

GAHC010009812013



2019:GAU-AS:20828

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/4712/2013

ON THE DEATH OF DEBA KUMAR BORA, HIS LEGAL HEIR REP.
S/O- LT. KESHAB RAM BORA, PROPRIETOR OF M/S BORA SERVICE
STATION, R/O- G.S. ROAD, ULUBARI, DIST.- KAMRUP M, GHY- 7.

1.1: SRI KAUSHIK BORA
S/O. LATE DEBA KUMAR BORA
R/O. G.S. ROAD
ULUBARI
DIST. KAMRUP (M)
GUWAHATI-781007

VERSUS

INDIAN OIL CORPORATION LTD. and 4 ORS
A COMPANY REGISTERED UNDER INDIAN COMPANIES ACT 1956 HAVING
ITS REGISTERED OFFICE AT INDIAN OIL BHAWAN, G-9. ALL YAYER JUNG
MARG BANDRA EAST, MUMBAI- 400051.

2:GENERAL MANAGER
INDIAN OIL CORPN. LTD.
NORTH EAST INTEGRATED STATE OFFICE
EAST POINT TOWER
BAMUNIMAIDAM
GHY- 21.

3:SENIOR DIVISIONAL RETAIL SALES MANAGER
INDIAN OIL CORPORATION LTD.
SECTOR- 3
NOONMATI
KAMRUP M
GHY- 20.

4:CHIEF MANAGER RS
INDIAN OIL CORP. LTD.
NORTH EAST INTEGRATED STATE OFFICE

EAST POINT TOWER
BAMUNIMAIDAM
GHY- 21
KAMRUP M.

5:UNION OF INDIA
REP. BY THE SECY. TO THE MINISTRY OF PETROLEUM AND OIL AND
NATURAL GAS
GOVT. OF INDIA
SANSAD MARG
NEW DELHI

Advocate for the Petitioner : MR.N DUTTA, MR.K N CHOUDHURY,MR.S SARMA,MR.R SEKHAR,MR.A BISWAS,MRU S BORGOHAIN ,MR.A BARUAH

Advocate for the Respondent : ASSTT.S.G.I., MR.M K CHOUDHURY,MR.A BARKAKATI,FOR CAVEATOR,,,

BEFORE
HONOURABLE MR. JUSTICE ARUN DEV CHOUDHURY

JUDGMENT

Date : 04-10-2024

1. Heard Mr. K.N Choudhury, learned senior counsel assisted by Mr. N Gautam, learned counsel for the petitioner. Also heard Mr. M.K. Choudhury, learned senior counsel assisted by Mr. M Sarma, learned counsel for the respondents.

2. The present writ petition is filed assailing the search and seizure conducted by Anti Adulteration Cell (AAC) officials on 21.03.2012, in the premises of the IOCL dealership, of which the petitioner is a proprietor, being illegal and void ab initio. The further challenge is an order dated 12.07.2013 issued by respondent No.3, whereby the petitioner's dealership was terminated.

3. Mr. K.N. Choudhury, learned senior counsel for the petitioner argues that his fundamental challenge is to the illegality in search and seizure conducted by AAC primarily on the ground that while conducting

such search, not only statutory mandate has been violated but also the person who performed the search and seizure is not authorized under law to do so and therefore, if this court upholds such contentions, deliberation on other issues raised, may not be necessary.

4. Mr. M.K. Choudhury learned senior counsel for the respondents while agreeing with the contention that if the issue as regards procedure and authority of search and seizure is determined in favour of the petitioner, then there may not be any necessity to go into the other issues raised in this writ petition. At the same time, Mr. Choudhury learned senior counsel also raised a preliminary objection as regards the maintainability of the present writ petition as petitioner is having an alternative remedy of appeal against the order of termination of the dealership dated 12.07.2013.

5. In view of the aforesaid contention and as agreed to, this court has decided first to deal with the issues raised as regards the legality and validity of the seizure and authority of the AAC officials and the objection as to the availability of alternative efficacious remedy and then to proceed for further hearing on the other issues depending upon the outcome of the aforesaid two issues. At this stage both the learned senior counsels have advanced their arguments on these two points only.

6. Before dealing with the arguments advanced by the learned counsels for the parties, let this court first record the facts, which are not in dispute.

I. In the exercise of Power under section 3 of the Essential Commodities Act, 1955 the Central Government issued orders in the year 1998 and 2002 for regulating Motor Spirit and High Speed Diesel distribution and Prevention of Malpractices.

II. Union of India in the petroleum ministry suggested the

creation of a special unit by the Oil companies themselves for execution and implementation of the orders issued in this regard under the Essential Commodities Act, 1995.

III. Accordingly, an Anti Adulteration Cell was established by the Corporation with an object to control adulteration in petroleum products.

IV. A Gazette Notification was issued on 17.02.2002 in terms of order 1998 authorizing the Joint Director of Anti Adulteration Cell as the authority to exercise the power of search and seizure under Order 1998.

V. On 21.03.2012, some officials from the Anti Adulteration Cell, Eastern Region (AAC/ERD) visited the retail outlet of the petitioner and inspected the retail outlet, including all the equipment installed therein and it was alleged that they have found serious anomalies and discrepancies in respect of the retail outlet of the petitioner. It was alleged that two numbers of unauthorized electronic devices were found connected to a pulsar cable and by operating a switch connected to these devices, short delivery was affected. It was also alleged that another unauthorized electronic device was found connected to the pulsar cable, however, no change in delivery was found in operating the switch.

VI. According to the respondent Corporation, these unauthorized devices were taken out from the dispensing unit and was kept in an envelope signed and sealed by AAC with its hologram and seal.

VII. Thereafter, by a communication dated 24.03.2012, the respondent Corporation sought an explanation from the

dealership on the point raised by the inspecting team from AAC.

VIII. The petitioner thereafter, by its communication dated 11.04.2012, replied to such explanation, amongst others, contending that the AAC has no jurisdiction nor is empowered to carry out such inspection in the absence of the authority. The whole exercise of AAC was beyond jurisdiction, without authority of law and the rules framed there under.

IX. It was also contended in the said reply that the seizure was carried out behind the back of the proprietor of the dealership and the proprietor was compelled to put a signature on the envelope as well as on the report dated 21.03.2012, as it was intimated that if the dealer does not put the signature he will face evil consequences.

X. At that stage by a communication dated 10.07.2012, the respondent Corporation issued a show cause notice for termination of dealership for violation of MDG/2005.

XI. The said show cause notice was issued in terms of the report of the inspection with an allegation that there was short delivery by using unauthorized electronic devices connected to the pulsar cable of MS-1 and MS-2 nozzles. It was also contended in the show cause notice that the officials of AAC are authorized as per the dealership agreement, based on which, the retail outlet dealership is operated and that AAC officials are empowered under clause 4 (A) of Motor Spirit and High-Speed Diesel (Regulation of Supply of Distribution and Prevention of Malpractices) Order, 1998 (Order 1998) to seize and seal the dealership.

XII. Thereafter, the dealer filed its preliminary reply on

03.09.2012. A specific stand was taken that the action of search and seizure can be done in terms of the Petroleum Act 1994, The Standards of Weights and Measures Act, 1976, The Essential Commodities Act, 1955 and Motor Spirit and High-Speed Diesel (Regulation of Supply of Distribution and Prevention of Malpractices) Order, 2005 (for short Order 2005) and therefore, in that context, Marketing Discipline Guidelines (MDG) 2005 shall have no relevance.

XIII. Thereafter, by way of the impugned order dated 12.07.2013, the dealership was terminated having not satisfied with the reply of the petitioner.

7. Mr. K.N. Choudhury learned senior counsel for the petitioner argues that an officer in the rank of Chief Manager, AAC and Senior Manager AAC is not empowered to carry out search and seizure in terms of Order 1998, inasmuch as by way of notification dated 18.01.2002 only the Joint Director of AAC is empowered to exercise such power of search and seizure and therefore the entire search and seizure is bad for want of authority and jurisdiction. According to the learned senior counsel for the petitioner when the entire decision was based on such search and seizure, such determination is resultantly a nullity. It is further contended that even if it is assumed that the officer who conducted the search and seizure is authorized under law, however, the mandate of orders under Order 1998 and Order 2005, to follow the procedure of Section 100 Cr.P.C., so far the same relates to search and seizure has not been followed inasmuch as admittedly from the record of the respondents, it is clear that no independent witnesses were present during the search and sealing of the petrol pump and such procedural lapse itself makes the search and seizure illegal and therefore, the termination of dealership

solely based on such illegal procedure is bound to fall.

8. Mr. Choudhury, learned counsel for the petitioner relying on the decision of a coordinate bench in **[WP(C) 3567/2013 (Nibedita Roy Vs. Union of India)]**, argues that in a similar situation, the writ petition was allowed.

9. Per contra, Mr. M.K. Choudhury, learned senior counsel for the respondent Corporation submits that the AAC is an independent authority consisting of officers of the IOCL and they are within their jurisdiction to conduct search and seizure for ascertaining that there are no malpractices and such power is always there irrespective of any order issued under Order 1998 or Order 2005, inasmuch as the Corporation under the dealership agreement is having a right to verify whether the dealer under it are committing malpractices and therefore, in such a situation the authority prescribed under gazette notification of 2002 shall have no material bearing. Replying to the other argument of the learned senior counsel for the petitioner as regards applicability of section 100 Cr.P.C, Mr. M.K. Choudhury, learned senior counsel argues that such procedure is not applicable in the present case as section 100 is a part of chapter VII Cr.P.C., which deals with the process to compel the production of things and relatable to general provisions of searches and is made applicable under section 99 of Cr.P.C to certain sections. According to him, such a section is mandated to be applied under Order 1998 and Order 2005, as far as practicable and therefore, such prescription is not always mandatory. He further contends that the presence of independent witnesses shall not automatically vitiate the search and seizure and therefore, the contention of the writ petitioner is liable to be discarded.

10. It is further contended that the Order of termination is appealable and the petitioner has not preferred any appeal against such

order. Therefore, this court may not exercise the power of judicial review in the given facts of the present case inasmuch as the appellate authority can deal with all the arguments that have been advanced in the present case. According to the learned counsel for the respondent, this writ petition is liable to be dismissed for having alternative efficacious remedy.

11. Replying to the arguments as regards the determination made by a coordinate bench in [**Nibedita Roy Vs. Union of India**], supra, Mr. Choudhury contends that the said judgment has been interfered with by a **Division Bench in WA 149/2018** preferred by the Indian Oil Corporation Ltd and it was held by the Division Bench that the disputed questions of fact should be relegated to the appellate authority.

12. I have given anxious consideration to the arguments advanced by the learned counsel for the parties. Perused the materials available on record, and the relevant provisions of the statutes relied on by the learned senior counsel for the parties and the authorities relied on by them.

13. There is no dispute that the Ministry of Petroleum and Natural Gas advised the oil manufacturing companies to create their own surveillance cells and accordingly, the Indian Oil Corporation, Anti Adulteration Cell was formed in April 2005.

14. It is important to note herein that section 3 of the Essential Commodities Act, 1955 (hereinafter referred to as Act, 1955) empowers the Central Government to issue orders for the purpose of regulating or prohibiting production, supply and distribution and trade and commerce of Essential Commodities. In exercise of such power, Order 1998 was issued. Subsequently, Order 2005 was issued in supersession of Order 1998. In terms of clause 2(f)(X) of such Order, short delivery comes within the definition of malpractice.

15. Clause 7 of Order 2005, deals with powers of search and

seizure. Clause 7(1) empowers amongst other, any officer of the oil company, not below the rank of sales officer to conduct search and seizure for secure compliance with the provision of Order 2005 or for the purpose of satisfying himself that the Order 2005 or any order made thereunder has been complied with or when there is reason to believe that all or any of the provision of the Order 2005 have been or are been or about to be contravened.

16. Clause 7(1)(a) to (d) enumerates the powers to do certain things including, enter, search, inspect and take sample, however, Clause 8(2) mandates that the authorized officer is to record, in writing the reason for exercising power of search and seizure and a copy of such recording is to be provided to the dealer. Clause (8)3 further mandates that provision of section 100 of the Cr.P.C, 1973 relating to search and seizure shall, as far as may be applied to searches and seizure shall as far as be practicable, may be applied to searches and seizures under Clause 7 of Order 2005.

17. As recorded hereinabove, an officer not below the rank of sales officer is empowered to carry out such search and seizure. Since on the advice of the Ministry, a Special Cell (AAC), was constituted therefore, it had become necessary to statutorily empower the AAC to carry out search and seizure in terms of Order 1998/Order 2005.

18. Accordingly, a notification was issued in the official gazette which was published on January 18, 2002 and by the said notification, a Joint Director of AAC established by the Ministry was notified as the authority to exercise the powers of search and seizure under the Order 1998. It is important to record here that the provision contained in this regard in Order 2005 is parameteria to the provisions under Order 1998.

19. Now coming back to Order 2005, it is seen that in terms of

Clause 6 of Order 2005, a dealer, transporter, consumer or any other person is barred in any manner from indulging in any one or more malpractices as defined under Clause 2(f) of the Order 2005. A conjoint reading of Clause 6 and Clause 7 and the notification dated 18.01.2002, it is clear that if any dealer indulges in any manner, in any one or more of the malpractices, as enumerated and defined under Order 2005, the Joint Director of AAC is empowered to conduct search and seizure, however, while exercising such power, such authorized officer needs to record in writing the reason for doing so and a copy of such recording is to be provided to the dealer. Apart from that, the provision of section 100 of the Cr.P.C 1973 so far relating to search and seizure is to be followed.

20. One of the conditions of search as provided under section 100 Cr.P.C is that the authorized officer conducting a search is required to call upon two or more independent and respectable inhabitants of the locality to attend and witness the search. Law is by now well settled that when there is no possibility or it is not practicable to find out an independent witness, the absence of an independent witness may not be fatal for the search and seizure. Thus, when it is not possible to find an independent witness at the place of seizure, it cannot be said that the obligation to take public witness is an absolute rule and if despite the effort, the public witness could not be associated with the search or recovery, the search and seizure may not necessarily be vitiated (**Ref: Ajmer Singh Vs. State of Haryana** reported in **2010 3 SCC 746**). Thus when an attempt is made to join a person from the public at the time of search but no such person is available or it is not practicable, it will not render the search and seizure unreliable (**Dharampal Singh Vs. State of Punjab Ref 2010 9 SCC 608**).

21. Therefore, to conclude, though the presence of an independent

witness at the time of search is required to ascertain the sanctity of such search and seizure, however, in a situation, where inspite of, effort no such witness can be gathered, want of an independent witness may not land the entire search and seizure invalidated. It is apposite to record that the provisions of presence of two independent witnesses is mandated to prevent potential manipulation and unfair practices by those authorized to conduct the search and to ensure that any incriminating evidence claimed to have been found in the searched premises was genuinely discovered there and was not planted by the search party. Therefore, in the absence of an independent witness, the value of such a search may get weaken and even invalidate the admissibility of such material depending upon the facts of each case.

22. In the case in hand, admittedly the search was conducted during day time in a busy public place in the heart of the Guwahati city, however, there is nothing on record to suggest that any attempt was made to have independent witness during the search operation conducted by AAC official or that even after their attempt, no person came forward to be the witness of such seizure. The seizure report which is part of the record, clearly shows that there was no witness to such search, except the signature of the Sales Officer and the signature of the Seizing Officer along with the signature of the dealer. The purported seizure list is stated to be in "a retail outlet as per inspection report by AAC". The details of sealed samples taken from the retail outlet is shown in the report/seizure list to be "all the three nozzles". It is also recorded in the Report/seizure list that after removal of the devices and after being sealed, the cover containing the unauthorized electronic devices were handed over to Shri M. K. Das for submission to Guwahati D.O. for further necessary action. Thus, the Sales Officer, M.K. Das who put the signature in the report is

the recipient of the sealed electronic devices and AAC officer is the seizing officer. There is no name of any witness in the said report not to say about any independent witnesses.

23. Now coming to the authority of the Seizing Officer, it is seen that the seizure was admittedly done by a team consisting of a Chief Manager, AAC and Senior Manager, AAC. No dispute has been raised as regards the contention that this officer is not in the rank of Joint Director of AAC. Though a stand has been taken that the search was conducted by officers of the Corporation and they can do that in terms of dealership agreement and Marketing Guidelines, however, no specific provision in the dealership agreement and/or under The Marketing Discipline Guidelines (MDG), 2005 and/or any other material is brought to the notice of this Court in this regard. The corporation could not bring on record any cogent material to project and/or suggest that beyond the power entrusted under the Control Orders issued in the exercise of power under section 3 of the Essential Commodities Act, 1995, there is any authority under law to exercise the power of search and seizure more particularly, when allegation is malpractice. It is also an admitted position that the power was exercised in terms of the Control Orders.

24. It is well settled that when a statute or any order issued under EC Act 1955, prescribes certain things to be done by certain authorities, it is to be done by the authority prescribed under such law and in absence of non compliance of such prescription (when the action is done by a person not authorized under law), shall lead such exercise of power to a nullity and therefore on this count alone, there shall not be any sanctity to the seizure conducted on 21.03.2012

25. A jurisdictional fact is a fact that must exist before a court, tribunal or "**an authority**" to assume jurisdiction over a particular

matter. A jurisdictional fact is one on the existence or non-existence of which depends jurisdiction of such an authority. It is the fact upon which an administrative agency's power to act depends. Therefore, if the jurisdictional fact does not exist, the authority or the officer cannot act. It is equally well settled that if an authority wrongly assumes the existence of such a fact, the order can be questioned by a writ of certiorari. The underlined principle is that by erroneously assuming the existence of such jurisdictional fact, no authority can confer upon itself jurisdiction, which it otherwise does not possess (*ref : Arun Kumar & others Vs. Union of India & ors 2007 1 SCC 73*).

26. In the case at hand, in terms of the gazette notification dated 18.01.2002, a Joint Director of AAC is authorized to conduct a search, when there is malpractice in terms of the order 1998/2005. Therefore, the jurisdictional fact in the present case is alleged malpractice by the petitioner. Under such a jurisdictional fact the authority to conduct search and seizure is statutorily conferred upon an officer who is a Joint Director of AAC.

27. There is no dispute to the fact that the search and seizure in question was not conducted by Joint Director of AAC, rather, by one Senior Manager, AAC. Therefore, this court shall have no hesitation to hold in the given facts of the present case that the senior manager AAC has wrongly assumed jurisdiction, more particularly, in absence of any material that Joint Director, AAC & Senior Manager, AAC are of same rank.

28. There is no dispute that the procedure for cancellation of dealership was initiated on the basis of the alleged malpractice on the part of the dealer and the conclusion of such malpractice is entirely based on inspection conducted and seizure made by the AAC. Therefore, when the foundation of seizure on the basis of which the malpractice is alleged

is held to be non sustainable under law, being an action conducted by an Officer not authorized under notification dated 18.01.2002, the decision to terminate the dealership on the basis of such seizure, such decision is also bound to fail.

29. Now, coming to the argument of Mr. M.K. Choudhury, learned senior counsel as regards availability of alternative and efficacious remedy, it is by now well settled 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 provision of the Constitution. It is equally well settled that under Article 226 of the Constitution of India, the High Court, has discretion to entertain or not to entertain a writ petition, having regard to the facts and circumstances of the case. The availability of alternative remedy is a self imposed restriction and normally, High Court should not exercise its discretion under writ jurisdiction, when an efficacious alternative remedy is available. However, such alternative remedy shall not operate as a bar, where the writ petition has been filed for enforcement of any of the fundamental rights or where there has been violation of the principle of natural justice or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged or an important legal issue is involved. It is also well settled that the power under Article 226 of the Constitution of India to issue a writ can be exercised not only for the enforcement of the fundamental right but also for any other purpose as well.

30. It is also by now well settled that 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 of India. This Rule of exercise of statutory remedy is a rule of

policy and convenience and it is discretionary. The said principle also emphasizes that in cases where there are disputed question of facts, the High Court may decide not to exercise its writ jurisdiction, except when an important question of law is involved.

Ref : *State of UP Vs. Mohd. Nooh AIR 1958 SC 86*

Harbanslal Sahnia Vs. Indian Oil Corporation Ltd., (2003) 2 SCC 107

Whirlpool Corporation Vs. Registrar of Trademarks, (1998) 8 SCC 1

M/S Godrej Sara Lee Ltd. Vs. Excise and Taxation Officer cum Assessing Authority, 2023 SCC Online SC 95.

31. It is equally well settled and held by the Hon'ble Apex Court in ***Hindustan Petroleum Corpn Ltd & Ors Vs. Super Highway Services & Anr*** reported in **3 SCC 321**, cancellation of dealership agreement by a party is a serious business and cannot be taken lightly and in order to justify the action taken to terminate such an agreement, the concerned authority has to act fairly and in complete adherence of the rules, guidelines framed for the said purpose

32. In the case in hand, and as held in **Super Highway Services (supra)**, the issues involved is a cancellation of dealership agreement and therefore is a serious business. As held in **Harbanslal Sahnia (supra)**, cancellation of dealership is an infringement of dealers fundamental right under article 21 and 19(1)(g) of the Constitution of India. The issues involved in the present case is not relatable to recovery of any public dues, inasmuch as the existence of alternative remedy is more rigorously applicable in the matters of taxes, sales, fees and the dues of banks and other financial institutions. It is also recorded herein

that in the case in hand, the fundamental issue is the authority of the officer to seize and seal the dispensing unit of the petitioners dealership for alleged malpractices as defined under Order 1998 and Order 2005. The determination made to terminate the dealership of the petitioner under the order dated 12.07.2013 is solely based on the impugned action dated 21.03.2012. Therefore, in the considered opinion of this court and in the given facts of the present case, when the action taken on 21.03.2012 is held to be unauthorized, the natural corollary is that all subsequent action shall fall. The fact also remains that the action involves infringement of the right of the petitioner under Article 19(1)(g) and Article 21 of the Constitution of India. The fact also remains that the present writ petition was filed way back in the year 2013 and the matter was admitted for hearing by this court on 26.08.2013. Therefore in the totality of the matter, this court is of the opinion that this is a fit case where the petitioner should not be shown the door and relegate it to the appellate authority, inasmuch as the writ petitioner has been able to show infringement of his right under Article 19(1)(g) and Article 21 of the Constitution of India. Therefore, this court is not inclined to exercise its discretion in favour of the Corporation for the reasons recorded hereinabove and accordingly, the contention of the learned senior counsel for the corporation as regards availability of efficacious alternative remedy stands negated.

33. As to the judgment delivered in **Nibedita Roy** (supra) by the coordinate bench as well as the Division Bench, it is seen that the learned coordinate bench interfered with the action of the IOCL on the ground of having varying stands in the report of the Joint Inspection Committee and the finding recorded by the Appellate Authority which was under challenge in the said writ petition. The determination of the learned

coordinate bench that the allegations leveled in the show cause notice dated 08.06.2012 issued in that case against the dealer, was wholly untenable on the face of the record was held by the division bench to be an action of entering deep into disputed factual issues and re-appreciation of evidence and thus, Division Bench held that such disputed factual determination is not within the domain of powers of judicial review conferred upon this court by virtue of Article 226 of the Constitution of India.

34. In the considered opinion of this court, both the judgments are not applicable in the given facts of the present case, inasmuch as in the case in hand, no disputed questions of fact are adjudicated upon, rather the legal issue of authority and the procedural lapses in conducting the seizure is dealt.

35. Accordingly, in view of the reasons recorded hereinabove, the writ petition stands allowed by interfering with the action of the respondents dated 21.03.2012 in seizing and sealing the dispensing unit of the dealership being done by persons not authorized under law and resultantly the order of termination of dealership dtd 12.07.2013 is also interfered with having no foundation of alleged malpractices. Accordingly, the dealership be restored within a period of four weeks from today.

36. While parting with the record, it is made clear that the order passed today shall not preclude the respondent to take any action against the dealer under the terms of the agreement and Marketing Discipline Guidelines, if the corporation so desires, however subject to the determination made hereinabove.

37. This writ petition stands disposed of. Parties to bear their own cost.

JUDGE

Comparing Assistant