

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

WPA 21507 of 2023

M/s. CLS Limited & Anr.

-Vs-

Union of India & Ors.

For the Petitioners: Mr. Debabrata Saha Roy,
Mr. Neil Basu,
Mr. Rahul Kumar Singh,
Mr. Sankha Biswas.

For the Respondent No.2 to 7:

Mr. Biswanath Chatterjee,
Mr. Sobhan Pathak,
Mr. Soham Krishna Chatterjee.

Heard on: 08 September, 2023.

Judgment on: 10 October, 2023.

BIBEK CHAUDHURI, J. : -

1. M/s CLS Limited a private company registered under the Companies Act, 1956 carries on the business of distributorship of Hindustan Petroleum Corporation Limited (HPCL) in respect of sale and distribution of domestic LPG cylinders under the name of its business concerned M/s Anand HP Gas Service CLS Limited. The operation of the business of the said Gas Service is limited to an area in the district of Howrah. It is the case of the petitioners that for the purpose of distributorship business the petitioners constructed a godown having

12,000 KG capacity as per the norms and guidelines laid down by the respondent No.2 Company. The petitioners also obtained a fire license and other licenses necessary for carrying on the said business. The godown with storage articles has been insured by the National Insurance Company in due compliance with Clause 20 of the Dealership Agreement. The petitioners further contend that after entering into the dealership agreement with HPCL, the petitioners are bound by the terms and conditions mentioned in the Marketing Discipline Guidelines for LPG Distributorship which is published by the Oil Marketing Companies as per the Marketing Discipline Guidelines. The LPG Distributors are required to place timely and sufficient indents for filled cylinders and at the bottling plants of the Oil Marketing Companies to ensure timely delivery of filled cylinders to the customers. Therefore the companies are obliged to deliver packed LPG cylinders to the distributors according to their requirement. The grievance of the petitioners is that the respondent No.2 Company has been acting contrary to these norms and unilaterally dumping its products upon the petitioner without any order being placed by it. Furthermore, the company compels the petitioner to receive commercial cylinders and store them in their godown although, the distributorship was granted to the petitioner for domestic cylinders. Since the petitioner's godown has 12,000 KG or 12 Metric tons capacity the petitioner is suffering from a space crunch to keep the cylinders supplied by the respondent No.2 in excess of the petitioner's capacity. The petitioner is compelled to keep commercial cylinders in his godown in

excess of its capacity and it is the reasonable apprehension of the petitioner that the Fire license and Trade license may be cancelled if any inspection is held by the said authorities of the government for storing cylinders in excess of the capacity of the godown. Therefore the petitioner was compelled to make representation before the respondent on 7th June, 2023 when the HPCL gave a specific target to distribute the cylinders both domestic and commercial, in most arbitrary and unjust manner. In spite of receipt of such representation the respondent No.2 did not stop their unilateral deliveries and continued to dump commercial cylinders to compel the petitioner to sell the same at a higher price than what is available in the open market.

2. On the above fact, the petitioner has prayed for the following reliefs:
 - a) Dispense with Rule 26 of the Writ Rules framed under Article 226 of the Constitution of India for this Hon'ble Court;
 - b) A Writ of and/or in the nature of Mandamus do issue directing the respondents, their men, agents, servants, and assignees specifically the Respondents No. 2 to 7 not to unilaterally alter the indent of your Petitioners and not to deliver the commercial cylinders to the godown of your Petitioner without any prior order being placed for those commercial cylinders by your petitioners;
 - c) A Writ of and/or in the nature of Mandamus do issue directing the respondents, their men, agents, servants, and assignees specifically the Respondents No. 2 to 7 to take back the commercial cylinders already delivered to the godown of your Petitioner for reducing the stock of

your Petitioner's godown below the permissible limit of 12000 Kg or 12 MT;

- d) A Writ of and/or in the nature of Prohibition do issue prohibiting the respondents, their men, agents, servants, and assignees specifically the Respondents No. 2 to 7 from unilaterally altering the indent of your Petitioners and from delivering the commercial cylinders to the godown of your Petitioner without any prior order being commercial placed for those commercial cylinders for by your Petitioners;
- e) A Writ of an/or in the nature of mandamus do issue directing the respondents, their men, agents, servants, assignees specifically the Respondents No. 2 to 7 not to take any coercive step against your Petitioner;
- f) A Writ of and/or in the nature of Certiorari do issue directing the respondents and/or their men/ agents/ servants to transmit all records relating to and/or forming the basis of unilaterally altering the indent of your Petitioner and unilaterally delivering the commercial cylinders of 19 Kg and 5 Kg to the godown of your Petitioner in absence of any Order being placed for such cylinders and to certify the same and on being so certified quash the same so that conscionable justice may be rendered;
- g) Rule NISI in terms of prayers (b) to (f) as above and to make the Rule absolute if no cause and/or insufficient is shown in reply cause thereto;
- h) An Order do issue directing the Respondent officials not to unilaterally alter the indent of your Petitioners and not to deliver the commercial cylinders to the godown of your Petitioner without any prior order being placed for those

commercial cylinders by your Petitioners during the pendency of this Writ Petition;

- i) An Order do issue directing the Respondent officials to take back the commercial cylinders already delivered to the godown of your Petitioner for reducing the stock of your Petitioner's godown below the permissible limit of 12000 Kg or 12 MT;
- j) An Order do issue directing the respondents and/or their men, agents, servants, assignees not to terminate the LOA and Dealership Agreement issued to the Petitioner till disposal of this Writ Petition;
- k) Ad-interim order in terms of prayers (h), (i) and (j) above;
- l) Pass such other or further order or orders and/or direction or directions as Your Lordships would deem fit and proper

Since the respondent No.2 to 7 entered appearance through their learned Advocate, the instant writ petition was heard on merit and this Court proceeds to deliver the following judgment.

3. It is submitted by Mr. Saha Roy, learned Advocate for the petitioner that Clause 1.6 of the Marketing Discipline Guidelines 2022 states-

- i) LPG distributor should ensure availability of sufficient filled cylinders of correct quantity and quality for timely delivery of filled cylinder to the customers by placing timely and sufficient indents for filled cylinders at Bottling Plants of OMCs. Normally filled cylinders' stock equivalent to two days of average daily off-take and turnaround time of the truck from the supply point must be available and an indent available at supply point should be the basis for placing the next indent by distributor.

- ii) LPG distributor should provide adequate delivery infrastructure for making home delivery of LPG cylinders commensurate to the average daily refill sales and also to take care of breakdowns/absenteeism. In case of backlog situation, additional delivery infrastructure as per requirement is to be provided.

4. The above-mentioned two guidelines normally suggest that the Oil Company will deliver LPG cylinders as per the indents submitted by the distributor. In the instant case the Oil Company has been supplying not only the domestic but also commercial cylinders to the petitioner for distribution. Further, the grievance of the petitioner is that the Marketing Company is not making the supply of the cylinders as per the indents. On the contrary, they unilaterally supplied more cylinders than required for more requirement of cylinders for distribution to the company. Thus, the petitioner company is forced not only to keep but to distribute the cylinders although the customers did not have the requirement. It is submitted by Mr. Saha Roy that although the distributorship of the petitioner is the outcome of a contract between the HPCL and the petitioners, since the contract has been made by the Oil Company Corporation, which is owned by the State, the arbitrary, unjust and malafide act of the Corporation is amenable to writ jurisdiction. As per the contract the petitioner is under an obligation to sell domestic LPG cylinders but he was forced to receive and sell commercial cylinders. However in the case of domestic cylinders the Oil Company is not following guidelines of Marketing Guidelines framed by the respondent

themselves. Therefore the petitioners are entitled to get relief in the instant writ petition as prayed for by it.

5. Mr. Biswanath Chatterjee, learned Advocate on behalf of the respondent, on the other hand he submits that the dispute between the parties arises out of contract. It is a contractual dispute absolutely private in nature and therefore, there is no semblance of public law involvement in the dispute. The grievance of the petitioners is that the respondents are delivering commercial cylinders to the petitioner for sale. It is pointed out by Mr. Chatterjee that the contract was made between the petitioner and the HPCL appointing the petitioner as dealer of the corporation “ on principal to principal basis, for sale of the Corporation’s Liquefied Petroleum gas (LPG) known as ‘H.P gas’ in cylinders only for household consumers and commercial consumers like hotels, canteens, hospitals etc. but not for industrial use nor for any industrial use nor for any industrial consumer in the territory or distribution area of operation at Howrah Municipality or.....”. The contract also states that the corporation is at liberty to change the trading area of operation. Thus the petitioner was under obligation to sell both domestic and commercial cylinders. The petitioner cannot say that he will only sell domestic cylinders and not the commercial cylinders.

6. Secondly, it is submitted by Mr. Chatterjee, learned Advocate for the respondents that the instant writ petition is not maintainable in view of the fact that the writ petition it does not contents any allegation of violation of Fundamental Right of the petitioner. It is also not alleged that

the principle of natural justice has been violated or that the delivery of commercial gas cylinders for sale to the petitioner/distributor by the Oil Company is wholly without jurisdiction.

7. Thirdly, it is submitted by Mr. Chatterjee that the instant writ petition is not maintainable in view of the fact that the agreement between the petitioner and HPCL contains an arbitration clause and in case of any dispute between the petitioner and HPCL, either of the parties can refer the dispute to the distributor of arbitration. Thus when an alternative efficacious remedy is available equitable relief by issuing a prerogative writ is not maintainable.

8. In reply to the submission made by Mr. Biswanath Chatterjee, learned Advocate for the respondents, Mr. Saha Roy refers to a decision of this Court in **M/s Bimala Gas Service & Anr. vs. Indian Oil Corporation** reported in **2018 SCC OnLine Cal 7352** in paragraph 34 of the aforesaid report a Co-ordinate Bench of this Court held that the availability of alternative remedy is not an absolute bar to entertain a writ petition. When the livelihood of the petitioners has been taken away relying on an irrelevant and non-existence clause, Fundamental Right of the petitioners to carry on trade and earn their living has been illegally infringed by the respondent authorities. Therefore, the Bench held that the order of termination of distributorship of the petitioners is not tenable in the eye of the law. While coming to such a decision, the Co-ordinate Bench relied on the decision of the Apex Court in **Harbanslal Sahnia & Anr. vs. Indian Oil Corporation Ltd. & Ors.** reported in **2003 (2)SCC**

107. Thus the impugned order of termination of the distributorship license of the petitioners was set aside and the respondent authorities were directed to restore the distributorship license of the petitioners.

9. The Indian Oil Corporation preferred an appeal against the aforesaid judgment which was registered as MAT 1493 of 2018. The Division Bench, placing reliance on the decision in **Harbanslal** (supra) and **Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai & Ors.** reported in **(1998) 8 SCC 1** dismissing the said appeal. The Oil Corporation preferred a Special Leave Petition being SLP (Civil) Diary No.31111/2019 before the Hon'ble Supreme Court which was dismissed.

10. Thus, it is submitted by Mr. Saha Roy that, if a distributor is forced to distribute the product of the corporation over and above the indent submitted by the distributor, the act of the corporation is not only an unfair trade practice but is also violates the petitioners Right to Business provided under Article 19(1)(g) of the Constitution of India. So the writ petition is maintainable and it requires to be heard on merit.

11. Considering the law on the subject of the precedents not only by the Hon'ble Supreme Court, the law on the subject has been succulently laid down in **Radha Krishan Industries vs. State of Himachal Pradesh & Ors.** reported in **(2021) 6 SCC 771**. Paragraph 27 of the aforesaid judgment describes the principles of law in the following words:-

“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.”

12. In **Uttar Pradesh Power Transmission Corporation Ltd. & Anr. vs CG Power Industrial Solutions Ltd. & Anr.** reported in (2021) 6 SCC 15 the Hon’ble Supreme Court held in paragraph 67:-

“**67.** It is well settled that availability of an alternative remedy does not prohibit the High Court from entertaining a writ petition in an appropriate case. The High Court may entertain a writ petition, notwithstanding the availability of an

alternative remedy, particularly: (i) where the writ petition seeks enforcement of a fundamental right; (ii) where there is failure of principles of natural justice or (iii) where the impugned orders or proceedings are wholly without jurisdiction or (iv) the vires of an Act is under challenge. Reference may be made to Whirlpool Corpn. v. Registrar of Trade Marks Whirlpool Corpn. vs. Registrar of Trade Marks, (1998) 8 SCC 1 : AIR 1999 SC 22] and Pimpri Chinchwad Municipal Corpn. v. Gayatri Construction Co., cited on behalf of Respondent 1.”

13. I have carefully considered the facts and circumstances of the instant case and also the decisions relied on by the learned Counsels for the petitioners and the respondents.

14. In **Bimala Gas** (supra), the distributorship was terminated by the Oil Corporation. This Court on considering the particular facts and circumstances as well as on due consideration of the decisions came to the conclusion that an order of termination of distributorship on some unknown non-existence ground amounts to the denial of livelihood thus, constituting infringement of basic Fundamental Right of life and trade and commerce and therefore, order of termination was set aside.

15. In the instant case, the respondents did not take any such steps against the petitioner. It is the allegation of the petitioner that the respondents are forcing the petitioner to sell commercial gas cylinders to sell but the terms and contract was that the petitioner is under obligation to sell domestic cylinders. The dispute between the parties is absolutely private in nature and it can be settled through arbitration. In the instant

case the petitioner has failed to establish a violation of any Fundamental Right or principles of natural justice. The allegation of imposition of the condition by the respondents upon the petitioner to sell commercial gas cylinders is without jurisdiction.

16. The decision of U.P Power Transmission Corporation Ltd. & Anr. is also not applicable in the instant case because of fact that it is ascertained that the petitioner before the Hon'ble Supreme Court did not oppose the writ petition on the ground of the existence of an arbitration clause there is whisper of any arbitration agreement in the counter affidavit filed by the UPPTCL to the writ petition in the High Court. On the above fact, the Hon'ble Supreme Court entertained the Special Leave Petition filed by the petitioner.

17. In the instant case, maintainability of the writ petition has also been challenged on the ground of the existence of an arbitration clause.

18. For the reasons stated above, I do not find any merit in the instant writ petition.

19. Accordingly, the writ petition is dismissed for being not maintainable.

(Bibek Chaudhuri, J.)