

W. A. No.183/2015**22.07.2015**

Shri P. K. Saxena, learned Senior Counsel with Shri Sudarshan Joshi, learned counsel for the appellants.

Shri Prateek Maheshwari, learned counsel for the respondent, on advance notice.

Heard on the question of admission.

By this intra-court appeal, the appellants (respondent Nos.1 & 2 in the writ petition) are aggrieved by the order dated 07.04.2015 whereby learned Writ Court while allowing the Writ Petition No.8844/2014 filed by the respondent – Ashok Dhawan directed the appellants to issue 'No Objection Certificate' to the respondent, within a period of ten days from the date of receipt of certified copy of the order.

2. Brief facts of the case are that the respondent was allotted a property situated at Plot No.5, Scheme No.59 ad-measuring 8000 square meters on 26.11.1981 and he was placed in possession on 26.02.1988. On 01.11.2004, a registered lease deed was executed for 30 years in favour of the respondent for construction of residential purpose. On 17.09.2011, an advertisement was issued by the Bharat Petroleum Corporation Ltd. (BPCL) for allotment of

dealership of petroleum retail outlet. The respondent applied for allotment of dealership of retail outlet and was interviewed by BPCL on 18.02.2011. He was again interviewed and finally he was selected by the Oil Company and later on, a Letter of Intent (LOI) was issued on 18.02.2012. The respondent was directed to obtain 'No Objection Certificate' from various departments. Clause 9 to 11 of the LOI reads as under :-

- 9. You will also assist us in getting the requisite NOC from appropriate Authorities within one month of handing over of necessary documents.*
- 10. You will be depositing with us a Demand Draft for Rs.3 lakhs (Three Lacs) drawn on any Nationalised bank in favour of M/s Bharat Petroleum Corp. Ltd. payable at Indore towards security Deposit at the time of issuance of appointment letter after you have complied with all the requirements of the LOI. Kindly note that this deposit will not carry any interest and is refundable at the time of expiry of agreement between you and the Corporation. However, if such expiry of agreement is consequent to proven adulteration/malpractice at the dealership, this amount will be forfeited. Moreover, this Corporation reserves its right to adjust this amount towards any dues to it.*
- 11. You will be notified by the corporation, in writing, after the facilities mentioned above are made available and are ready for commissioning the dealership. Immediately on receipt of the above*

notice from the corporation, you shall, within a period of two months, comply with the following requirements and produce proof thereof to our satisfaction.

a. You have obtained each and every license necessary for operating your dealership as may be required under any central/state govt./municipal or local authorities for the time being in force; and

b. You have resigned from your employment, if you are employed, and obtained the letter of acceptance from your employers.

Please note that your failure to comply with the requirements mentioned above will entitle the corporation to withdraw this letter of intent without making any further reference to you, purely at your own risk.

3. The respondent in pursuance to the aforesaid, applied for statutory 'No Objection Certificate' from all the departments, as required by the Oil Company. In pursuance to the aforesaid, he filed an application before the Indore Development Authority (IDA) for converting the property in question to free hold property and the IDA converted the property in question as free hold property and executed a lease deed on 09.07.2012 by charging a premium to the tune of Rs.1,48,640/-.

4. The respondent also applied to other authorities for grant of 'No Objection Certificate'. As per averments made in

the writ petition, except the present appellants, all other authorities like Electricity Department, Public Works Department, Industrial Health & Security Department, Revenue Department granted 'No Objection Certificate' by imposing certain conditions and all those NOCs were annexed along with the writ petition. No NOC was issued by the appellants – Indore Development Authority and, therefore, he filed W. P. No.8844/2014 for issuance of writ of mandamus directing the appellants to grant NOC in favour of the respondent.

5. The appellants have filed their reply on 20.03.2015. They raised an objection that the land in question has been allotted for construction of residential purpose. Now the respondent does not want to abide by the conditions of the lease deed, which is in clear violation to the conditions of the lease deed. In Paras-5, the appellants very categorically admitted that the land is converted from lease hold land to free hold land. Paras-5.1 to 5.16, Para-6 and Para-7 of their reply, which are relevant, reads as under :-

Para 5.1 to 5.7 - The contents of these para do not call for any reply. However the adverse allegations if made in these para are denied.

Para 5.8 - That in reply to the communication sent by the collector the answering respondent have duly

relied that they cannot issue NOC for the said purpose.

Para 5.9 - *That the free hold rights have been provided to the petitioner in respect of the property in question and the registered deed dated 05/07/2012 clearly speaks that the said free hold rights are for residential purposes. Thus the petitioner is trying to interpret the document as per his wishes.*

Para 5.10 - *That the contents of the para do not call for any reply.*

Para 5.11 to 5.12 - *That the contents of the para have been replied in the preliminary submission hence do not call for separate reply.*

Para 5.13 - *That the answering respondents have rightly denied the issuance of NOC. The petitioner is not appreciating the fact that the plot had been leased out to the petitioner for the residential purposes and even the conversion of it to a free hold property clearly stipulates its use for residential purposes.*

Para 5.14 to 5.16 - *That the contents of the para have been replied in the preliminary submission hence do not call for separate reply. That there is no occasion for the petitioner to file the present petition. Thus the petition deserves to be dismissed.*

- 6.** *That the answering respondent further submits that after the said land was converted to free hold land the petitioner now wants no objection certificate from the answering respondent so that he may open retail out let for petroleum produce. The petitioner is under a misconception that if a property become*

a free hold property then basic terms of the allotment agreed to in the lease deed would cease to operate.

- 7. That the registered transfer deed also clearly stipulated that the free hold rights have been given only for residential purposes and not for any other purposes. The copy of the registered transfer deed has been annexed by the petitioner as Annexure P/8.*

6. Learned Writ Court considering the provisions of the Madhya Pradesh Bhoomi Vikas Rules, 2012 came to the conclusion that the respondent can establish a retail outlet, subject to the parameters, provided under Rule 53(iv). Learned Writ Court after considering the Rule 53(iv)(b) of the Madhya Pradesh Bhoomi Vikas Rules, 2012 came to the conclusion that the respondent was having freehold rights and the retail outlet is permissible in residential area and his plot is ad-measuring 24.384 x 30.486 meters, which is certainly within the permissible limits as provided under the aforesaid statutory provision, hence he is entitled for establishment of retail outlet and the appellants have been directed for issuance of NOC. Paras-6 to 8 of the order dated 07.04.2015 are relevant, which reads as under :-

06. In the present case it is an admitted fact that the plot in question is certainly not on lease.

The Madhya Pradesh Bhoomi Vikas Rules, 2012 (Rule 53 (iv)), which has been quoted above, thus permits a land owner to establish a retail outlet, subject to fulfillment of parameters, provided under Rule 53 (iv). The petitioner is certainly fulfilling a parameters of Rule 53 (iv) (b). Not only this Section 11 of the Transfer of the Property Act, 1882 reads as under :-

"11. Restriction repugnant to interest created

Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Where any such direction has been made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof."

07. In light of the aforesaid statutory provisions of law, the petitioner cannot be restricted to use a plot only in a particular manner specially in light of the fact that retail outlet is being established, keeping in view Rule 53 (iv) of Madhya Pradesh

Bhoomi Vikas Rules, 2012. The respondents have not taken care of Section 53 while tackling with the case of the petitioner and, therefore, as the petitioner has applied for grant of 'No Objection Certificate', the Indore Development Authority is directed to issue 'No Objection Certificate' to the petitioner for establishment of Retail Outlet.

08. The writ petition is allowed. The Indore Development Authority is directed to issue 'No Objection Certificate' to the petitioner, within a period of ten days, from the date of receipt of certified copy of this order.

7. Learned Senior Counsel for the appellants have drawn our attention to Rules 144 and 154 of the Petroleum Rules, 2002 and submit that the Petroleum authority is a necessary party. He also pointed out that in case, if no NOC was granted by the IDA, then in that event, he has to file an appeal under Rule 144 (5) of the Petroleum Rules, 2002. He has also drawn our attention to the NOC granted by the MPSEB and PWD (Annexure-P/9 and P/10) and submit that the impugned order is contrary and is in violation to Rule 50 of the Madhya Pradesh Bhoomi Vikas Rules, 2012 and Sections 10 & 11 of the Transfer of Property Act, 1882. He submits that the learned Writ Court erred in holding that Section 11 of the Transfer of Property Act would not apply in the instant case as

		(FFS)	Service Facilitie s (FFSS)				
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1.	Up to 1 lac	20x20	35x35	20 (FFS) 35 (FFSS)	18	100	Residential , Commercia l,
2.	Above 1 lac	20x20	35x35	20 (FFS) 35 (FFSS)	24	100	Industrial, Public and Semi Public, Transport Agriculture and Recreation

Note :- All dimensions are in meter.

1. Road junction as shown in the map of Traffic and Transportation plan enclosed with Development Plan book shall be accepted for column No.6 in the table above.

2. Provision for distance from Road junction shall not be applicable on roads of widths 18m. and above having service roads. However, the petrol pump owner shall have to construct service road and footpath in front of the petrol pump upto 250-250 meters on either sides of the petrol pump at his own cost.

3. Minimum plot size for retail outlet for farmer service center in rural areas shall be as per column (4).

4. Workshop shall not be permitted in the plots of column (3)

5. For plot mentioned in column No.4 maximum built up areas shall not exceed

40% of the total plot area which may includes workshop and other services and facilities such as snack, stall drinking water, ATM, toilets (Ladies and gents) etc.

6. Ladies and gents toilets, drinking water, equipments for fire fighting shall be necessarily provided in all fuel filling stations.

From perusal of the aforesaid, it is clear that for establishing a retail outlet, the respondent – land owner has to fulfil the norms provided under the Rule 53(iv). The respondent is fulfilling the conditions of Rule 53(iv)(b).

10. As per Rules 143 and 144 of the Petroleum Rules, 2002, any person who wants to obtain license under these Rules shall have to submit an application in writing to the authority empowered to grant such a license. As per Rule 144, where the licensing authority is the Chief Controller of Explosives defined under Rule 2 (iv) and (v) or District Magistrate as defined under Rule 2 and that as per Rules 144, the applicant for a new license other than a license in Form III, XI, XVII, XVIII or XIX shall have apply to the District Authority for grant of NOC to the applicant. The procedure for grant of NOC is also prescribed under the said Rules. As per Rule 154, an appeal shall lie against any order refusing to grant,

amend or renew a license cancelling or suspending a license to the authorities provided under sub-rule (1).

11. In the present case, various authorities have granted NOCs to the respondent by imposing certain conditions except the appellants – IDA and, therefore, the respondent has rightly not impleaded any one except the IDA. It is also submitted that as per the law laid down in the case of **State of Kerala & others vs. Kandath Distilleries** reported in AIR 2013 SC 1812, no writ of mandamus can be issued. He has also drawn our attention to Paras-29 and 31 of the judgement in the case of **Jagdishchandra & another vs. State of Madhya Pradesh & others** reported in 2015 (II) MPJR 211. The arguments, which has been advanced by the learned Senior Counsel for the appellants, were not argued before the learned Writ Court nor any ground was taken in the reply and, therefore, we have quoted the relevant proceedings.

12. The case of the respondent is governed by the provisions of the Madhya Pradesh Bhoomi Vikas Rules, 2012 and the learned Writ Court after appreciating the provisions of Rules 53 (iv)(b) of the Madhya Pradesh Bhoomi Vikas Rules, 2012 allowed the writ petition and directed the appellants to issue NOC. No argument was advanced by the learned Senior

Counsel whether provisions of Rule 53(iv) has been rightly complied by the learned Writ Court or not. If we peruse the aforesaid provisions, it is clear that petroleum outlet can be installed over a residential area also, subject to compliance of provisions of the Madhya Pradesh Bhoomi Vikas Rules, 2012. We are not impressed by the contentions advanced by the learned Senior Counsel that the learned Writ Court has no power to issue such type of writ of mandamus.

13. It is well settled that a mandamus can be issued where the Government or a Public Authority has failed to exercise or wrongly exercised the discretion conferred upon it by a statute or rule or a policy decision. In order to compel the parties of public duty, the Court may itself pass an order/direction.

14. Here, in the present case, the appellants failed to comply its own policy/instructions issued by them from time to time and, therefore, the writ court has compelled to issue such a direction. It is not a case of the IDA that there is no such Policy. Thus, we are of the view that the learned Writ Court exercising their jurisdiction under Article 226 of Constitution of India have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the government or a public

authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the government or has exercised such discretion mala fide or on irrelevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case, a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or give directions which the government or the public authority should have passed or given had it properly and lawfully exercised its discretion.

15. On due consideration of the arguments, we are of the view that the learned Writ Court has rightly directed the IDA to issue NOC in favour of the respondent. Before the learned Writ Court, the respondent was not praying for issuance of NOC by the District Magistrate and the District Magistrate

was rightly not impleaded in the writ petition. As per statutory provisions, the District Magistrate is the final authority for grant of NOC for setting up of a petroleum outlet and, therefore, all the questions whether the NOC issued by the other departments has been right or not cannot be considered in this case. The writ petition of the respondent was confined only to the question of grant of NOC issued by the IDA and the learned Writ Court considering the provisions of the Madhya Pradesh Bhoomi Vikas Rules, 2012 allowed the writ petition. No case to interfere with the impugned order, as prayed is made out. The writ appeal filed by the appellants have no merit and is accordingly dismissed.

(P. K. Jaiswal)
Judge

(T. K. Kaushal)
Judge