IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 10455 of 2021
With
CIVIL APPLICATION (FOR INTERIM RELIEF) NO. 1 of 2021
In
R/SPECIAL CIVIL APPLICATION NO. 10455 of 2021

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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SANDIP DALPATBHAI KIKANI

Versus

INDIAN OIL CORPORATION

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Appearance:
MR. SUNIT SHAH WITH MR BHARAT T RAO(697) for the Petitioner(s) No. 1
MR. MUNJAAL M BHATT(8283) for the Respondent(s) No. 1,2,3

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CORAM:**HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI**

Date : 07/06/2022

ORAL JUDGMENT

Issue ***Rule*** returnable forthwith. Mr. Munjaal M. Bhatt, learned counsel appearing waives services of notice of Rule on behalf of the respondents.

1. By way of the present petition under Article-226 of the Constitution of India, the petitioner herein has prayed for the following reliefs:

> *"A. Your Lordships may be pleased to admit this Special Civil Application;*
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> *B. Your Lordships may further be pleased to issue a writ of certiorari and/or any other appropriate writ, order or direction in the nature of Certiorari quashing and setting aside the impugned Order No. DRP/IOC/RET/0004/2020, Dated:28/06/'21 and the Order No.RDO/R/5310, dated 18/01/'20 Annexure A & B holding it to be ex-facie illegal, arbitrary, capricious, perverse, and de-hors the Marketing Discipline Guidelines, 2012 and is liable to be quashed and set aside forthwith in the facts and circumstances of the case and in the interest of justice;*
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> *C. Pending the admission, hearing and final disposal of this petition, Your Lordships may be pleased to stay the execution, operation and implementation of the impugned order No. DRP/ IOC/RET/0004/2020, Dated:28/06/'21 to meet with the ends of justice;*
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> *D. Any other and further relief as thought fit may kindly be granted."*

2. The brief facts leading to the filing of the present petition are stated thus:

2.1. The petitioner and the respondent corporation entered into a dealership agreement on 25.02.2013, permitting the petitioner to run retail outlet for selling high-speed diesel and petrol at Village: Kunkavav, Dist.: Amreli for 15 years. It is stated that the dealership agreement firstly entered into between the respondent-Corporation and father of the petitioner – Shri Dalpatbhai Ghusabhai Kikani in the year 1994. After petitioner's father expired on 21.08.2012, the dealership was entered into between the petitioner and respondent-corporation w.e.f. 25.02.2013.

2.2. On 13.05.2013, W & M department undertook the calibration work of the petitioner's outlet and issued certificate No. 59 of even date. It is stated that the said certificate would be in force for a period of one year i.e. till 12.05.2014. The respondent – Corporation thoroughly inspected the dispensing unit on 11.07.2013 and 10.10.2013 and as per the checking

report, the seal on nozzles and totalizer were found intact and the delivery of 5 Liters was also found Ok and within limit, accordingly, reports were issued.

2.3. On 04.12.2013, the Anti-Adulteration Cell (AAC) of the corporation inspected the dispensing unit of the petitioner. In the said inspection report dated 04.12.2013, the AAC found the seals on nozzle and totalier intact and also the delivery ok and within the limit and issued report on 04.12.2013. The report however recorded that the calibration was done on 22.05.2013 and that the K-factor was changed. Consequent thereto, it appears that the respondent corporation issued a fact finding / show cause notice dated 05.12.2013 to the petitioner calling upon the petitioner to explain about the e-calibration work dated 22.05.2013 qua the nozzle-A after Weight & Measures Department stamping and undertaking the work of calibration on 13.05.2013. It is stated that after the calibration work dated 13.05.2013 was done and the seals were put by the W & M Department, no such calibration was done at the instance of the petitioner. The seal was put by the

respondent department on both the nozzles and the seal was also put on totaliser.

2.4. The petitioner replied to the show cause notice on 20.12.2013 clarifying the fact that the outlets were brand-new and installed before a week and that the petitioner was innocent and not played any role. The respondent corporation formed a committee of 5 members to investigate the cause of change in the K-factor. It appears that the committee had to undertake the calibration / hardware change / software change logs from the subject DU. It observed that there is no hardware or software change done to the DU from the date of installation. The report further records the reason of voltage fluctuation at the RO (Retail Outlet) and that the dealer to submit the certificate of calibration dated 22.05.2013.

2.5. The petitioner on apprehension that the respondent – Corporation would terminate the dealership, filed Civil Suit being Regular Civil Suit No. 60 of 2014 against the respondent Corporation and the State authorities before the Court of Principal Civil Judge, Amreli for declaration and permanent

injunction. The said suit is pending adjudication. The Court below rejected the application filed by the petitioner below Exh.5 and 16 by common judgment and order dated 17.06.2014.

2.6. The petitioner being aggrieved by the said judgment and order dated 17.06.2014 passed below Exh.5 and Exh.16, preferred an Appeal being Civil Misc. Appeal No. 13 of 2014 in the Court of Principal District Judge, Amreli. The Appellate Court dismissed the appeal filed by the petitioner observing that the petitioner is permitted to do his business till date but did not protect the petitioner by oral dated 15.05.2015.

2.7. Being aggrieved and dissatisfied by the said order passed in Civil Misc. Appeal No. 13 of 2014, the petitioner approached this Court by filing Special Civil Application No. 8860 of 2015 on 25.05.2015. The coordinate bench of this Court by an order dated 26.05.2015 issued notice and notice as to interim relief. One Mr. B.P. Mohanti, Chief Divisional Retail Sales Manager, IOC, Rajkot Divisional Office, Rajkot issued show cause notice dated 25.05.2015 calling upon the petitioner

to show cause as to why the action including the termination of dealership agreement should not be taken against the petitioner within 10 days. The said notice came to be served upon the petitioner on 27.05.2015. The petitioner challenged the said show cause notice by preferring Special Civil Application No. 9025 of 2015. By an order dated 15.04.2019, the coordinate bench of this Court permitted the petitioner to approach the authority and further permitted to respond to the show cause notice and to file a fresh reply to the show cause notice, over and above the reply already submitted. By further directing the interim relief which was granted by the order dated 03.06.2015 to be continued till the respondent authority took a decision.

2.8. The respondent authority by an order dated 18.01.2020 terminated the dealership agreement dated 25.02.2013. Being aggrieved by and dissatisfied with the said order dated 18.01.2020, the petitioner was constrained to challenge the said order by filing Special Civil Application No. 2699 of 2020. The respondent authority in the said application

appeared on caveat and submitted that it was open for the petitioner to avail alternative remedy under Clause-8.9 of the Marketing Discipline Guidelines (MDG-2012). The coordinate bench of this Court by oral order dated 05.02.2020, permitted the petitioner to approach the appellate authority and the said interim relief was continued till such application was decided. The petitioner preferred an appeal on 25.02.2020. The said appeal came to be dismissed by Dispute Resolution Panel (DRP) by an order dated 28.06.2021. Being aggrieved and dissatisfied by the said order passed by the DRP dated 28.06.2021, the petitioner has approached this Court seeking the reliefs as referred herein-above.

3. Heard Mr. Sunit Shah, learned counsel with Mr. B.T. Rao, learned counsel appearing for the petitioner and Mr. Munjaal M. Bhatt, learned counsel appearing for the respondent- Indian Oil Corporation Limited (IOCL).

SUBMISSIONS ON BEHALF OF THE PETITIONER:

4.1. Mr. Sunit Shah, learned counsel appearing for the

petitioner submitted that by way of the present petition, petitioner challenged the order dated 18.01.2020 terminating the dealership agreement dated 25.02.2013 and also order dated 28.06.2021 passed by the Dispute Resolution Panel nominated by Oil Marketing Company in Appeal No. DRP/IOC/ RET/0004/2020.

4.2. Mr. Shah, learned counsel submitted that since 1994, dealership was in the name of the petitioner's father and after death of his father on 21.08.2012, dealership was transferred in favour of the petitioner and executed the dealership agreement in favour of the petitioner on 25.02.2013. Mr. Shah, learned counsel submitted that there were 2 dispensing units for diesel with single nozzle, viz. One unit of Zetline company and one unit of Applab company. Apart from the above two diesel dispensing units, one dispensing unit with 2 nozzles for petrol of Midco company.

4.3. Mr. Shah, learned counsel submitted that there is no complaint or malpractice of any nature against the petitioner since 1994. Mr. Shah, learned counsel submitted

that, on 13.05.2013, respondent no.1 company replaced one diesel dispensing unit (Applab company) with electronic MPD pump unit having 2 nozzles (manufactured by Gilbergo company) and process of calibration was carried-out by company and seals were applied by representative of Legal Metrology Department. On 11.07.2013, inspection of Retail outlet including dispensing units (including one which was replaced) was carried-out by respondent no.1 company through their representative. As per the said inspection report, (I) seals were intact, (II) there was no short delivery, (III) no stock variation and (iv) all parameters were found to be ok. On 10.10.2013, quarterly inspection of Retail outlet including dispensing units was carried-out by respondent no.1 company through their representative and the said report was the same remarks as carried-out on 11.07.2013.

4.4. Mr. Shah, learned counsel submitted that on 04.12.2013, Anti Adulteration Cell (AAC), Mumbai inspected Retail Outlet. In the said report which is duly produced at pg.-49, the report was same as of earlier report, however, for

Nozzle-A, the said report observed as under:

> *"The Calibration log trail of HSD Dual DU L & T sprint GVR Sr. No. 20/30/000347 was recorded from the display of the dispensing unit in respect of Nozzle A it is observed that last calibration of Nozzle is done on 22.05.2013 of 21:05 hrs with K factor as 0.933."*

4.5. Mr. Shah, learned counsel submitted that, AAC sealed the nozzle-A but permitted the petitioner to continue to sell through nozzle-B. On 05.12.2013, the petitioner was served with a notice to explain irregularities / discrepancies observed by AAC on 04.12.2013 within a period of 10 days. On 20.12.2013, petitioner responded to the said show cause notice vide his communication and attaching copy of the certificate No. 59 of W & M Department and Inspection report dated 04.12.2013 by AAC. Mr. Shah, learned counsel further submitted that no anomaly was found including any 'short delivery' or 'variations' during inspection, neither sales nor cover of the dispensing units were tempered, change in K-factor does not show any tempering by petitioner, new pump was installed on 13.05.2013 i.e. a week before the alleged change in K-factor on 22.05.2013.

4.6. Mr. Shah, learned counsel submitted that petitioner has no knowledge of the mechanism of the electronic or the mechanism of the DU and any occurrence of this anomaly may be purely coincidental as the DU was new and could have a start-up hitch. Mr. Shah, learned counsel further submitted that the petitioner was innocent and had not indulged into any kind of malpractice.

4.7. Mr. Shah, learned counsel submitted that thereafter, a committee was constituted by the respondent no.3 on 19.04.2014. On 29.09.2014, the respondent no.1 company sent e-mail to the petitioner raising certain query which reads thus:

> *"Whether e-calibration factor (K-factor) for the DU can be changed only on manual intervention or it can change owing to any other internal technical parameters?*

4.8. Mr. Shah, learned counsel submitted that the said manufacturing company Gilbarco immediately responded in its reply through e-mail dated 01.10.2014, which reads thus:

> "When we do electronic calibration procedure (after getting W & M Approval), K-Factor is generated with date and time. K-Factor cannot get generated or changed due to any technical issue in the DU."

4.9. Mr. Shah, learned counsel submitted that the petitioner approached the Civil Court by filing Regular Civil Suit No. 60 of 2014 before the Court of Principal Civil Judge, Amreli for declaration and permanent injunction, on apprehension that petitioner's dealership may be terminated by the respondent- Corporation.

4.10. Mr. Shah, learned counsel submitted that the show cause notice dated 25.05.2015 issued by the respondent herein which culminated into impugned orders which are the subject matter of challenge before this Court, which required to be interfered with, in view of the fact that only the issue is error in K-Factor. Once seal is found intact, dealer cannot be penalized for fault / defect / error in dispensing unit. If seals are intact, there is no basis for proceeding against the dealer. The only issue is whether dealer can be held liable in any way for mal-functioning of the unit, if seal put is intact.

4.11. Mr. Shah, learned counsel relied upon the decision in the case of (I) ***HPCL V/s. Super Highway Service*** reported in

(2010) 3 SCC 321, (II) in the case of ***Bharat Petroleum Corporation Limited V/s. Jgannath and Company and others*** reported in ***(2013) 12 SCC 278***, (III) in the case of ***Bharat Petroleum Corporation Ltd. v. Induben Laxmanbhai Dudakhiya*** reported in ***2017 (3) GLR 2571***.

4.12. Mr. Shah, learned counsel relying on the aforesaid principle submitted that both the authorities below had failed in applying the settled legal proposition, and orders impugned being arbitrary, illegal and perverse, are required to be quashed and set aside.

4.13. Mr. Shah, learned counsel submitted that the Committee's report which is signed by representative of manufacturing company and representative of respondent no.1, accepted the fact that fluctuation in the voltage could have affected K-Factor without breaking / open seal. Neither and respondent no.1 nor the Appellate Authority offered any reason for overruling the committee's report, and therefore, order impugned passed by the authority below is required to be quashed and set aside.

4.14. Mr. Shah, learned counsel lastly submitted that impugned order is required to be interfered with by this Court under Article-226 of the Constitution of India by quashing and setting aside both the impugned orders passed by the respondents.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS:

5.1. Mr. Munjaal M. Bhatt, learned counsel at the outset appearing for the respondent-Corporation submitted that the emphasis laid by the petitioner that the petitioner had a 'blemish free' career since 1994 is incorrect. Mr. Bhatt, learned counsel submitted that the (i) respondent authority levied the penalty on the erstwhile dealership on 11.11.2008 and (ii) the petitioner has entered into a new dealership agreement on 25.02.2013, and therefore, cannot rely on any action / inaction in respect of the erstwhile dealership.

5.2. Mr. Munjaal M. Bhatt, learned counsel appearing for the respondent-Corporation raised the following preliminary objections regarding the maintainability of the present petition,

which reads thus:

> "At the outset, it may be noted that the DRP has threadbare considered all the contentions raised by the Petitioner including but not limited to the very same submissions which are canvassed before this Hon'ble Court and all the judgments which have been relied upon have also been considered. In such circumstances, it would be highly inappropriate and unwarranted on the part of the Petitioner to request this Hon'ble Court to invoke its extraordinary jurisdiction under Article 226 of the Constitution of India and dwell into the merits as well as de-merits of the case specifically when a detailed order has been passed by the DRP.
>
> At this juncture, it may be noted that the DRP is headed by a retired High Court Judge and consists of two other technical members. Therefore, there is some sanctity attached to the order passed, since the same has considered all judicial as well as technical aspects of the matter.
>
> The Respondents seek to place reliance on a decision rendered by the Hon'ble Apex Court of India in the case of *Municipal Corporation, Ujjain v. BVG India Limited & Ors.* reported in (2018) 5 SCC 462, wherein the Hon'ble Court has reiterated that *"under the scope of judicial review, the High Court could not ordinarily interfere with the judgment of the expert consultant on the issues of technical qualifications of a bidder when the consultant takes into consideration various factors including the basis of non-performance of the bidder"* and that *"It is not open to the court to independently evaluate the technical bids and financial bids of the parties as an appellate authority for coming to its conclusion inasmuch as unless the thresholds of mala fides, intention to favour someone or bias, arbitrariness, irrationality or perversity are met, where a decision is taken purely on public interest, the court ordinarily should exercise judicial restraint."*
>
> In respect of the limited scope of interference under an Article 226 petition, the Respondents seek to place reliance

on: (i) Decision passed by the Hon'ble Apex Court in the case of *Municipal Councilor, Neemuch v. Mahadev Real Estate & Ors.* reported in (2019) 10 SCC 738 (Relevant Paras 13 to 16)- Page 63 of the petition; and (ii) Decision passed by this Hon'ble Court in the case of *Kamdar Ladat Simiti of Nanikram v. Nanikram Shobraj Mills Limited* reported in 2004 (3) GLR 175 (Relevant Para 11)- Page 75 of the petition.

Assuming without accepting that the present petition is filed under Article 227 of the Constitution of India, in that case, the Respondents humbly state and submit that scope of interference further narrows as compared to the scope of interference under Article 226 of the Constitution of India. Therefore, in respect of the aforesaid submissions, the present petition filed either under Article 226 of the Constitution of India or under Article 227 of the Constitution of India may kindly not be entertained."

5.3. Mr. Munjaal M. Bhatt, learned counsel further submitted that the petitioner is riding two horses at the same time. The said submissions read thus:

"Before adverting to the merits of the captioned matter, it may be noted that the Petitioner has also filed another petition titled Special Civil Application No. 19962 of 2021, pending before this Hon'ble Court, which has a direct bearing on the present case.

The Petitioner had soon after issuance of show cause notice in 2013, filed a Regular Civil Suit No. 60 of 2014 before the Ld. Civil Court, Amreli. The said suit was filed "apprehending" that Respondents- IOCL "may" terminate the dealership of the Petitioner as well as for seeking a declaration that the Petitioner has not done any e-calibration on 22.05.2013. The Petitioner had also prayed for a direction that the dealership of the Petitioner may not be terminated.

As late as in 2021, the Petitioner preferred an application under Order 6 Rule 17 CPC for amendment of pleadings, where the Petitioner wished to bring on record all the subsequent events from 2014 till 2020 i.e. till the passing of the termination order dated 18.01.2020. It may be noted that the DRP order dated 28.06.2021 is not brought on record.

The Ld. Civil Court, Amreli did not allow the amendment application, against which, the Petitioner has preferred Special Civil Application No. 19962 of 2021.

The Respondents humbly submit that in the event the amendment application is allowed, all subsequent events till 18.01.2020 would be brought on record. Additionally, either party will thereafter request the Ld. Civil Court, Amreli to also take on record the DRP order dated 28.06.2021. If that be the position, the Ld. Civil Court, Amreli would in essence be adjudicating the veracity and legality of the termination order dated 18.01.2020 and DRP order dated 28.06.2021, which is also under adjudication before this Hon'ble Court.

Therefore, the Respondents humbly submit that the Petitioner is as on date riding two horses at the same time and taking his chance before two Courts of law, which can never be permitted. Hence, first and foremost the Petitioner may be called upon to choose which petition/ suit does he wish to continue before deciding the present petition on merits."

5.4. Mr. Munjaal M. Bhatt, learned counsel further relied on the importance of the Marketing Discipline Guidelines (MDG), which reads thus:

*"The Respondents would like to highlight the importance and sanctity of the Marketing Discipline Guidelines (**MDG**), basis*

which the termination order has been passed. Attention of this Hon'ble Court is invited to Page 277 of the paper book. It is specifically noted in the Preamble to MDG that the said guidelines are introduced only in order to maintain a very high customer service benchmark.

The Respondent would also like to place reliance on the recent decision passed by the Hon'ble Division Bench of the Delhi High Court in LPA No. 24 of 2021, a copy of which was provided by the Ld. Advocate for the Respondent during the course of oral arguments. The Hon'ble Division Bench of the Delhi High Court after considering all the submissions has under several paragraphs specifically noted that MDG is essentially brought into effect for customer support and maximization of its effectiveness. The Hon'ble Court has consciously noted that the ultimate beneficiaries of these MDG's are the public at large. (Relevant Paras 61, 76 to 81).

The only reason for showing this point is to dislodge the belief of the Petitioner that an adverse order has been passed though there is no violation under the MDG. On the contrary, any adversarial order passed by the Respondents resulting in stoppage of sale would directly hamper the Respondents only. Therefore, only with a view to ensure that no mischief is played with the public at large, is the termination order for violation of MDG been passed."

5.5. Mr. Munjaal M. Bhatt, learned counsel relying on the merits of the present petition, submitted thus:

"Strictly going by the prayers of the petition, though what is to be adjudicated by this Hon'ble Court is the veracity and legality of the orders dated 18.01.2020 and 28.06.2021, the Petitioner has travelled beyond the scope of these two orders and hence, the Respondents are also responding to all such contentions raised.

The Petitioner has requested this Hon'ble Court to

adjudicate "Whether e-calibration was done on 22.05.2013, specifically when there is no Weights and Measurement Department Certificate (W&M Certificate) produced on record by the Petitioner?"

At the outset, it may be noted that there are 3 persons who are present at the time a DU is calibrated and K-Factor is determined: (i) Original Equipment Manufacturer (OEM)- in this case, Gilbarco; (ii) Petitioner himself; (iii) Weights and Measurements Department official.

The Respondents state and submit that admittedly e-calibration was carried out on 22.05.2013 basis which the K-Factor was changed. The Respondents have explained in great detail as to how K-Factor is arrived at and its importance in their Affidavit-in-Reply (Page 55 of the petition). Suffice it to state that once a K-Factor has been arrived at, the same bears a lot of significance since it is essentially providing a brain to the dispensing unit (DU) indicating that as and when (x) Ltrs. is punched into the DU, only (x) Ltrs. would come out of dispensing unit, no more no less.

The Petitioner has time and again placed heavy reliance on the fact that even though e-calibration as alleged was carried out on 22.05.2013, the Respondents did not notice the said fact in the inspections carried out on 11.07.2013 and 10.10.2013. The Respondents in response to this submit that, though inspection was carried out on 11.07.2013 and 10.10.2013, however the said inspection was not in respect of determining whether there is any change in K-Factor. Both these reports are silent with regard to what was the K-Factor. It is only on 04.12.2013 when the Anti Adulteration Cell (AAC, Mumbai) carried out a random inspection at the retail outlet of the Petitioner was this fact about change of K-Factor was learnt.

When the Petitioner was called upon to produce a W&M Certificate for calibration done on 22.05.2013, he could not produce the same. As compared to the same, a W&M Certificate was available when calibration was done on

13.05.2013 (Page 34 of the paper book).

At this juncture, attention of this Hon'ble Court is invited to Page 6 of the Written Submissions filed by the Petitioner wherein under Para 12, the Petitioner has himself admitted *that in the Regular Civil Suit No. 60 of 2014, the Weights and Measurements Department had appeared before the Ld. Trial Court and filed written submission stating that they have* not *carried any calibration of the pump on 22.05.2013.*

Admittedly, even as on date, the Petitioner has not produced on record any such W&M Certificate for the e-calibration which has happened on 22.05.2013. Reliance is placed on the inspection report prepared by AAC (Relevant Page 52 of the paper book) where a tabular chart produced by the committee would specifically note that calibration count on 13.05.2013 was 0.935 whereas the calibration count on 22.05.2013 was 0.933. It is trite to note that the Petitioner has signed the said report and therefore, has acquiesced and acknowledged that e-calibration was carried on 22.05.2013, but is not in a position to produce any W&M certificate to prove the same.

The Respondents have taken the decision to terminate the dealership agreement of the Petitioner for breach of Clause no. 42 r/w Clause no. 45 (a) and 45 (l) of the Dealership Agreement dated 25.02.2013 [Pages 238 and 239 of the paper book]. Since by virtue of Clause no. 42 of dealership agreement, the MDG have been read into the dealership agreement, therefore, the Petitioner was admittedly required to adhere to the MDG as a whole. Hence, as per Clause no. 5.1.2(b) r/w Clause no. 8.2(ii) of the MDG [Pages 307 and 319 of the paper book] the Respondents have terminated the dealership of the Petitioner.

The Petitioner has vehemently submitted that the very basis on which the Respondent has taken the decision i.e. Clause no. 5.1.2(b) is not applicable to the Petitioner since the W&M Department seals have not been tampered. The said submission is far from truth inasmuch as a bare perusal of

the said Clause will specifically reveal that it is not only in cases where the seal is tampered that the said Clause can be invoked. The said Clause notes that the seal would be tampered in the following cases i.e. (i) Seal itself is missing; (ii) Different seals has been put other than the embossed by W&M Inspector; (iii) Sealing wire is broken and not in one place. Admittedly, none of these three circumstances or cases have arisen in the present case. However, the wordings inserted after reproducing Clauses 1, 2 and 3 are relevant for adjudication of the present case. It is specifically stated that "in addition to this, other situations which can lead to manipulation of delivery/quantities/totalizer may also be treated as tampering. Penal action to be taken even if the delivery is found to be correct or excess". Ba*sis the aforesaid, the Respondents humbly state and submit that since the action of "manipulation of delivery" is also envisaged under Clause 5.1.2(b), the said Clause is strictly applicable to the facts of the present case.*

> *One argument that had fallen from the Petitioner was that after the change of K-Factor on 22.05.2013, the delivery or the output of the DU had actually increased and therefore, Clause 5.1.2(b) would not be applicable. In this respect, the Respondents wish to* place reliance on the latter part of the quoted portion herein above which specifically states that penal action is ought to be taken even if the delivery is found to be correct or excess. Therefore, once the Respondent Corporation comes to a solid conclusion that there has been manipulation of delivery committed by the Petitioner by change of K-Factor, the *resultant effect of that manipulation i.e. either equal, less or more output would hardly be of any consequence because the Petitioner would admittedly have been guilty of committing a critical irregularity. Therefore, since the Respondents have reached a conclusion that there has been a breach of Clause 5.1.2(b), the dealership of the Petitioner is terminated as per Clause 8.2(ii).*

The Petitioner has time and again harped only on one report which is report dated 19.04.2014 [Page 59 of the paper book]. The said report has been highlighted and relied upon to note that under Para 6, it was noted by the Committee

that out of 20 logs, 18 logs are E-09 which as per the DU OEM, vendor representative gets recorded when there is low voltage / high voltage/ power fluctuation. The Petitioner has placed reliance on the said report to drive home his point that when the Committee itself under the report dated 19.04.2014 had come to the conclusion or even a probable defense that there is a possibility that the K-Factor could have been changed because of voltage fluctuation, the Petitioner could not have been implicated and the termination order resultantly having been passed.

The Respondent in response to the same would like to submit the following:

(1) *Admittedly, even as on date, the committee report dated 19.04.2014 has not been challenged before this Hon'ble Court in the present petition and has therefore attained finality;*

(2) *The Petitioner was forming a part of the said committee report dated 19.04.2014 and therefore, has acquiesced and acknowledged the contents of the said report;*

(3) *The report specifically states that the e-calibration was recorded on 22.05.2013 for which the Petitioner has not been able to produce any proof as to how the e-calibration was carried out;*

(4) *All that the committee states with regard to the power fluctuation is that there is possibility that software could get corrupted. The Respondents humbly state and submit that on instructions they are in a position to submit that the Code E-09, appears when fluctuation in voltage is detected. Interestingly, the report does not any where state that due to power fluctuation, there can be a change of K-Factor. The words "K-Factor" have been added and substituted by the Petitioner with the words "software", which can never be permitted.*

(5) *All that the committee states is that there is a possibility that entire software of the dispensing unit can be corrupted due to power fluctuation, however there is no mention of K-Factor being*

changed because of power fluctuation.

It is in this context that since the Petitioner was desirous of getting the said issue clarified, the Respondents had on 29.09.2014 addressed an email with this very specific query to the OEM [Page 75 of the paper book]. In response to the same, OEM had on 01.10.2014 answered that E-calibration and K-factor is generated with date and time only manually and K-Factor cannot get generated due *to any technical issue in the DO.*

It may also be noted that the Petitioner has till date not challenged the veracity or sanctity of the reply submitted by the OEM dated 01.10.2014 and therefore, has acquiesced and acknowledged the reply given by the OEM."

5.6. Mr. Munjaal M. Bhatt, learned counsel relied on the following judgments, which reads thus:

(I) In the case of M.S. Desai & Company & *Hindustan Petroleum Corporation Limited [LPA No. 160 of 1989].*

(II) In the case of S. Suresh v. IOCL passed by the Andhra Pradesh High Court in W.P. No. 18572 of 1994.

(III) Andhra Pradesh High Court in the case of M/s. Pulla Reddy Service Centre v. IOCL dated 21.9.2021. The Respondents in this context apart from stating that the facts of that case are not at all similar to the facts of the present case, humbly submit the said judgment has been stayed by the Hon'ble Apex Court under order dated 29.11.2021 passed in Special Leave to Appeal (Civil) No. 19008 of 2021. Therefore, reliance on the judgment passed by the Andhra Pradesh High Court would not be proper.

5.7. Mr. Munjaal M. Bhatt, learned counsel filed

additional written submission on behalf of the respondent-Corporation, which reads thus:

> *"(a) In continuation of the Written Submissions dated 19.03.2022, more particularly, Paragraph No. 4, the Respondents submit that Special Civil Application No. 19962 of 2021 was listed before this Hon'ble Court on 22.03.2022 i.e. after conclusion of hearing in the captioned writ petition.*
> *However, the Petitioner has chosen not to withdraw the said matter and is therefore pursuing two remedies at the same time, which may be taken note of.*
> *(b) The Respondents also wish to place reliance on the most recent Judgment dated 21.03.2022 delivered by the Hon'ble Apex Court of India in the case of M/s. N.G. Projects Limited v. M/s. Vinod Kumar Jain & Ors. wherein the Hon'ble Court has in no uncertain terms held that "In contracts involving technical issues, the Courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain".*

***ANALYSIS*:**

6.1. The petitioner and respondent corporation entered into dealership agreement dated 25.02.2013 to run retail outlet for selling high-speed diesel and petrol at Village: Kunkavav, Dist.: Amreli for 15 years. It appears that on 13.05.2013, Weight and Measures Department ('W & M Department' for short) carried-out calibration work of the petitioner's outlet

and issued Certificate No. 59 of even date, which was issued for a period of one year i.e. till 12.05.2014. It appears that on 04.12.2013, the Anti-Adulteration Cell ('AAC' for short) of the respondent Corporation inspected the petitioner's dispensing unit. The said report dated 04.12.2013 is duly produced. The observations of the said report are as under:

> *"Observations:*
> *1) Approved sealing diagram of above Dus are available at the RO.*
> *2). The Calibration log trail of HSD Dual DU L & T sprint GVR Sr. No. 201301000347 was recorded from the display of the dispensing unit in respect of Nozzle A is observed that last calibration of Nozzle is done on 22.05.2013 of 21:05 hrs with K factor as 0.933."*

6.2. Pursuant to the said report, a show cause notice dated 05.12.2013 came to be issued to the petitioner to explain about the e-calibration work dated 22.05.2013 qua the Nozzle-A, after the W and M Department carried-out calibration work on 13.05.2013.

6.3. The petitioner replied to the said show cause notice on 20.12.2013 stating that the petitioner has not tampered with the seals or covers of the units of the DU in any manner,

and the deliveries too were found to be correct. It was further stated by the petitioner in the said reply that the petitioner failed to even understand as to how electric error could have happened on 22.05.2013 that could lead to showing any tampering by petitioner. It was further relied that pumps were brand new, installed only about a week before the inspection, the petitioner also have no knowledge of the mechanism of the electronics or the mechanism of the DU. It could be said that any occurrence of the anomaly may be purely coincidental as the DU was brand new and could have had a start up hitch and the petitioner had no role to play in it. The petitioner pleaded innocence and ignorance by the said reply dated 22.05.2013.

6.4. Pursuant to the reply filed by the petitioner, CDRSM, RDO constituted a committee on 19.04.2014, of the followings persons to investigate further into subject matter:

1. Shri Atulkumar, Mgs (Rs), RDO
2. Shri Bhanupratap Chendra, EO, RDO
3. Shri Yogesh Patidar, AM (RS), Amreli
4. Shri Sandeep Kikani, Prop. Dealer, M/s. Indu Petroleum, Kunkavav.

6.5. The committee inspected the petrol pump and recorded the findings and after recording the findings, opined that there should be some paper (written) proof which substantiate the E-Calibration recorded in DU (sr. No. 201301000347) on 22.05.2013, for which there is no W & M certificate available at RO/ Dealer.

6.6. The 2nd show cause notice dated 25.05.2015 came to be issued by the respondent – IOC to the petitioner calling upon the petitioner stating that the explanation offered by the petitioner cannot be considered as satisfactory, as the petitioner have not given any concrete and proper justification for generation of calibration log on 22.05.2013. As per the clarification sought from the Chief of service operation, GVR, Gujarat "K-Factor changes during E-calibration only and cannot change owing to any other technical issues." It was further stated that the generation and calibration tag confirms that the box was opened by tempering the seal of W & M Department and thereafter K-Factor was changed. In view of above finding, the petitioner was called upon to show cause within 10 days

from the receipt of the said notice dated 22.05.2015 as to why the action including termination of dealership could not be taken against the petitioner, for the above-mentioned mal-practice / discrepancy. It was further stated in the said notice that, if the petitioner failed to submit any reply or the explanation given by the petitioner is not found to be satisfactory, the respondent- Corporation shall take further action against the petitioner's dealership as deemed fit in line with MDG, 2012 and the terms and conditions mentioned in the dealership agreement dated 25.02.2013.

6.7. The petitioner challenged the said show cause notice by preferring Special Civil Application No. 9025 of 2015, which came to be disposed of, by an order dated 15.04.2019. The Court was permitted the petitioner to respond to the said show cause notice by producing the documentary evidences and further directing the respondent authority to decide the same within a period of two months from the date of the order.

6.8. Pursuant to the order dated 15.04.2019 passed in

Special Civil Application No. 9025 of 2015, the petitioner filed its reply to the said show cause notice dated 25.05.2015 and produced all the documentary evidences alongwith the reply. The petitioner was represented through his advocate. On 16.06.2019, the petitioner preferred Misc. Civil Application No. 2 of 2019 in Special Civil Application no. 9025 of 2015 with a prayer to recall the oral order dated 15.04.2019 with a view to have decision of this Court on the merits of the matter. The said request was declined, however, it was directed not to give effect for a period of two weeks from the date of service of such decision, in case such decision is adverse to the petitioner.

6.9. The respondent no.3 earlier passed an order with reference No. RDO/R/5310 on 08.11.2019 terminating the petitioner's dealership agreement dated 25.02.2013. The petitioner challenged the said order by way of preferring Special Civil Application No. 20228 of 2019 and Special Civil Application No. 2699 of 2020. By an order dated 05.02.2020, the petitioner was relegated to the alternative remedy of filing

an appeal under Clause-8.9 of the Marketing Discipline Guidelines (MDG-2012). On 25.02.2020, the petitioner preferred appeal as per the MDG, 2012. The appeal filed by the petitioner came to be rejected vide an order dated 28.06.2021. It appears that the petitioner served a copy of the amendment application. It further transpires that the civil suit proceedings was kept for further hearing on 09.07.2021. While an application for amendment was pending before the court below, the Area Sales Manager, IOC, Amreli mailed a copy of the order dated 28.06.2021 purportedly passed by the DRP dismissing the appeal filed by the petitioner. Being aggrieved by the same, the petitioner approached this Court by way of the present petition.

6.10. This Court has considered the Marketing Discipline Guidelines (MDG)-2012 i.e. Retail Outlet Dealership / Superior Kerosene Oil Dealership. The relevant extract of the aforesaid guidelines germane for the adjudication of the dispute raised in the present petition are produced thus:

> ***"5.1.2.*** *Short Delivery of Products*
> *(b) with Weights & Measures department Seals*

tampered:

W & M department seals are put on Metering unit and Totaliser unit with the help of a sealing wire and a lead seal which is embossed by W & M inspector.

The seal would be deemed tampered in the following cases also:

1. Seal itself is missing.

2. Different seal has been put other than embossed by W & M.

3. Sealing wire is broken and not in one piece.

In addition other situations which can lead to manipulation of delivery / quantity / totaliser may also be treated as tampering.

Penal action to be taken even if the delivery is found to be correct or excess.

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

"8. Action to be taken by OMC under the Marketing Discipline Guidelines:

8.2. Critical Irregularities: The following irregularities are classified as critical irregularities:

ii. seals of the metering unit found tampered in the dispensing pumps.{5.1.2(b)}

Action: Termination at the FIRST instance will be imposed for the above irregularities.

6.11. By an order dated 18.01.2020, the dealership agreement between the petitioner and respondent -IOC dated 25.02.2013 came to be terminated on the following grounds, which reads thus:

"1. Violation under Clause No. 8.2(ii) and 5.1.2(b) (other situations which can lead to manipulation of delivery / Quantity / totaliser may also be treated as tampering) of MDG-2012 for tampering of dispensing units.

2. Violation of following clauses of Dealership agreement dated 25.02.2013:

(a) Clause no. 42: The dealer shall at all times faithfully promptly and diligently observe and perform and carry out at all times all directions instructions guidelines and orders given or as may be given from time to time by the corporation or its representatives on safe practices and marketing discipline and/ or for the proper carrying on of the dealership of the corporation. The dealer shall also scrupulously observe and comply with all laws rules regulations and requisitions of the central / State Government and of all authorities appointed by them or either of them including in particular the chief controller of explosives, Government of India and or any other local authority with regard to the safe practices.

(b) Clause No. 45 (a): Notwithstanding anything to the contrary here in contained the corporation shall be at liberty at its entire discretion to terminate this agreement forthwith upon or at anytime after the happening of any of the following events namely, if the dealer shall commit a breach or default or any of the terms conditions covenants and stipulations contained in this agreement.

(c) Clause No. 45 (I): 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 safety practices to be followed by him in the sale or supply and storage of the corporations products or otherwise.

In view of the foregoing, the discrepancies observed at your RO are established. The malpractices observed at your, RO fall under 'critical irregularity' of the Marketing Discipline Guidelines, 2012, clause no 8.2 (ii) and 5.1.2 (b) read with relevant clauses of Dealership Agreement dated 25.02.2013 such as clause No. 42, 45(a), & 45 (I).

Termination of your dealership will be effective after two weeks from the date of service of this notice of termination in compliance of the Order dated 09.07.2019 passed by Hon'ble High Court of Gujarat in Miscellaneous Civil Application 2 of 2019 in Special Civil Application 9025 of 2015, Sandip Dalpatbhai Kikani vs.

Indian Oil Corporation Limited.
Please note that you will cease to be our dealer at Kunkavav, Dist. Amreli and the licence/permission granted to you to operate the equipment of IOCL installed at the RO will be cancelled after two weeks from the date of service of this notice of termination. You are advised to hand over peaceful possession of equipment(s)/documents of the Dealership to our representative of Rajkot Divisional Office as soon as he / she calls you for the said purpose and settle your accounts, if any, within 30 days from receipt of this letter. You are also advised not to use any logo and trade mark of Indian Oil Corporation Ltd. or sell any petroleum product in the name of Indian Oil Corporation Ltd. in future.

It may please be noted that as per clause no. 8.9 of the chapter 8 of MDG 2012, in case of termination arising out of invocation of MDG, the dealer will have the right to appeal within a period of 30 days from the date of receipt of order (in your case it will be 30 days from effect of termination order), before the Appellate Authority, through the concerned Divisional office of the Oil Marketing Company (OMC). The Appellate Authority is empowered to decide the matter and the appeal shall be disposed of preferably within 90 days from the date of filing of the appeal along with applicable fees in the Divisional Office i.e. Rajkot Divisional office in your case.
For all appeals in case of termination arising out of invocation of MDG, the Appellate Authority will be the Dispute Resolution Panel (DRP) nominated by the OMC.
The terminated dealer preferring appeal would be required to deposit Non refundable Appeal fee of Rs.5 lakhs along with their appeal at Rajkot Divisional office. However, if appeal results in restoration of the Dealership, 50% of Appeal fee amount shall be refunded.
Accordingly, you can prefer an appeal within 30 days from effect of termination order.
This letter is issued without prejudice to our other rights and contentions in the matter."

6.12. The said order dated **18.01.2020** terminating the dealership agreement dated **25.02.2013** came to be confirmed by the Dispute Resolution Panel in Appeal No. DRP/ IOC/ RET/0004/2020 by an order dated **28.06.2021.** The DRP was constituted comprising of a High Court Judge and two other technical members, as stated herein-above. The conclusion arrived at by the said Committee, reads thus:

> *"(i) It is not disputed that an e-calibration record dated 22.05.2013 was found by the AAC during the inspection where K-Factor had been changed. The inspection report dated 04.12.2013 as well as the committee report dated 19.04.2014 recording this fact has been signed by the Appellant. The Appellant could not produce any OEM Service Record or W&M certificate in support of this e-calibration record. As the K-Factor has been generated without corresponding certificate from W&M department and the DU was in the custody of the Appellant, he owed an explanation as to how it happened.*
>
> *(ii) The Appellant has tried to explain that the e-calibration record might have been created due to initial start-up hitches, the DU being new, or it could be due to low voltage, the fact which the Committee has confirmed in its report dated 19.04.2014 after going through the error logs of the DU. However, the OEM has specifically confirmed that the K-Factor can't get generated or changed due to any technical issue in the DU. In the light of this, we are unable to accept this contention of the Appellant.*
>
> *(iii) Clause 5.1.2(a) of MDG covers for situations where short delivery of the product is found with W&M seals intact and in such cases it provides for suspension of sales forthwith and recalibration and re-stamping to be done*

before recommencement of sales. This clause applies to cases where there no other irregularity is found except short delivery. However, as in this case K-Factor was also found changed, we are not able to accept the contention of the Appellant that the case should be dealt under clause 5.1.2(a).

(iv) While specifying various situations where Weights and measures seal would be deemed as tampered, Clause 5.1.2(b) of Marketing Discipline Guidelines also provides:

"In addition other situations which can lead to manipulation of delivery / quantity / totalizer may also be treated as tampering.

Panel action to be taken even if the delivery is found to be correct or excess."

There is no denying the fact that a change in K-Factor will result in change in delivery. Therefore, the case in hand would be covered under this clause.

a) Clause 8.2(ii) classifies irregularity under Clause 5.1.2(b) of Marketing Discipline Guidelines as Critical Irregularity *providing for action to be taken as termination at the FIRST instance.*

b) The Appellant has quoted few judgments without explaining their relevance to the present case."

6.13. The submissions advanced by the learned counsel appearing for the petitioner that on **11.07.2013**, inspection of Retail Outlet (RO) including dispensing units was carried out by the respondent-company and as per the said inspection report, seals were intact, there was no short delivery, no stock variation and all parameters were found to be ok. Learned counsel appearing for the petitioner has relied on the

inspection report dated 11.07.2013 and stated that on 10.10.2013 quarterly inspection was carried out by the respondent – IOC which reiterate the same thing. On 04.12.2013, AAC, Mumbai inspected the Retail Outlet and for Nozzle-A, the following observations is made in the report, which reads thus:

> "The calibration log trial of HSD Dual DU L & T sprint GVR Sr. No. 20/30/000347 was recorded from the display of the dispensing unit in respect of nozzle A it is observed that last calibration of nozzle is done in 22.5.2013 at 21:05 hrs with K factor as 0.933."

6.14. The nozzle-A came to be sealed by the AAC, pursuant thereto, two show cause notices came to be issued in favour of the petitioner. The 1st show cause notice came to be issued on 20.12.2013, which was replied by the petitioner and considering the submissions advanced by the petitioner, the fact finding authority by its report dated 19.04.2014 opined that there was irregularities at the end of the petitioner herein. The 2nd show cause notice came to be issued by the respondent on 25.05.2015 seeking explanation from the petitioner as to why the said dealership dated 22.05.2013 should not be cancelled. Considering the submissions made by

the petitioner and after granting an opportunity of hearing to the petitioner through his advocate, the order of terminating the dealership agreement dated 25.02.2013 came to be passed by the respondent on 18.01.2019, which came to be confirmed by the Dispute Resolution Panel (DRP) in Appeal No. DRP/IOC/ RET/0004/2020.

6.15. Both the authorities have concurrently held against the petitioner, taking into consideration all the submissions advanced by the petitioner and arrived at a conclusion and observed that the discrepancies were established at the RO of the petitioner. The mal-practices were also observed at the RO of the petitioner, which fall under 'critical irregularity' of the MDG, 2012, clause no. 8.2(ii) and 5.1.2(b) r/w. relevant clauses of Dealership Agreement dated 25.02.2013 such as clause No. 42, 45(a) and 45(I). Further, the authorities have relied on the inspection report dated 04.08.2013 as well as report dated 19.04.2014, wherein, it was reiterated that K-factor was changed. It was further held that the petitioner could not produce any OEM service record or W & M

certificate in support of this e-calibration record. Further, as the K-Factor had been generated without corresponding certificate from W & M department and DU was in the custody of the petitioner, the petitioner was required to offer an explanation as to how it happened. The authorities have further held that OEM has specifically confirmed that the K-Factor could not be generated or changed due to any technical issue in DU, as stated by the petitioner and in the aforesaid facts and circumstances, the authorities did not accept the contentions raised by the petitioner.

6.16. This Court has considered the documents which are produced on record and it appears that e-calibration record dated 04.12.2013 was found by the (Anti Adulteration Cell), ACC-Bombay, during the inspection where K-Factor had been changed. The petitioner failed to produce any OEM Service record or W & M certificate in support of the e-calibration record, which was subsequent to the inspection carried-out and relied upon by the petitioner dated 11.07.2013 and 10.10.2013, wherein, seals were intact, there was no short delivery, no

stock variation and all parameters were found to be ok. The inspection by the AAC was carried out on 04.12.2013 and e-calibration was noticed and recorded on 22.05.2013 which is clearly subsequent to the aforesaid inspection. It appears that the petitioner failed to explain with regard to K-Factor having been generated without corresponding certificate from W & M department and DU was in the custody of the appellant.

6.17. The contention raised by the petitioner that the said e-calibration could have been a technical defect also cannot be accepted, in view of the fact that OEM specifically confirmed that K-Factor could not get generated or changed, due to any technical issue in the DU, and therefore, the said contention of the petitioner has rightly not been accepted by the respondent authority.

(a) It appears that, under Clause-5.1.2(a) of MDG provides for situations where short delivery of the product is found with W & M seals intact and in such cases it provides for suspension of sales forthwith and re-calibration and re-stamping to be done before recommencement of sales.

The above-referred clause applies to the cases, where there no other irregularity is found except short delivery. However, in the present case, K-Factor was also found changed, therefore, the said contention of the petitioner was rightly not accepted by the respondent authority that the case could not be dealt with under clause-5.1.2(a).

(b) Clause-5.1.2(b) of the Guidelines as referred above, clearly stipulates that change in K-Factor results in change in delivery. The authorities rightly considered the case of the petitioner to be covered under clause-5.1.2(b).

(c) Once the authorities have concluded concurrently that the irregularities have noticed under clause-5.1.2(b), the action of the termination would be taken under Clause-8.2(ii), resulting in termination of agreement. The conclusion arrived at by the authorities is after taking into consideration the material produced on record, the Marketing Discipline Guidelines (MDG-2012) and after giving due opportunity of hearing, passed the impugned order.

6.18. Further the Civil Suit No. 60 of 2014 preferred by the petitioner seeking the same reliefs is pending adjudication before the Civil Court at Amreli.

POSITION OF LAW:

6.19. The Hon'ble Supreme Court in case of M/s. N.G. Projects Limited v. M/s. Vinod Kumar Jain & Ors. in Civil Appeal No. 1846 of 2022, the Court has in no uncertain terms held that **"**In contracts involving technical issues, the Courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain**".**

> *"13. This Court sounded a word of caution in another judgment reported as Silppi Constructions Contractors v. Union of India and Ors.6, wherein it was held that the Courts must realize their limitations and the havoc which needless interference in commercial matters could cause. In contracts involving technical issues, the Courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain.*
>
> *As laid down in the judgments cited above, the Courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the*

government and public sector undertakings in matters of contract. Courts must also not interfere where such interference would cause unnecessary loss to the public exchequer. It was held as under:-

"19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry.

The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts, but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realize their limitations and the havoc which needless interference in commercial matters can cause.

In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder . In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realize that the authority floating the tender is the best judge of its

requirements and, therefore, the court's interference should be minimal.

The authority which floats the contract or tender and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind, we shall deal with the present case."

22. The satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers while evaluating the consequences of non-performance. In the tender in question, there were 15 bidders. Bids of 13 tenderers were found to be unresponsive i.e., not satisfying the tender conditions. The writ petitioner was one of them. It is not the case of the writ petitioner that action of the Technical Evaluation Committee was actuated by extraneous considerations or was malafide. Therefore, on the same set of facts, different conclusions can be arrived at in a bona-fide manner by the Technical Evaluation Committee. Since the view of the Technical Evaluation Committee was not to the liking of the writ petitioner, such decision does not warrant for interference in a grant of contract to a successful bidder.

23. In view of the above judgments of this Court, the Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the presentday economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues.

The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a malafide manner, still the Court should refrain from interfer- ing in the grant of tender but instead relegate the parties to seek damages for

> *the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work."*

6.20. In the case of Letters Patent Appeal No. 160 of 1989 in Special Civil Application No. 3943 of 1982 decided on 11.04.2020 in case of M.S. Desai and Co. V/s. Hindustan Petroleum Corp. Ltd., the the Hon'ble Division bench has held that "If the appellants wants restoration of the dealership agreement executed between the parties and we are of the view that such relief cannot be granted in a petition under Article 226 of the Constitution of India". *The relevant para reads thus:*

> "11. Even if it is assumed for the purpose of argument that the second set of instructions dated March 1, 1982 were applicable to the facts of the present case, we are of the firm opinion that the action taken by the respondent Corporation in terminating the dealership agreement is not liable to be voided on the ground that it is contrary to those instructions. It hardly needs to be emphasised that the consumers are entitled to unadulterated petroleum products for which they pay high prices. If petrol is adulterated with diesel it has two effects. The consumer gets lower quality of petrol and pay higher price. Such malpractice is rightly not tolerated by the petroleum companies. Moreover, the adulteration not only pollutes the air but is also seriously viewed by the legislature which can be seen from different control orders promulgated under the provisions of the Essential Commodities Act, 1955. If instructions dated March 1, 1982 were to be followed, no steps could have been taken till another case of adulteration

was found against the appellant. It is a common knowledge that with scanty staff it is not possible for the authorities to take sample every day from all retail outlets and subject them to laboratory test. Therefore, to say that dealership agreement cannot be terminated till second lapse is found is contrary to the overwhelming public interest and policy. The instructions dated March 1, 1982 are contrary to public interest as well as public policy namely that adulteration should be viewed seriously. Therefore, those instructions cannot be enforced by way of writ of Court. On the basis of such instructions no relief can be granted to the dealer who has admittedly adulterated petroleum product, in a petition under Article 226 of the Constitution. To put it differently, if the respondent Corporation is called upon to adhere to the instructions dated March 1, 1982, it would give further opportunity to the appellant to adulterate petroleum products and perpetuate malpractices which cannot be done in a petition under Article 226 of the Constitution. Therefore, even if it is held that the second set of instructions dated March 1, 1982 are applicable to the facts of the present case, the appellant is not entitled to any relief in the present petition. For these very reasons no relief can be granted to the appellant on the basis of instructions of 1998 which are sought to be produced on the record of the case by affidavit of Smt. Sulochanaben K. Desai."

"18. The decision of the respondent Corporation to terminate the dealership agreement indicates that everything is considered i.e., terms of contract, three instructions, factum of having taken sample and found adulterated, notice dated November 1, 1981, etc. The order was not made improperly, mistakenly nor with closed mind nor contrary to principles of natural justice. In order to enable the appellant to make effective representation, even punishment proposed was also indicated in the show cause notice which cannot be termed as the respondent having made up its mind in advance as is contended on behalf of the appellant. The Court in a petition under Article 226 of the Constitution does not exercise appellate powers and the Court can examine whether decision making process is vitiated in any manner or not. The action of the respondent Corporation is neither found to be arbitrary nor irrational nor irrelevant and, therefore, is not liable to be voided in the present appeal. In fact the prayers claimed in paragraph 26 of the petition would indicate that the petitioner wants direction against the respondent to resume supplies of petroleum products to the appellant and not to terminate the dealership agreement. In

> substance, the appellant wants restoration of the dealership agreement executed between the parties and we are of the view that such a relief cannot be granted in a petition under Article 226 of the Constitution. The principle of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, as observed by the Supreme Court in Tata Cellular (supra) there are inherent limitations in exercise of that power of judicial review. Duty of the Court is to confine itself to the question of legality. Its concern should be: whether a decision making authority has (1) exceeded its powers, (2) committed an error of law, (3) committed a breach of the rules of natural justice, (4) reached a decision which no reasonable Tribunal would have reached; or (5) abused its powers. The discussion made above does not indicate that the decision making authority has exceeded its powers or that it has committed any error of law or breach of the rules of natural justice or reached a decision which no reasonable Tribunal would have reached or abused its powers. Therefore, no case is made out by the appellant to interfere with the impugned judgment. The result is that the appeal is liable to be dismissed.''

6.21. The Hon'ble Supreme Court in the case of ***Bharat Petroleum Corporation Ltd. v. Induben Laxmanbhai Dudakhiya*** reported in ***2017 (3) GLR 2571*** is not applicable in the facts of the present case. It appears that the Court exercised its jurisdiction under Article 226 of the Constitution of India in view of the fact that the concerned Civil Court refused to exercise its power citing lack of jurisdiction, without relating the parties to any other remedy. However, in the present case, the Civil Suit is pending adjudication before the Civil Court,

Amreli and the petitioner is the who has approached the Civil Court as back as in the year 2014 by filing Civil Suit.

6.22. The reliance placed by the learned counsel appearing for the petitioner mainly deal with the violation of the principles of natural justice and the dealing with technical aspects of the facts of each case, this Court has referred to all the citation as submitted by the learned counsel appearing for the petitioner. In view of this Court, the said ratio cannot be said to be made applicable, in the facts and circumstances of the present case.

6.23. The Hon'ble Supreme Court in the case of Hindustan Petroleum Corporation Pvt. Ltd. and others v/s. Super Highway Services and Others reported in (2010) 3 SCC 347 has observed that "Non-service of notice to before termination of dealership agreement violative of principles of natural justice." The aforesaid decision would not apply in the facts of the present case, in view of the fact that principles of natural justice has been duly complied with by the respondent authority.

6.24. The Hon'ble Supreme Court in the case of Indian Oil Corporation Limited & Ors. V/s. M/s. Pullareddy Service Center, dealer, Indian Corporation Ltd. reported in 2021 (6) ALT 17. The aforesaid judgment - i.e. M/s. Pullareddy Service Center v/s. Indian Oil Corporation Limited & Ors. has been stayed by the Hon'ble Supreme Court in Special Leave to Appeal (c) No. 19008 of 2021 dated 29.11.2021.

6.25. The Hon'ble Supreme Court in the case of ***Bharat Petroleum Corporation Limited V/s. Jgannath and Company and others*** reported in ***(2013) 12 SCC 278,*** the said ratio is not applicable in the present case, in view of the fact that the said case pertains to non-adherence to marketing disciplinary procedure / guidelines by the Corporation. The Hon'ble Supreme Court confirmed the findings arrived at by the High Court with regard to the termination of dealership. However, in the present case, the respondent authorities have duly followed the MDG-2012.

6.26. In the present case, the parties are governed by the

MDG, 2012 based on which the impugned termination order dated 18.01.2020 came to be passed by the respondent authority. The said MDG is duly produced at page-277. The preamble of the MDG is introduced to maintain the very high customer service benchmarks. In Letters Patent Appeal No. 24 of 2021, the Delhi High Court has considered the aforesaid guidelines and held in para-61 and 76 to 81, which reads as under:

> *"CLAUSE 5.1.2 – SHORT DELIVERY OF PRODUCTS*
> *61. Learned Solicitor General and learned Senior Counsels representing the respective sides have read and re-read Clause 5.1.2 of the amendment in 2017 in MDG-2012. While the contention of the Appellants is that even where the Weights & Measures Department Seals are intact and there is short/excess delivery, though within the permissible limit, the sales of the concerned Dispensing Unit are to be suspended and recalibration and restamping is to be done, before recommencement of sales, Respondents urged that where the dispensation is within the permissible limit, there cannot be suspension of sales, especially when no time limit is prescribed for recalibration and re-stamping in the MDGs. In order to appreciate the argument, it is pertinent to refer to Clause 5.1.2, which is extracted hereunder for ready reference :-*
> *"Clause 5.1.2 a) With Weights & Measures Department Seals intact Sales through the concerned dispensing unit to be suspended forthwith and recalibration and re-stamping to be done before recommencement of sales. (Even if short/excess delivery is found within permissible limit, recalibration and re-stamping to be done before recommencement of sales.) Penalty in case of short delivery beyond permissible limit: i. First instance: Rs. 25,000/- per nozzle found delivering short beyond permissible limit as specified in Legal Metrology Act/Rule. ii. Second instance within one year of 1st instance: Rs. 50,000/- per nozzle found delivering short beyond*

permissible limit as specified in Legal Metrology Act/Rule & suspension of Sales and supplies for 15 days. iii. Third instance within one year of 1st instance: Termination of the dealership."

76. The relationship between the Dealers and the Appellants is guided by Dealership Agreement subsisting between them. The said agreement provides for certain obligations on the part of Dealers and in terms of breach of such terms, the Appellants have a right to take action, including termination of Dealership Agreement. The civil right under the agreement is obviously in addition to and not in substitution to right of various State Authorities or their Instrumentalities to take action against the Dealers for violation of the terms of the Agreement or the directions issued to them under the MDGs.

77. Appellants have formulated common Guidelines to provide for uniform and consistent practices and action against the Dealers in the form of MDGs. The provisions of MDGs are essentially between the Appellants and the Dealers, covering their rights and obligations, on various counts such as, methodology of sampling, filling and decantation of tank lorries, maintenance of equipment at Retail Outlets and other aspects of purely commercial nature and linked with the Dealership Agreement.

78. The MDGs for Retail Outlets/SKO Dealerships, which have been in existence for last 3 decades, facilitate marketing of petroleum products (MS/HSD/SKO) by the Dealers on the principles of highest business ethics and excellent customer service.

79. These Guidelines are updated/amended from time to time to meet the growing customer expectations, ensuring quality & quantity of products and service, enforcing discipline amongst the Dealers' network and preventing malpractices in the sale of petroleum products. MDGs aim to bring consistency amongst the OMCs with respect to implementation of various marketing practices and different cases of malpractices for taking civil action under dealership agreements.

80. Penalties are imposed where malpractices and/or violation of Guidelines are established as the Dealers are expected to carry on business on the principles of highest business ethics and excellent customer service, complying with the Guidelines.

> *81. Appellants brought out that it was noticed that in some cases, the RO Dealers were involved in Chip manipulation, short delivery, not maintaining toilets, etc. which was adversely affecting not only the image of the Appellants but also the consumers. Short delivery of product, non-provision of customer convenience facilities, selling of normal Petrol & Diesel as branded products, etc. was affecting the brand image of the Appellants and directly hitting the sales volume. In addition, the unwary customers are short-changed. In view of the aforesaid, we agree with the Appellants that it was imperative that some sort of monetary penalties are provided for in the MDGs, which would help in curbing the malpractices and be a deterrent, at the same time falling short of the extreme penalty of terminating the Dealership Agreement."*

6.27. On apprehension that the dealership may be terminated by the respondent no.1, the petitioner approached the Civil Court by filing Regular Civil Suit No. 60 of 2014 against the respondent no.1 and others in the Court of Principal Civil Judge, Amreli for declaration and permanent injunction. The Civil Judge by an order dated 17.06.2014 rejected the interim injunction application filed by the petitioner. Being aggrieved by the said order dated 17.06.2014, petitioner preferred Civil Misc. Appeal No. 13 of 2014 before the District Court, Amreli. The said appeal came to be rejected by the District Court by an order dated 15.05.2015.

6.28. The petitioner challenged the order dated 15.05.2015 passed by the District Court by filing Special Civil Application No. 8860 of 2015 before this Court. The petitioner preferred an application in the year 2021 seeking amendment in the plaint, wherein, the petitioner seeks to bring on record all the subsequent events from 2014 to 2020 i.e. till the passing the termination order dated 18.01.2020. The Civil Court, Amreli did not allow the amendment application, against which petitioner had preferred Special Civil Application No. 19962 of 2021 before this Court, which is pending. The Regular Civil Suit No. 60 of 2014 is pending adjudication before the Civil Court, Amreli.

6.29. This Court has considered the submissions canvassed by the learned counsel appearing for the respective parties, documents produced on record, the findings arrived at by the authorities below while passing the impugned orders dated 18.01.2020 confirmed in appeal vide an order dated 28.06.2021. This Court has also taken into consideration the ratio as laid down by the Hon'ble Supreme Court and other

Hon'ble High Courts as relied upon by the respective parties, no error of law much less any error of jurisdiction can be said to have been committed by the respondent authorities, while passing the impugned orders. The scope of judicial review for interference in contractual matters is very limited. In the facts of the present case, the impugned orders passed by the respondent authorities are based on the expert opinion and the expertise in the field. Both the impugned orders are passed by the experts in the field, further, the appellate authority i.e. DRP included a High Court Judge and two technical members examined the said issue and accordingly while passing the impugned orders, the issue involved came to be tested by the judicial expert as well as technical expert. At this stage, it is apposite to refer the ratio as laid down by the Hon'ble Supreme Court in the case of AIR 2022 1413 reported in State of Punjab v. Mehar Din. The relevant para reads thus:

> *"26. This being a settled law that the highest bidder has no vested right to have the auction concluded in his favour and in the given circumstances under the limited scope of judicial review under Article 226 of the Constitution, the High Court was not supposed to interfere in the opinion of the executive who were dealing on the subject, unless the decision is totally arbitrary or unreasonable, and it was not*

open for the High Court to sit like a Court of Appeal over the decision of the competent authority and particularly in the matters where the authority competent of floating the tender is the best judge of its requirements, therefore, the interference otherwise has to be very minimal."

6.30. This Court has also considered the submissions advanced by the learned counsel appearing for the respective parties in accordance with the MDG-2012. The authorities below have also while passing the impugned orders tested the case of the petitioner in light with the above-referred guidelines and have concurrently concluded that the irregularities were noticed under Clause-5.1.2(b) and that the action of termination of the dealership agreement came to be undertaken under Clause-8.2 (ii) which resulted into termination of the agreement.

6.31. As stated above, the petitioner has also approached the Civil Court by filing Regular Civil Suit No. 60 of 2014 which is also pending. Further, in view of this Court, two remedies cannot be availed by the petitioner seeking the same relief at the same time.

6.32. In view of above, this Court is not inclined to exercise its extraordinary jurisdiction under Article **226/227** of the Constitution of India and further this Court would not sit in appeal over the decision arrived at concurrently by the competent authorities. Accordingly, the present petition fails and the same is dismissed. Rule is discharged. No order as to costs.

In view of the order passed in main petition, Civil Application does not survive, and accordingly, the same is also stands dismissed.

(VAIBHAVI D. NANAVATI,J)

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