

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.03.2015

Date of Reserving the Judgment	Date of Pronouncing the Judgment
06.03.2015	18.03.2015

Coram

The Hon'ble Mr. Justice T.S. SIVAGNANAM

W.P. No.35017 of 2014 &
M.P.Nos.1&2 of 2014

Sri Vinayaga Transport
rep. By its Partner A.Saravanamoorthy ... Petitioner

Vs

- 1.The General Manager
Hindustan Petroleum Corporation Ltd.,
Thalamuthu Natarajan Building
No.1, Gandhi-Irwin Road
Egmore, Chennai 600 008.
- 2.The Chief Installation Manager
Hindustan Petroleum Corporation Ltd.,
Chennai New Terminal, NCTPS Main Road
Attipattu Pudhunagar (RS), Vallur Village
Chennai 600 120. ... Respondents

Prayer :-Petition filed under Article 226 of the Constitution of India praying to issue a writ of Certiorari to call for the records relating to the order passed by the 2nd respondent in No.PN/CNT/OPS dated 16.12.2014 and quash the same.

For petitioner .. Mr.N.R.Chandran,Sr.Counsel
for Mr.M.Baskar
For Respondents .. Mr.O.R.Santhanakrishnan

O R D E R

Heard Mr.N.R.Chandran, learned Senior Counsel, appearing for the petitioner and Mr.O.R.Santhanakrishnan, learned counsel appearing for the respondents.

2.The petitioner / Transport Contractor has filed this Writ Petition praying for issuance of a writ of certiorari to quash the order passed by the second respondent dated 16.12.2014. By the impugned order, the Transport Contract Agreement entered into by the petitioner with the respondent Corporation dated 17.01.2014, was terminated and all the Tank Trucks offered by the petitioner were blacklisted permanently and also on industry basis, by referring to various clauses in the Transport Contract Agreement.

3.The petitioner is a Partnership Firm engaged in the business of Transport by offering Trucks owned by them to various Oil Companies. In response to the tender notified by the respondent Corporation during May 2013, for transportation of Bulk While Oil Petroleum Products (MS/HSD) by Road Ex Ennore/Chennai Terminal for a period of five years with effect from 01.10.2013, the petitioner was declared as a successful bidder and they entered into a contract agreement on 17.01.2014, with effect from 01.10.2013. Under the contract agreement, the petitioner was awarded work for 25 trucks. During the course of contract, the petitioner was issued with a show cause notice dated 14.7.2014, stating that they have violated the Transport Contract Agreement entered by offering three tank trucks which were blacklisted by the Indian Oil Corporation on permanent basis vide their letter dated 13.11.2013 and that the petitioner provided false information in the tender and agreement was entered with the respondent Corporation. This according to the respondent Corporation is in violation of the Industry Transport Discipline Guidelines and Transport Agreement clauses 2.1.1, 2.1.2, 5.1, 5.2, 5.3, 8.2.1, 8.2.2.13, 8.2.2.14, 8.2.2.16 and clause 17 respectively.

4.The petitioner was called upon to show cause as to why action should not be taken as deemed fit including the termination of transport agreement dated 17.01.2014. The petitioner was granted seven days time to submit his explanation. Pending receipt of the explanation, three tank trucks bearing Registered Nos. TN341 6305, TN04U 1256 & TN34E 1014, were kept under suspension. Further, the crew who operated those three trucks were also debarred from entering into terminal, till further advise. The petitioner submitted their explanation on 31.07.2014, stating that the aforementioned blacklisted tank trucks were operated in IOCL and the contract expired on 31.10.2013 and the tank trucks were blacklisted on 13.11.2013, only for two years which was after the submission of tender documents. Further, it is stated that the tank trucks were not blacklisted by any other Oil Company during the submission of tender documents and requested for replacement of few tank trucks before induction of tank trucks under the contract and were instructed by the HPCL that replacement will be approved only after the induction of original tank trucks offered in the tender. Therefore, the petitioner justified their conduct in inducting all tank trucks under the contract and subsequently planned for replacement of few tank trucks including the blacklisted tank trucks

from the contract with equivalent latest tank trucks. The petitioner apologised and regretted for inclusion of the three tank trucks which were blacklisted by IOCL for two years till 12.11.2015 due to ignorance. The petitioner offered to replace the tank trucks immediately for uninterrupted operation.

5. After the reply was submitted to the show cause notice dated 17.01.2014, another show cause notice was issued on 22.09.2014, stating that the explanation given for the show cause notice dated 14.07.2014, is under perusal, while so, it was noticed that another tank truck bearing Registration No. TN-03-F-5511, was found to have indulged in malpractice/irregularity of having additional solid hollow pipe in one of the compartment for which the second show cause notice was issued. By the second show cause notice, the petitioner was called upon to show cause as to why action should not be taken as deemed fit including termination of the transport agreement dated 17.1.2014, for violation of clause 17(i) of the transport agreement and clauses 8.2.1., 8.2.2.5 and 8.2.2.6 of the Transport Discipline Guidelines. The petitioner submitted their explanation on 04.10.2014, stating that none of their tank trucks involved in any malpractice nor blacklisted and in respect of the additional solid hollow pipe in one of the compartment, it was stated that they have taken action after they came to know of it on 31.07.2014 and terminated the driver and helper immediately from the employment and instructed the respondents to cancel their entry passes. Further, the petitioner pleaded that the incident happened without their knowledge and they were not involved in the malpractice and attributed the same to the crew which operated the tank trucks. Pursuant thereto, a common order was passed on 16.12.2014, terminating the Transport Contract Agreement dated 17.01.2014 and blacklisted all the tank trucks of the petitioner permanently. Challenging the same, the petitioner has filed this writ petition.

6. The learned Senior counsel appearing for the petitioner submitted that by virtue of the impugned order, all the tank trucks of the petitioner have been permanently blacklisted and the agreement has been terminated and such order of termination of the contract by the second respondent is in excess of his jurisdiction, arbitrary and illegal. Further, it is submitted that the order of termination was passed without following proper procedure as stipulated under clause 8.2.1 and 8.2.2. of the Transport Discipline Guidelines. Further, it is submitted that though only four of the tank trucks have come under scanner of alleged violation of the guidelines/agreement, the second respondent erroneously terminated the entire contract and blacklisted all the 19 tank trucks. Further, it is submitted that the petitioner has been permanently debarred and their entire business has come to stand still.

7.The learned Senior counsel referred to the various clauses in the agreement and also to the documents filed in the typed set of papers including the explanations offered by the petitioner dated 31.07.2014 and 04.10.2014. It is further submitted that penalty imposed is extremely harsh and the same having been in excess of the jurisdiction vested with the second respondent, the petitioner was justified in approaching this Court by filing this Writ Petition.

8.It is further submitted that in the light of the aforementioned facts, the petitioner need not be driven to resort to the remedy of arbitration available under the contract. In support of the contention that the rule of exclusion of writ jurisdiction by availability of alternate remedy is a rule of discretion and not one of compulsion, reliance was placed on the decision of the Hon'ble Supreme Court in the case of HARBANSLAL SAHNIA AND ANOTHER V. INDIAN OIL CORPORATION LTD., AND OTHERS [AIR 2003 SCC 2120]; M/S RAM BARAI SINGH & CO. v. STATE OF BIHAR & ORS. [CIVIL APPEAL NO.11465 OF 2014 dt. 17.12.2014] and the decision of the Division Bench of this Court in the case of THE SENIOR MANAGER (CONTRACTS CELL) v. LAKSHMI TRAVELS [2013 (1) CWC225] and the decision of this Court in C.SHANMUGAVEL & ORS v. INDIAN OIL CORPORATION LTD. [W.P.No.19513 of 2009 dt 03.12.2009].

9.The learned Senior counsel further referred to the additional affidavit filed by the petitioner and submitted that the vehicles were inspected by the staff of the respondent Corporation regarding the calibration and it was found that the records of the company did not refer the vehicles as having been blacklisted by any other Company and the petitioner is not aware that the vehicles were blacklisted. Further, it is submitted that action has been taken against the staff who committed irregularity.

10.The learned counsel for the respondent submitted that the Writ Petition is not maintainable as there is an arbitration clause in the agreement in clause No.18 and without resorting the said arbitration clause, the petitioner cannot invoke the writ jurisdiction of this Court. It is submitted that the petitioner provided false information in the tender and in the agreement entered into with the respondent Corporation and committed gross violation of the guidelines and the conditions in the transport agreement. By referring to the averments made in the counter affidavit, it is submitted that the reason for termination of the agreement and the blacklisting the petitioner's tank trucks was on account of the serious violation by inserting unauthorized equipments in the tank trucks. It is further submitted that the petitioner entered into agreement on 17.01.2014 with the respondent Corporation with the blacklisted tank trucks, which is gross violation of the transport agreement and the guidelines. It is further submitted that even assuming that the contentions of the petitioner is correct and that the tank trucks were blacklisted only when the petitioner accepted

the letter of acceptance from the respondent Corporation, the petitioner being aware of the terms and conditions of the agreement, should have brought it to the notice of the respondent Corporation. Therefore, the petitioner having concealed the fact of blacklisting and entered into the agreement, the respondent Corporation was justified in passing the impugned order. The action said to have been taken against the driver and the helper of those tank trucks will not absolve the petitioner from the present charge.

11.The learned counsel referred to the additional counter affidavit filed by the respondent Corporation and submitted that the admitted fact is that the Indian Oil Corporation blacklisted the tank trucks of the petitioner on 13.11.2013. The tank trucks which were blacklisted belong to A.Kesavamurthy, Proprietor of Balaji Transport who is one of the partner of the petitioner Firm and he is the brother of the deponent/petitioner. It is further submitted that the Partnership Deed was entered into on 01.03.2013, much before the tank trucks were blacklisted by Indian Oil Corporation and even while receiving the letter of acceptance, A.Kesavamurthy, has affixed his signature as one of the partners acknowledging the receipt of the letter of appointment. Hence, it is factually incorrect to state that the petitioner was not aware of the factum of blacklisting of tank trucks by Indian Oil Corporation. Further, it is submitted that the respondent Corporation conducts safety checks before inducting any tank trucks in the contract and the responsibility of contracting a vehicle which is not in contract/blacklisted by other Oil Company is solely on the petitioner and the petitioner is trying to shift the onus and the responsibility on the respondent Corporation. In this regard, clauses 2.1.1, 5.1, 5.2, 5.3 of the Transport Discipline Guidelines were referred to. Further, it is submitted that the petitioner is fully aware of the action that could be initiated for violation of the terms and conditions of agreement or the Transport Discipline Guidelines and proper procedure was followed and the petitioner was afforded opportunity and the punishment of termination and blacklisting is neither excessive nor violative of Article 14 of the Constitution of India.

12.After hearing the submissions made by the learned counsels appearing for the parties and perusing the materials placed on record, two issues fall for consideration. Firstly, whether the Writ Petition is maintainable challenging the impugned order terminating the petitioner's contract and blacklisting the petitioner permanently, when there is a binding arbitration agreement between the parties and the second issue would be as to whether the punishment imposed on the petitioner was justified and warranted in the facts and circumstances of the case.

13.If the first issue regarding the maintainability of the writ petition is decided first and if this Court is convinced that the writ petition is maintainable, then only a need would arise to go

into the second issue regarding the proportionality of the punishment imposed.

14. The existence of arbitration clause in the agreement is not in dispute. The petitioner having signed the agreement and accepted the terms and conditions of the contract is bound to adhere to the same. It has to be seen under what circumstances the petitioner can bypass the alternate remedy provided under the contract. Merely because one of the contracting party is the Government of India Enterprises, that will not make a contract, a statutory contract and the contract will continue to be a pure commercial transaction. The circumstances under which one of the contracting party is entitled to bypass the alternate remedy of arbitration provided under the agreement is fairly well settled in several decisions of the Hon'ble Supreme Court and this Court. In fact one such decision referred to by the learned Senior counsel for the petitioner is the case of HARBANSLAL SAHNIA (supra). The Hon'ble Supreme Court after taking note of the earlier decisions on the point held that in appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies viz. (i) where the writ petition seeks enforcement of any of the Fundamental Rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act and is challenged. [see Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and others (1998) 8 SCC 11].

15. It has to be now seen as to whether the petitioner's case falls under any one of the contingencies laid down by the Hon'ble Supreme Court to bypass the remedy of arbitration. The petitioner would state that the impugned order is violative of Article 14 of the Constitution, arbitrary, unreasonable and there is violation of principles of natural justice.

16. The procedure adopted by the respondent Corporation in issuing show cause notice cannot be faulted as it is well within the scope and ambit of the agreement and Transport Discipline Guidelines. The petitioner would find fault with the respondent Corporation in issuing the second show cause notice without finalising the first show cause notice dated 14.07.2014. The answer to this is found in the second show cause notice. After the first show cause notice was issued to the petitioner dated 14.07.2014 and after the petitioner's reply dated 31.07.2014, was received, it came to the notice of the respondent Corporation regarding another violation committed and that necessitated the respondent Corporation to issue the second show cause notice dated 22.09.2014.

17. Perusal of the show cause notice shows that the circumstances under which the second show cause notice was issued has been clearly spelt out. Further more, the respondent Corporation has stated that

the first show cause notice and the petitioner's reply dated 31.07.2014 is under perusal and the circumstances under which the second show cause notice was issued has been clearly mentioned. After receiving the reply to the second show cause notice dated 04.10.2014, both the show cause notices were considered together, their replies were considered and the impugned order has been passed. The procedure adopted by the respondent Corporation is in consonance of the terms and conditions of contract of agreement. The petitioner has been afforded reasonable opportunity to put forth their reply/explanation. In the reply dated 31.07.2014, the petitioner Firm in fact have tendered apology and expressed regret and undertook to replace those three tank trucks which were blacklisted. In the explanation for the second show cause notice, the petitioner states that their crew viz. driver and helper were responsible for the same and they have already initiated action against them and terminated them.

18.The allegation in the second show cause notice was with regard to an unauthorized fitting, which according to the respondents directly affects the quality and quantity of fuel. The unauthorized fabrication of hidden chamber /facility to siphon product from the tank, is one of the irregularities which would fall within the scope of clause 17(i)(p) of the Transport Agreement. If the petitioner would state that they were not responsible for installing unauthorized equipments or devices in the tank truck and the crew alone have to be blamed, it is a factual issue which the petitioner has to establish by producing evidence. The contention that they were unaware of the blacklisting of those tank trucks has been demonstrated to be factually incorrect, since Kesavamurthy is none other than the brother of the present deponent and he is also a Partner of the petitioner Firm. This again is a factual issue. In the light of the serious disputed questions of fact, this Court is not inclined to adjudicate the same in a writ petition moreso, when such adjudication is not permissible.

19.Thus, the allegations based on which action has been taken clearly empowers the respondent Corporation to terminate all the tank trucks and blacklisted on industry basis. Therefore, on both these grounds the case of the petitioner has to be referred to arbitration and they have to prove before the arbitrator that they are innocent.

20.That apart, there is no error in the decision making process to state that there was violation of principles of natural justice. The show cause notice clearly indicates the offences committed by the petitioner are being viewed seriously, and action as deemed fit including termination of the Transport Agreement, were liable to be imposed. Therefore, the petitioner cannot plead ignorance of what

could be the ultimate penalty that could be imposed by the respondent Corporation. Hence, on this ground also, the petitioner has not made out a case to bypass the arbitration clause available under the agreement.

21.Regarding the proportionality of the punishment imposed, the same is also a question of fact, which cannot be adjudicated in a Writ Petition, since the conduct of the petitioner which is a Partnership Firm and who are Transport Contractors for other Oil Corporations as well assumes significance. Hence, the proportionality of the penalties also is a matter to be adjudicated in an arbitration proceedings. Hence, on these grounds, this Court is of the firm view that the petitioner has not made out a case to carve out an exception to bypass the remedy of arbitration available under the agreement.

22.In view of such conclusion, issue No.1, is decided against the petitioner and the writ petition is held to be not maintainable. In view of such conclusion, there is no necessity to go into the factual aspects raised by the petitioner so as to decide issue No:2 on merits.

23.Accordingly, petitioner is directed to avail the remedy of arbitration available under the Transport Contract Agreement. If the petitioner Firm exercises its option for arbitration, the Arbitrator so appointed in terms of the Agreement shall decide the case independently based on oral and documentary evidence, without being in any manner influenced by any observations made in this order.

24.In the result, the Writ Petition is dismissed as not maintainable with the aforesaid observations. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

rpa/pbn

To

1.The General Manager

Hindustan Petroleum Corporation Ltd.,
Thalamuthu Natarajan Building
No.1, Gandhi-Irwin Road
Egmore, Chennai 600 008.

2.The Chief Installation Manager

Hindustan Petroleum Corporation Ltd.,
Chennai New Terminal, NCTPS Main Road
Attipattu Pudhunagar (RS), Vallur Village
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+ 1 cc to Mr.O.r. Santhanakrishnan, Advocate SR.15557

PS (CO)

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