED THE FOLLOWING:

VERDICTUM.IN

3

WA Nos 503, 504 and 505 of 2022

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.S.DIAS

&

THE HONOURABLE MR.JUSTICE BASANT BALAJI

FRIDAY, THE 6TH DAY OF MAY 2022 / 16TH VAISAKHA, 1944

WA NO. 505 OF 2022

AGAINST THE INTERIM ORDER DATED 13.4.22 IN WP(C) 9414/2022 OF THE HIGH COURT OF

KERALA

APPELLANT/S:

BHARATH PETROLEUM CORPORATION .LTD
BHARAT BHAVAN, 4 AND 6 CURRIMBOY ROAD, BALLARD ESTATE, MUMBAI,
MAHARASHTRA - 400001, REPRESENTED BY ITS MANAGING DIRECTOR.

BY ADVS.

M.GOPIKRISHNAN NAMBIAR

K.JOHN MATHAI

JOSON MANAVALAN

KURRYAN THOMAS

PAULOSE C. ABRAHAM

RAJA KANNAN

PARAG.P.TRIPATHI (SR)

RESPONDENT/S:

- 1 KERALA STATE ROAD TRANSPORT CORPORATION (KSRTC)
TRANSPORT BHAVAN, EAST FORT, THIRUVANANTHAPURAM - 695023,
REPRESENTED BY ITS CHIEF LAW OFFICER (IN CHARGE), NENA P.N.
- 2 UNION OF INDIA
MINISTRY OF PETROLEUM & NATURAL GAS, A-WING SHASTRI BHAVAN ROAD,
IP ESTATE, NEW DELHI - 110002, REPRESENTED BY ITS SECRETARY.
- 3 THE INDIAN OIL CORPORATION,
REGISTERED OFFICE INDIAN OIL BHAVAN, G-9, ALI YAVAR JUNG MARG,
BANDRA EAST, MUMBAI, MAHARASHTRA - 400051, REPRESENTED BY ITS
COMPANY SECRETARY.
- 4 HINDUSTAN PETROLEUM CORPORATION LIMITED,
17, JAMSHEDJI TATA ROAD, CHURCHGATE, MUMBAI, MAHARASHTRA - 400020,
REPRESENTED BY ITS MANAGING DIRECTOR.
- 5 PETROLEUM & NATURAL GAS REGULATORY BOARD,
FIRST FLOOR, WORLD TRADE CENTRE, BARBER ROAD, NEW DELHI - 110001,
REPRESENTED BY ITS CHAIRPERSON.

BY ADV MANU S., ASG OF INDIA

BY ADV DEEPU THANKAN, SC, KSRTC

BY ADV DUSHYANT DAVE (SR), KSRTC

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 26.4.2022, ALONG WITH
WA.503/2022 AND CONNECTED CASES, THE COURT ON 6.5.2022 DELIVERED THE FOLLOWING:

‘C.R.’

C.S DIAS & BASANT BALAJI, JJ.

W.A Nos 503, 504 and 505 of 2022

Dated this the 6th day of May, 2022.

COMMON JUDGMENT

C.S.DIAS, J.

The intra-Court appeals are filed by the respondents 2 to 4 in W.P(C) 9414/2022 — the Public Sector Oil Marketing Companies — aggrieved by the interim order passed in the writ petition, directing them to sell high-speed diesel to the writ petitioner — the Kerala State Road Transport Corporation — at the market price available for Retail Outlets. The parties are referred to as per their status in the writ petition.

2. The concise facts in the writ petition, relevant for the determination of the appeals, are:

2.1. The petitioner is a State Transport undertaking established under the Road Transport Corporation Act, 1950. The petitioner is aggrieved by the decision of the respondents 2 to 4 (hereinafter collectively referred to as ‘OMCs’) to increase the price of high-speed diesel

(in short 'diesel'), sold in bulk to the petitioner, higher than the market price of diesel, approximately more than Rs.21/- per litre, which is violative of Articles 14 and 19 (i) (g) of the Constitution of India.

2.2. The petitioner is the largest establishment in the State, with 26578 employees and 41,000 pensioners. Before the pandemic, the petitioner used to transport nearly 35,00,000 passengers every day using 6241 buses on 6389 routes. The petitioner operates the schedules and pays the salaries and other emoluments to its employees. It is the State Government that fixes the fare tariff considering the various aspects like fuel prices, tax, and revision of minimum wages to the workers. The petitioner cannot demand the Government to effect changes in the fare tariff due to its commitment to the society.

2.3. The respondents 2 and 3 are Petroleum Corporations owned by the first respondent – the Union of India. The fourth respondent is a subsidiary of the Oil and Natural Gas Corporation. The fifth respondent is the Board constituted under the Petroleum and Natural Gas Regulatory Board Act, 2006.

2.4. The petitioner requires 300 to 400 kilolitres of diesel per day. The petitioner has 72 consumer pumps across the State. Being a bulk consumer of petroleum products, the petitioner has entered into separate agreements with the respondents 2 to 4.

2.5. Fuel prices were fixed by the first respondent, and the rules were revised from time to time by imposing restrictions on pricing. The pricing of petroleum products was brought under the Administered Pricing Mechanism (in short, 'APM') effective July 1975. The APM was dismantled from 1.4.2002, starting with aviation turbine fuel, followed by petrol and diesel. As an aftermath of the dismantling of the APM, there is an unprecedented hike in the price of petroleum products as per the whims and fancies of the respondents 2 to 4.

2.6. The petitioner was enjoying the price concession granted by the first respondent to all the bulk consumers of the OMCs. However, the benefit was withdrawn in 2013, and a non-subsidized market-determined price was fixed. Although the petitioner and other State Transport Corporations challenged the

withdrawal of subsidy before the High Courts and the Supreme Court, the challenge was rejected by the Supreme Court in the case reported in Indian Oil Corporation Ltd v. Kerala State Road Transport Corporation [(2018) 12 SCC 518] finding that the concession granted by the Government to its beneficiaries cannot confer upon them a legally enforceable right.

2.7. Initially, the price of diesel supplied to consumer pumps was less than the price supplied to retail outlets. By the end of January 2022, the price difference between the two classes of outlets got gradually reduced. By the first week of February 2022, the price of diesel supplied to consumer pumps skyrocketed to touch Rs.121.35 per litre from Rs.88/-. Due to the unforeseen price hike, as of 17.3.2022, the petitioner is paying Rs.21/- per litre more than the retail consumers for diesel.

2.8. The private bus operators, who are competitors of the petitioner, are operating on the same fare tariff fixed by the Government but are getting diesel at a lesser price. The supply of diesel to the petitioner alone

at a higher price is violative of Article 14 of the Constitution of India. The OMCs have no reason to supply diesel at a higher price to the petitioner. The petitioner is facing a severe financial crunch and has a liability of Rs.10,000 crore.

2.9. After the dismantling of the APM, the OMCs are enjoying unbridled power to fix the prices of petroleum products. The Petroleum and Natural Gas Regulatory Board Act, 2006 has provided for the establishment of the Petroleum and Natural Gas Regulatory Board, to monitor the price fixation of petroleum products and protect the interest of the consumers. Even though the Board has advised notifying petroleum, petroleum products and natural gas, the first respondent has not taken any action. Hence, the first respondent is to be directed to notify that petroleum, petroleum products and natural gas fall under Section 11 (f) read with Section 2 (zc) of the above Act. Aggrieved by the action of the OMCs in increasing the price of diesel being supplied to the petitioner, the petitioner has sought the following reliefs:

(i) issue a writ of mandamus or any other appropriate writ, order or direction directing the respondents 1 to 4 to sell diesel to the petitioner at the available market rate in the retail outlets in the state;

(ii) issue a writ of mandamus or any other appropriate writ, order or direction directing declaring that the action of the respondents 2 to 4 to sell diesel to the petitioner at a higher rate than the retail market rates is inherently discriminatory, arbitrary unreasonable and violative of Article 14 of the Constitution of India;

(iii) issue a writ of mandamus or any other appropriate writ, order or direction directing the first respondent to notify petroleum, petroleum products and natural gas under Section 2 (zc) of the PNGRB Act, 2006 enabling the fifth respondent to function under Section 11 (f) of the Act.

2.10. The petitioner has also sought the following interim relief:

“For the reasons stated in the writ petition and accompanying affidavit, it is humbly submitted that this Hon’ble Court may be pleased to direct the respondents 2 to 4 to levy the price of diesel at par with the existing market rate available market for the retail outlets, pending disposal of the writ petition.”

3. The second respondent has filed a counter affidavit objecting to the maintainability of the writ petition. It is, *inter alia*, contended that there is no public law element or violation of rights of any person involved in the writ petition. This Court may not invoke its extraordinary jurisdiction under Article 226 of the Constitution of India. Exhibit P1 agreement is contractual. It is a settled law that this Court shall not

exercise its jurisdiction under Article 226 of the Constitution of India for resolving contractual disputes. Clause 14 of Exhibit P1 expressly provides that in case of any dispute arising between the parties, relating to the terms and conditions outlined in the agreement, the same shall be resolved by mutual negotiation, failing which the dispute shall be adjudicated through arbitration. The pricing of products, which is the subject matter of the writ petition, squarely falls within Clause 14 of Exhibit P1. The writ petition is silent on the alternative remedy provided in the agreement. The price fixation of petroleum products is a policy consideration and is not the forte of the Court. Hence, the scope of judicial review is limited. In non-statutory price fixation matters, as in the present case, the scope of judicial scrutiny is minimal. This Court may not judicially review the price fixation made by the respondent. The petitioner's attempt is to persuade this Court to enter the intricacies of inter-party commercial matters and the price fixation mechanisms. In a situation of contractual price fixation, a mere difference in price may not justify the prayer to judicially review

the price fixation mechanism and arrive at a different price to be fixed by this Court under Article 226 of the Constitution of India. Moreover, the petitioner has failed to produce any material to show any demand made to the respondents, to issue a writ of mandamus. Hence the writ petition may be dismissed.

4. The learned Single Judge admitted the writ petition and passed the impugned interim order on a finding that the price levied is exorbitant and is an unconscionable term of bargain. The operative portion of the order reads as follows:

“In the facts and circumstances of the case, there will be an interim order directing the respondents 2 to 4 to levy the price for HSD from the petitioner at par with the existing market rate available for the retail outlets. This interim order is provisional and will be subject to the outcome of the writ petition”.

5. It is challenging the above finding and direction that the respondents 2 to 4 have independently preferred the three writ appeals.

6. Heard; Sri. Parag P. Tripathi, the learned Senior Counsel appearing for appellants/respondents 2 to 4, assisted by Sri. Paulose C. Abraham and Sri. Dushyant Dave, the learned Senior Counsel appearing for the first

respondent/writ petitioner, assisted by Sri.Deepu Thankan.

7. Sri. Parag P.Tripathi argued that the learned Single Judge has erred in passing the impugned order, which is against the well-settled principles of law laid down by the Hon'ble Supreme Court. He contended that the learned Single Judge ought to have adverted to the objection raised by the 2nd respondent in the counter affidavit regarding the maintainability of the writ petition, in view of Clause 14 of Exhibit P1. The agreement mandates the parties to resort to the 'ADR' mechanism. Unfortunately, the same was overlooked by the learned Single Judge without assigning any reason. He placed reliance on the decisions of the Hon'ble Supreme Court in **Gail (India) Ltd v. Gujarat State Petroleum Corporation Ltd** [(2014) 1 SCC 329] and **Kerala State Electricity Board and Anr v. Kurien E.Kalathil** [(2000) 6 SCC 293] to support his submission. He contended that the learned Single Judge has failed to consider the implication of the inter-party judgment in **Indian Oil Corporation Ltd v. KSRTC** (supra), on substantially the same issue, which

operates as res-judicata against the petitioner. He further contended that, as the petitioner has entered independent contracts with the respondents 2 to 4 for the bulk purchase of petroleum products, the petitioner cannot compare itself to a retail customer. Only equals have to be treated equally. Therefore, there is no violation of Article 14 of the Constitution of India, as alleged in the writ petition. He relied on the decisions of the Hon'ble Supreme Court in **K.T Moopil Nair v. State of Kerala** [AIR 1961 SC 552], **Indira Sawhney v. Union of India** [(1992) Supp (3) SCC 217] to fortify his contention. He also submitted that the petitioner is being offered interest-free credit facilities for the first 15 days of supply, and petroleum products are being supplied at the doorsteps of the petitioner's consumer pumps with all facilities and technical services. Approximately Rs.140/- crore is outstanding from the petitioner to the respondents 2 to 4 towards arrears of petroleum charges. Without considering the above factual and legal aspects and the principles of balance of convenience, the learned Single Judge has passed the impugned order. Now, since the petitioner is not taking

supplies from the respondents 2 to 4, no hardship is being caused to them. Hence the writ appeals may be allowed.

8. Sri. Dushyant Dave countered the above submissions and argued that writ appeals are devoid of merit. He contended that the learned Single Judge has passed the interim order in exercise of his discretionary powers under Article 226 of the Constitution of India, particularly on a consideration of the peculiar facts and circumstances of the case. He drew the attention of this Court to paragraphs 9 and 10 of the judgment in **Indian Oil Corporation Ltd v. KSRTC** (supra) and argued that, at that point in time, the Government of India had given specific reasons for taking a policy decision in deregulating the prices of diesel, that too in a phased manner. Whereas now the respondents 2 to 4 are not giving any reason for fortnightly increasing the price of diesel being supplied to bulk purchasers. According to him, as per Clause 5 of Exhibit P1, the respondents 2 to 4 are contractually bound to supply petroleum products to the petitioner at the most competitive price available in the market. Instead, the respondents 2 to 4 are

indiscriminately increasing the price day by day, which has now skyrocketed to touch the price of Rs.121.35/- per litre, i.e., Rs.21/- above the current retail price. If the respondents 2 to 4 are given such leeway, the petitioner, who is reeling in debt, would have to stop their operations completely. He contended that as the petitioner requires approximately 300-400 kilolitres of diesel per day, with the arbitrary escalation of the price of diesel, the petitioner is put to severe hardship and financial loss. He relied on the decision of the Hon'ble Supreme Court in **Wander Ltd and Ors v. Antox India Private Ltd** [(1990) Supp SCC 727] to canvass the position that the Appellate Court should not interfere with the discretionary orders passed by the Single Judge. He also placed emphasis on the decision in **Unitech Ltd v. Telangana State Industrial Infrastructure Corporation (TSIIC)** [2021 SCC Online SC 99] to drive home the point that merely because the parties had agreed to resort to arbitration, it does not oust the jurisdiction of this Court, to exercise its discretion as enshrined under Article 226 of the Constitution of India. He further submitted that

although the respondents 2 to 4 were directed to file a statement explaining the pricing mechanism, the same was not done. Hence the learned Single Judge has exercised his discretion and passed the interim order. The appellants have not made out a case warranting interference by this Court to exercise its powers under Section 5 of the Kerala High Court Act. Hence the writ appeals may be dismissed.

9. In the light of the rival contentions, the points that arise for consideration in these appeals are:

(i) whether the learned Single Judge has erred in proceeding with the writ petition without considering the objection raised by the 2nd respondent and not stating any reason in not relegating the petitioner to the 'ADR' mechanism provided in the contract?

and

(ii) whether the direction in the impugned order that the respondents 2 to 4 have to supply diesel to the petitioner at par with the current market price available to retail outlets is sustainable in law?

10. The petitioner and the OMCs have entered into separate agreements for the supply of diesel, lubricants, greases, and other petroleum products at the petitioner's various depots/consumer pumps. It is

admitted that Exhibit P1 was subsequently renewed twice, i.e., on 25.6.2019 and 6.3.2020, and the contract is valid till 14.3.2023. Similarly, Exhibit P2 agreement entered between the petitioner and the 3rd respondent is valid till 31.05.2022.

11. Clause 14 of Exhibits P1 and P2 reads thus:

“14. ARBITRATION

In the event of any dispute arising between the two parties relating to the various terms and conditions set forth in the contract, the two parties undertake to resolve the difference by mutual negotiation. If such dispute or difference could not be resolved within one month from the date having arisen, the same shall be referred to a Sole Arbitrator to be appointed by the Managing Director of Buyer and by Director (Marketing) of Seller by mutual consent.

If however, the parties failed to agree upon a sole arbitrator with mutual consent, as aforesaid the Seller and Buyer will each nominate an arbitrator of their choice, and the two arbitrators so nominated shall choose a third arbitrator. The award published by arbitrator/s so appointed shall be final and conclusive and binding on both the parties to the Agreement. The award published by arbitrator/s should contain the reasons.

The provisions of the Indian Arbitration & Conciliation Act of 1996 or any statutory modification or re-enactment thereof and the rules made there under for the time being in force shall apply to the arbitration proceedings under this clause. The venue of arbitrator/s should be Ernakulam”.

12. It is alleging arbitrariness, unfairness, and irrationality on the part of the OMCs in increasing the

price of diesel sold to the petitioner above the retail price that the petitioner has approached this Court, *inter alia*, to direct the OMCs to sell diesel to the petitioner at the current rate being sold to the retail customers.

13. The second respondent has in its counter affidavit objected to the maintainability of the writ petition in view of the inbuilt 'ADR' mechanism agreed in Exhibit P1.

14. The Hon'ble Supreme Court in **Whirlpool Corporation v. Registrar of Trade Marks** [(1998) 8 SCC 1] has expressed as follows:

"14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".

15. 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 if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural

justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.”

15. The Hon’ble Supreme Court has reiterated the above legal position in a host of subsequent judicial pronouncements, namely **Harbansal Sahinia and Another v. Indian Oil Corporation Ltd. and others** [(2003) 2 SCC 107, **Rajasthan State Electricity Board v. Union of India and other** [(2008) 5 SCC 632, **Pimpri Chinchwad Municipal Corpn. V Gayatri Construction Co.** [(2008) 8 SCC 172, **Balkrishna Ram v. Union of India** [(2020) 2 SCC 442, **Unitech Ltd v. Telangana State Industrial Infrastructure Corporation (TSIIC)** [2021 SCC Online SC 99].

16. Recently, the Hon’ble Supreme Court in **Radha Krishnan Industries v. State of Himachal Pradesh and others** [(2021) 6 SCC 771] has carved out the exceptions to the “rule of alternative remedy” to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India, which are enumerated hereunder:

“27. The principles of law which emerge are that:

27.1. The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.

27.2. The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person.

27.3. Exceptions to the rule of alternate remedy arise where : (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged.

27.4. An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law.

27.5. When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.

27.6. In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.

28. These principles have been consistently upheld by this Court in *Chand Ratan v. Durga Prasad* [(2003) 5 SCC 399] *Babubhai Muljibhai Patel v. Nandlal Khodidas Barot* [(1974) 2 SCC 706] and *Rajasthan SEB v. Union of India* [(2008) 5 SCC 632] among other decisions.”

17. The above-cited precedents demonstrate that the discretionary power of this Court to entertain a writ petition filed under Article 226 of the Constitution of India, instead of relegating the parties to an alternative remedy, is separated by a narrow line. Currently, in the post amendment era of the Arbitration and Conciliation Act, 1996 (post Act 3 of 2016 and Act 33 of 2019) and the emergence of the doctrine of *kompetenz-kompetenz*, and the exposition of the law in **Vidya Drolia and others v. Durga Trading Corporation** [(2021) 2 SCC 1] the line has got narrower.

18. In addition to the above, the Constitutional Bench of the Hon'ble Supreme Court in **S.B.P and Company vs Patel Engineering Ltd** [(2005) 8 SCC 681 has held thus:

“16. We may at this stage notice the complementary nature of Sections 8 and 11. **Where there is an arbitration agreement between the parties and one of the parties, ignoring it, files an action before a judicial authority and the other party raises the objection that there is an arbitration clause, the judicial authority has to consider that objection and if the objection is found sustainable to refer the parties to arbitration.** The expression used in this section is “shall” and this Court in *P. Anand Gajapathi Raju v. P.V.G. Raju* [(2000) 4 SCC 539] and in *Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums* [(2003) 6 SCC 503] has held that the judicial authority is bound to refer the matter to arbitration once the existence of a valid arbitration clause is established.

Thus, the judicial authority is entitled to, has to and is bound to decide the jurisdictional issue raised before it, before making or declining to make a reference. Section 11 only covers another situation. Where one of the parties has refused to act in terms of the arbitration agreement, the other party moves the Chief Justice under Section 11 of the Act to have an arbitrator appointed and the first party objects, it would be incongruous to hold that the Chief Justice cannot decide the question of his own jurisdiction to appoint an arbitrator when in a parallel situation, the judicial authority can do so. Obviously, the highest judicial authority has to decide that question and his competence to decide cannot be questioned. If it is held that the Chief Justice has no right or duty to decide the question or cannot decide the question, it will lead to an anomalous situation in that a judicial authority under Section 8 can decide, but not a Chief Justice under Section 11, though the nature of the objection is the same and the consequence of accepting the objection in one case and rejecting it in the other, is also the same, namely, sending the parties to arbitration. The interpretation of Section 11 that we have adopted would not give room for such an anomaly.”

(emphasis given)

19. Thus, the law has crystalised that when a party invokes the plenary power of the High Court to issue a prerogative writ under Article 226 of the Constitution of India, notwithstanding the arbitration clause contained in an inter-party contract, and the opposite party objects to the maintainability of the writ petition, the High Court is bound to consider the objection and be satisfied that it is a fit case to exercise its discretion instead of relegating the parties to the alternative remedy.

20. In the case at hand, the learned Single Judge has erred in not advertng to the objection raised by the

2nd respondent and in not stating the reason for not relegating the parties to the alternative remedy, dehors the arbitration clause. Hence, we answer point No. (i) in favour of the appellants.

21. Even though we have held that the impugned order is erroneous in the light of our findings on point No. (i), we proceed to decide on point No. (ii) due to the questions of law that were argued.

22. The dispute in the writ petition is regarding the prohibitive price of diesel sold to the bulk consumers/consumer pumps compared to the price of retail customers/retail outlets.

23. Exhibit P3 proves that till 31.01.2022, the price of diesel sold to bulk consumers was lower than the price of retail customers. As per Exhibit P-11, the price of diesel sold to bulk consumers was fortnightly increased from Rs.82.75 per litre as of 31.12.2021 to Rs.121.35 per litre as of 30.03.2022, i.e., an increase by Rs.22.03 per litre.

24. Clause 5 of Exhibit P1 deals with fixation of price, which reads as follows:

“5. Price

The price of the petroleum Products shall be ex-Seller supply points as determined by the Seller's policy and shall be charged as applicable on the date of supply.

The Seller shall ensure that Products supply is executed at the most competitive price applicable in the market.

The Buyer will bear all the applicable taxes/duties or any other charges as imposed by the Govt./Local Bodies on supply of Products from time to time."

25. Clause 5 gives absolute freedom to the OMCs to fix the price of petroleum products as per their policy and as on the date of supply.

26. As can be gathered from the decision of the Hon'ble Supreme Court in **Indian Oil Corporation Ltd. v. Kerala SRTC** [(2018) 12 SCC 518], that is the earlier round of litigation between the parties, the petitioner had sought the following reliefs which are extracted in paragraph 2 of the said decision, which reads thus:

"2. Writ Petition (Civil) No. 7517 of 2013 was filed in the High Court of Kerala at Ernakulam. The prayer made in the writ petition is as follows:

(i) Issue an appropriate writ, order or direction declaring that the diesel price hike introduced as per Ext. P-1 to Kerala State Road Transport Corporation, compelling the petitioner to pay enhanced rate than while purchasing diesel from private or other diesel bunk, is wholly arbitrary, illegal, unjust, unconstitutional and violative of Articles 12 and 14 of the Constitution of India.

(ii) Issue any appropriate order commanding the first respondent to withdraw the dual pricing policy of diesel introduced as per Ext. P-1 or in the alternative accord exemption to the petitioner, from the category of bulk consumer, and treat the petitioner as a retail customer for the purpose of diesel purchasing.

(iii) Issue a writ of mandamus or any other appropriate writ, order or direction commanding the respondents to refund the excess diesel charge collection in pursuance of clause (b) of Ext. P-1, with interest at the treasury rate, with effect from 17-1-2013 to the petitioner, forthwith.”

27. On a juxtaposition of the reliefs sought in the earlier round of litigation and the one at hand reveals that reliefs are identical.

28. A learned Single Judge of this Court had by order dated 21.03.2013 in W.P.(C) No.7517/2013 restrained the respondents 2 and 3 from realising a higher price for diesel sold to the petitioner than the retail customers.

29. The Hon’ble Supreme Court, by order dated 16.09.2013 in S.L.P (Civil) No.19996/2013 filed by the respondents 2 and 3, stayed the operation of the impugned order after observing as under:

“In our opinion, having regard to the over-all facts and circumstances of the case, particularly that 83% of diesel is imported and the current value of Rupee against Dollar has substantially gone down, we are satisfied that not only the Oil Company has balance of convenience in its favour but we are also of the view that irretrievable injustice shall be caused to the Oil Company if the interim injunction granted by the High Court is allowed to operate.”

30. Later, the Honourable Supreme Court, by its common order dated 07.11.2017 in **Indian Oil Corporation Ltd. v. Kerala SRTC** (supra), allowed the Civil Appeal filed by the respondents 2 and 3 and dismissed the writ petition. It is apposite to extract paragraphs 15 and 19 of the said judgment.

“15. Firstly, coming to the issue of the policy framed by the Government of India; the grant of subsidy is a matter of privilege, to be extended by the Government. It cannot be claimed as of right. No writ lies for extending or continuing the benefit of privilege in the form of concession. Subsidy is the matter of fiscal policy. Such privilege can be withdrawn at any time is the settled proposition of law. Thus, it was open to the Government of India to take a decision to withdraw the subsidy enjoyed by the bulk consumers; and, it was a decision based upon the aforestated rationale to direct funds for social welfare scheme for common man and that by grant of subsidy, OMCs had suffered heavy losses, and had borrowed the excessive money to the extent indicated in the aforesaid paragraphs. Thus, it was decided by the Government of India, not to extend subsidy to bulk consumers; same could not be said to be an arbitrary decision, discriminatory or in violation of the principles contained in Article 14 of the Constitution of India.

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19. Thus, we find no merit in the submissions raised that subsidy should have been continued as an exception for the State Road Transport Corporations, though they may have been rendering public service. However, for the purpose of such public services corporation cannot claim as of right that the Government of India or the State Government should continue or grant the subsidy. It cannot be claimed as a matter of right; no such right exists to claim the subsidy. The Court cannot interfere in such matters.”

31. The common order in **Indian Oil Corporation Ltd. v. Kerala SRTC** (supra) indicates that the Government of India had dismantled the Administered Pricing Mechanism and deregulated the price of diesel in a phased manner. Afterwards, the OMCs were given the complete autonomy to fix the price as per their respective policies.

32. Notwithstanding the above common order, the petitioner continued to purchase petroleum products from the OMCs as a bulk purchaser at the prices fixed by the OMCs. The petitioner has on its free will and volition, renewed Exhibit P-1 with the 2nd respondent, not once but twice, on the same terms and conditions. Thus, it is beyond any semblance of doubt that the petitioner is fully conscious that the fixation of the price for petroleum products is exclusively within the domain of the OMCs, and the petitioner has no say in the matter. Moreover, after the passing of the common order in 2017, the petitioner has not complained about the price fixation, instead has enjoyed the benefits under the contract, especially the credit facility. It's only now that the petitioner cries foul when the price of

diesel sold to bulk consumers has risen above the price of retail customers. The petitioner is estopped from approbating and reprobating on the contract terms.

33. We accept the submission of Sri. Parag P.Tripathi that the petitioner cannot be treated at par with retail customers because the latter would have to go to a retail outlet and pay for the product then and there. On the contrary, petroleum products are supplied to the petitioner at their doorsteps, with credit facilities and other benefits as envisaged in the contract. Therefore, the petitioner — a bulk purchaser, falls within a separate class and cannot be treated at par with retail customers. Consequentially, following the principles laid down in **K.T Moopil Nair v. State of Kerala** and **Indira Sawhney v. Union of India** (supra) and a whole line of decisions, we hold there is no infringement of the petitioner's fundamental right as alleged in the writ petition.

34. The Hon'ble Supreme Court in **Union of India and another v. Cynamide India Ltd. and others** [(1987) 2 SCC 720 has held that 'price fixation is neither the function nor the forte of the court.'

35. The above view has been reiterated in **Union of India and others v. Cipla Limited and another** [(2017) 5 SCC 262]. Paragraph 96 of the judgment is relevant for the determination of the case at hand, which reads as follows:

“96. Fixing the price of any commodity is not only difficult but also tricky. There is material to be considered, a bundle of factors to be considered and appropriate weight is to be given to the material and the factors. This is not easy to decide and there will always be some criticism with regard to either the material utilised or the factors considered or the weight attached to the materials and factors. In matters pertaining to drug formulations, it is not only an issue of demand and supply but also the ability of a common person to afford the formulation. At the same time, the manufacturer must also make some profit and be in a position to invest in research and development. There simply cannot be any mathematical precision in fixing the price of a commodity. More than enough elbow room or a play in the joints is required to be given in such matters — and even then the price fixing authority may commit an error. Once this is appreciated, it will be realised that the task before the Central Government in prescribing the norms was not easy”.

36. In the light of the categorical declaration of law in the afore-cited decisions and the inter-party common order in **Indian Oil Corporation Ltd. v. Kerala SRTC** (supra), we have no doubt in our mind that it is not the function or forte of this Court to decide the optimal or competitive price at which diesel should be sold to the petitioner.

37. This Court finds that the petitioner has not represented their alleged grievance to the OMCs; instead has rushed to this Court. Therefore, no inaction can be alleged against the respondents 2 to 4, warranting the issuance of a writ of mandamus. Furthermore, the final relief sought in the writ petition has been granted as an interim measure, which again is impermissible in view of the law laid down by the Hon'ble Supreme Court in the **State of U.P and others v. Ram Sukhi Devi** [(2005) 9 SCC 733].

38. This Court finds that the present writ petition is nothing but the old case with a new docket. Hence the observations of the Hon'ble Supreme Court in its order dated 16.09.2013 in S.L.P (Civil) No.19996/2013 squarely apply to the case at hand. The petitioner has not made out a prima facie case, and the balance of convenience is in favour of the OMCs. In the above legal and factual background, we hold that the impugned order directing the respondents 2 to 4 to sell diesel to the petitioner at par with the market price available to retail customers is unsustainable in law. Accordingly, we find point no. (ii) also in favour of the appellants. In the

light of the findings of this Court on points nos.(i) and (ii), we exercise the powers of this Court under Section 5 of the Kerala High Court Act, 1958, and allow the appeals.

In the result, the writ appeals are allowed, and the impugned order dated 13.04.2022 in W.P (C) No.9414/2022 is set aside. The parties shall bear their respective costs.

Sd/-

C.S.DIAS
JUDGE

sd/-

BASANT BALAJI
JUDGE

sks/30.4.2022