IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

FRIDAY, THE 28TH DAY OF SEPTEMBER 2018

THE HON'BLE MR.JUSTICE C.SARAVANAN

A. No.3779 of 2018

In the matter of Arbitration & Conciliation Act 1996
And
In the Matter of Bulk Petroleum Products Road Transport Agreement dated 01.08.2016

A.No.3779 of 2018:-
T.Ravichandran,
Partner, R.Karthikeyan Trasnport,
having office at 8, Drivers Colony,
Kathivakkam High Road,
Korukkupet, Chennai - 600 021. ... Applicant

-VS-

Indian Oil Corporation Ltd.,
Tondiarpet Terminal,
Ennore High Road,
Chennai 600 081. ... Respondent

Application praying that this Hon'ble Court be pleased to grant interim stay of all further proceedings made in the order of the respondent dated 16.04.2018 under Ref.No.IOC/TNP/OP/TT MALPRACTICE/6027, pending disposal of arbitration.

This Application coming on this day before this court for hearing, the court made the following order:-

This application has been filed for grant of interim stay of all further proceedings made in the order of the respondent dated 16.04.2018 under Ref. No.IOC/TNP/OP/TTMALPRACTICE/6027 pending disposal of arbitration.

2. The applicant had a contract with the respondent under Bulk Petroleum Products Road Transport Agreement, dated 13.08.2016 for transporting fuel to the respondent's customers.

3. The present dispute pertains to the contract between the applicant and the respondent for transportation of fuel products with a tanker lorry bearing Registration No.TN03J6027.

4. The dispute arises on account of black listing of the applicant's tanker lorry bearing Registration No.TN03J6027 vide letter dated 16.04.2018 bearing reference IOC/TNP/OP/TTMALPRACTICE/6027 of the respondent.

5. The applicant's tanker truck was loaded with 20KL of High Speed Diesel for being delivered to M/s. Daimler India Commercial Vehicles Pvt. Ltd., Oragadam vide invoice No.699229564 dated 21.08.2017.

6. The tanker truck left the respondent's terminal at 11.40 a.m. but reported to the customer on the following day at about 9.30 a.m. though the distance between the loading terminal and the customer's premises is about 55 Kms.

According to the respondent, the travelling time should be approximately three hours even if there were road blocks.

7. The following day the customer rejected the consignment that there was a huge shortage in the quantity and called for joint inspection.

8. A joint inspection was carried on between the respondent's officer in the presence of crew and customer's representatives on 22.08.2017 and a conclusion arrived on 27.03.2017.

9. On 09.09.2017, similar exercise was carried at the respondent premises. Details of the dip reading are as under:

Compartment No.	**Difference in Dip reading**		
	22.08.2017	23.08.2017	09.09.2017
1	0.5 m.m.	10 m.m.	0.8 c.m.
2	0.5 m.m.	10 m.m.	0.4 c.m.
3	6.2 m.m.	70 m.m.	1.3 c.m.
4	5.7 m.m.	70 m.m.	1.2 c.m.

10. Finding No.1 in the Customer Check List for Joint Inspection of Tanker Truck for suspected malpractice dated 23.08.2017 reads as under:

<u>Findings:-</u>

1. Single locking rod setup was found rewelded right above the shut off value box.
2. Shortage observed on the date 23.08.2017 at 3.15 p.m.:-

   Comp. 1 ? 10 m.m.
   Comp. 2 ? 10 m.m.
   Comp. 3 ? 70 m.m.
   Comp. 4 ? 70 m.m.
   Temp. ? 37°C; Density: 814 ? @ 15°C = 829.4
3. Joint Dip Witness Letter attached.

11. The respondent concluded that the locking rod set up was found re-welded right above the shut off valve box. Thereafter, a show cause notice dated 11.09.2017 was issued alleging:

> (a) Excessive shortage in 3rd and 4th compartments. The joint dip certification duly acknowleged by your TT crew also reveals the above shortages (Ref Annex 2)
>
> (b) Single locking system rod was found re-welded right above the shut off value box. The locking rod where TT security lock was applied was found not properl aligned with main rod and with a prominent bend. After opening the lock, the bend was still more prominent (Ref Annex 3)

12. It was alleged that on 24.08.2017, vehicle was inspected at the respondent's terminal and that there was shortage and therefore, it was concluded that the “security locking system rod” of the tanker truck had been manipulated and that correction of product quantity in the respective compartments was carried and again re-welding of the rod had

been carried out en-route return journey to terminal from the customer's location.

13. The respondent further alleged that the vehicle tracking report reveals that the journey started at 6.16 hours on 22.08.2017 and diverted to Moorthy Nagar from Puthagaram Colony, returned to Puthagaram colony from Moorthy Nagar, then went inside the colony and finally returned to main route leading to customer premises.

14. It was therefore concluded that co-relation clearly indicates that security locking system was tampered with a view to pilferage of High Speed Diesel loaded by the applicant.

15. In view of the above, another Show Cause Notice dated 11.09.2017 was issued and called upon the applicant to show cause as to why action should not be initiated interms of clause Nos.8.2.1, 8.2.2.3, 8.2.2.8, 8.2.2.11 and 8.2.2.16 of the Oil Industry Transport Discipline Guidelines (OITDG) for tampering with tanker truck security locking system for the following discrepancies:

1. Not reporting the subject TT with reasonbale time to Customer and causing exorbitant deay,
2. Report in the TT with huge shortages with intention to cheat the Customer.

3. Tampering with TT security locking system enroute to Customer,
4. Tampering with TT security locking system on the return journey to Terminal with product,
5. Depriving our Customer of their product, adversely affecting their business,
6. Diversion of TT to unconnected areas while enroute to the Customer and
7. Harming the good name/image of IOCL.

16. The applicant replied to the said show cause notice dated 20.09.2017. The applicant has given explanation for the delay and that the customer did not allow for unloading because of the delay.

17. By another Show Cause Notice dated 05.11.2017, the respondent concluded as follows:-

1. That you attempted to short supply HSD consigned through Tank Truck bearing No.TN03J6027 to the customer-M/s.Daimler India Commercial Vehicles Pvt. Ltd., Oragadam vide Invoice No.699229564 dated 21.08.2017.
2. You have tampered with the standard fitting of Tank Truch bearing No.TN03J6027 as uneven bends, fresh welding on the horizontal rods of Single locking system and patches of fresh painting on the bracing of the vertical rod of Single locking System were observed.

18. The applicant was therefore called upon to show cause as to why appropriate action should against the applicant. The applicant was given 15 days time from the date of the show

cause notice to submit its explanation along with all documents available in support of the reply. Notice referred to breach of the terms and condition of the Bulk Petroleum Road Transport Agreement and Oil Industry Transport Discipline Guidelines. The notice also threatend blacklisting for two years and imposing damage of Rs.1 lakh or 3 lakhs depending upon the number of instances.

19. The applicant replied vide letter dated 22.11.2017 disputing the charges. Thereafter, on 08.01.2018, a personal hearing was held. By a letter dated 16.04.2018, the respondent had blacklisted the applicant's tanker truck for two years with effect from 16.04.2018 as per Clause No.8.2.3 of ITDG.

20. Aggrieved by the said letter, the applicant filed the present application and secured an interim order dated 27.04.2018 till 16.07.2018.

21. The order came to be extended from time to time and was taken up for hearing on 31.08.2018. The learned counsel for the respondent filed a detailed counter and consolidated typed set of papers.

22. The learned counsel for the applicant submitted whether there was tampering or not is to be decided only in an

arbitration proceeding and therefore the applicant cannot be blacklisted in a casual manner. He submitted that the respondent has blacklisted the applicant without considering the reply and therefore, prays for grant of interim relief as prayed for.

23. The learned counsel for the applicant strongly relied on the Joint Inspection Report dated 09.09.2017, where it was observed as under:

> "Dip rod was checked with calibration chart and measured physically and found ok".

24. He further submitted that while granting interim stay on 27.04.2018 also, this Court relied on the Joint Inspection Report dated 09.09.2017.

25. The contract contemplates obligation of the respective parties to the agreement. The agreement also contemplates resolution of dispute by way of arbitration. The arbitrator is to be appointed by the Managing Director of the respondent's company.

26. The agreement is valid for a peiod of three years from the effective date as given in the LOI/Work Order with option at the sole discretion of the respondent compnay to extend the same upto two years on the discretion of the

respondent. The respondent also has a discretion to terminate the agreement by giving two months advance notice without being liable to give any reason or pay any compensation.

27. The applicant is bound to comply with the requirments of Industry Transport Discipline Guidelines (ITDG) as enumerated in Annexure-A of the agreement.

28. The applicant is also bound to comply with the requirements of Marketing Discipline Guidlines as is published in the respondent's website. The agreement also enjoins the respondent to acquaint with it before operation.

29. The agreement also contemplates all incidential taxes, charges and other cost for running the vehicle to be paid by the applicant on reimbursible basis.

30. As per clause 9(c) of the said agreement if there is shortage in quantity and / or variation in quality of product is found at any stage after tank truck leaves the dispatch storage point up to receiving location, the carrier shall be responsible for the same irrespective of reason and company would be entitled to following:-

i. In case of quantity shortage of MS/HSD/Branded Fuels or any other POL product, recovery shal be made at the retail-selling price at the dispatch location or non subsidized market determined price of such product, whichever is higher and transportation charges for the shortage quantity.

ii. Without prejudice to any other right of Company including the right for termination of agreement in case of variation in quality, Company at its' discretion may dispose off the contaminated product and all expenses/losses and cost of product in this connection as determined by the Company shall be recoverable from Carrier.

31. Per contra, the learned counsel for the respondent has defended blacklisting the applicant's tanker truck. The main thrust of the respondent is that the Oil Industry Transport Discipline Guidelines (OITDG) forms part of the Bulk Petroleum Products Road Transport Agreement dated 13.06.2016 entered between the applicant and the respondent and any breach of the conditions and guildelines will attract consequences. In this case the respondent is guilty of malpractice.

32. According to the respondent, the delay in reaching the place of destination shall be construed as a malpractice and therefore action under Clause 8 is attracted.

33. The order of blacklisting the applicant is based on a valid allegation and that there was tampering of security lock system, pilfering of products and reporting to customer's premises with 160 mm short in dips, which eventually led to

rejection of consignment by M/s.Daimler India Commercial Vehicles Pvt. Ltd., Oragadam and after the customer rejected the consignment, the applicant had reported to terminal with all the compartments topped up to correct dip for which no proper reply was received from the applicant and therefore, in terms of clause 8.2.2.3 of the agreement the respondent was justified in blacklisting the applicant.

34. Heard, Mr.O.R.Santhanakrishnan, learned counsel for the applicant and Mr.Mohammed Fayaz Ali, learned counsel for the respondent.

35.The learned counsel for the applicant has relied upon the following decisions:-

> 1. In ***Firm Ashok Traders and another Vs. Gurukukh Das Saluja and others*** *2004 (3) SCC 155*, the Court has clarified the nature of relief that Court can grant interim relief under Section 9 of the Act. The Court is merely required to formulate "interim measure" so as to protect the right under adjudication before Arbitral Tribual is not frustrated. The order under Section 9 of the Act should fall within the meaning of the expression"an interim measure of protection"as distinguished for an all time or permanent protection.
>
> 2. In ***Techmo Car Spa Vs.The Madras Aluminum Company Ltd*** *2004 (3) SCC 754*, the Hon'ble Supreme Court laid down the general principle while granting interim relief. In the present case, the applicant has been however found to guilty of malpractice. If the applicant has to disprove the charge on the facts of the case, it has to establish

the same before arbitrator.

> 3. The decision of the Hon'ble Supreme Court in ***Gulf Goans Hotels Company Limited and another Vs. Union of India and others*** *2014 (10) SCC 673* is of no relevance as the ITDG as annexed in Annexure A to the aggreement is part and parcel of the contract. Therefore, such guidelines are part of the contract and not mere guidelines.

36. In ***Sundaram Finance Ltd. v. NEPC India Ltd., (1999) 2 SCC 479*** the Hon'ble Supreme Court observed that "But a situation may so demand that a party may choose to apply under Section 9 for an interim measure even before issuing a notice contemplated by Section 21 of the said Act. **If an application is so made, the Court will first have to be satisfied that there exists a valid arbitration agreement and the applicant intends to take the dispute to arbitration.** Once it is so satisfied, the Court will have the jurisdiction to pass orders under Section 9 giving such interim protection as the facts and circumstances warrant. While passing such an order and in order to ensure that effective steps are taken to commence the arbitral proceedings, the Court while exercising jurisdiction under Section 9 can pass a conditional order to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing the arbitral proceedings. What is apparent, however, is that the Court is not debarred from dealing with an application

under Section 9 merely because no notice has been issued under Section 21 of the 1996 Act. There is a valid arbitration clause and therefore the applicant is entitled to invoke Section 9 of the Act. However, whether the applicant is entitled for any relief is another issue altogether.

37. While exercising jurisdiction under Section 9 of the Arbitration and Conciliation Act, 1996 is restricted. Court cannot get into the merits of the case as that would be subject matter of the arbitration as per the agreement.

38. The Court is only concerned with the *prima facie* case made out by the applicant and whether balance of convenience is in favour of the applicant and irrepairable injury would be caused to applicant if relief is not granted and whether or not prejudice would be caused to the respondent.

39. As per the OITDG, black listing of tanker truck shall be on industry basis Clause 8.2.3 of OITDG specifies a minimum of 2 years in case of blacklisting. Apart from blacklisting the respondent is entitled to impose damage.

40. The relevant Clause reads as under:

8.2.3 Period of blacklisting:

> The period of blacklisting for the carrier & TTs shall be minimum 2 years or as per the

> respective corporation's assessment depending upon seriousness of the offence, but not exceeding 5 years. The TTs, on completion of Black listing period, can ply under the same contract in case the validity of contract exists and the company so desires.
>
> In case, the same TT is found to indulge in malpractice again (after completion of the first blacklisting period), the second time blacklisting shall be of 5 years.
>
> The blacklisting of TTs shall be on Industry basis.

41. In the present case, the vehicle loaded with High Speed Diesel on 21.08.2017 left about 11.40 hours. However, it reached the respondent's customers premises on 22.08.2017 at about 9.30 hours. On 22.08.2017 inspection was carried out at about 13.30 hours and it was noticed that there was huge shortage.

42. On the following day once again reading was taken and it was found that the locking system was welded to indicate tampering. On 09.09.2017, a Joint Inspection was done at the respondent's terminal where shortage was noticed.

43. *Prima faice*, it appears that the respondent has made out a case for alleged tampering of the single locking system by the applicant. The agreement signed between the applicant and the respondent contemplates consequences for shortage by recovery at higher prices and transportation charges for the shortage of quantity. The agreement read with OITDG also contemplates blacklisting of tanker truck.

44. The respondent also has a right to terminate the agreement. Paragraph 8.2 of the Oil Industry Transport Discipline Guidelines (OITDG) deals with penalities from mal-practice/irregularities relevant portion reads as under:-

> a. Unauthorized deviation from specified route/unauthorized delay/ unauthorized en-route stoppage/not reaching destination/over speeding/en-route switching of VMU/unauthorized removal of VMU/use of VMU on other vehicles.
>
> k. Tampering with standard fittings of TT including the sealing, security locks, security locking system, calibration, Vehicle Mounted Unit or its fittings/fixtures.
>
> q. Pilferage/short delivery of product.

45.Clause 8.2.2.3 of the OITDG prescribes punishment for different types of malpractice. Relevant clause in Clause 8.2.2.1 read as under:-

Clause No.	**Type of malpractice / irregularity**	**Penalty against number of instance**		
8.2.2.2	(a) Established repetitive un-authorized stoppage en route **(b) Established repetitive un-authorized diversion from specified route** (c) Refusal to carry loads allocated by the location (d) Irregular reporting of TT at loading location without permission of the location	TT shall be suspended for three months	TT shall be black listed	

Clause No.	**Type of malpractice / irregularity**	**Penalty against number of instance**		
8.2.2.3	**Short delivery of product for established malpractice**	TT shall be blacklisted		
8.2.2.11	Tampering with standard fittings of TT including the sealing, security locks, security locking system, Calibration.	TT shall be blacklisted.		

46. Further the agreement also contemplates omnibus clause in the form of Clause 15, which reads under:

> *This agreement shall be valid for period of three years from the effective date as given in the LOI/Work Order with option at the sole discretion of Company to extend the same up to two more years on same terms and conditions. <u>However, Company reserves the right to terminate this agreement by giving two months advance notice without being liable to give any reason or pay any compensation.</u>*

47. When the case was listed for ponouncing orders on 24.09.2018, the learned counsel for the appellant has filed a Memo dated 24.09.2018 In the said Memo, a letter dated 14.09.2018 issued by the respondent appointing Shri Praveen Ranjan presently General Manager (LPG-Engineering), Tamil Nadu

State Office, Indian Oil Corporation Ltd., at No.139, Mahatma Gandhi Road, the arbitrator to adjudicate the dispute between the parties and to give his award thereon is enclosed. It is in response to letter dated 19.08.2009 of the applicant.

48. Here, the applicant has enjoyed the benefit of an *exparte* order since 27.04.2018, which came to be extended by this Court.

49. The applicant has invoked the arbitration only on 18.08.2018 after a lapse of 108 days of the interim order though amended Section 9(2) of the Act mandates arbitration proceeding to be commenced within 90 days after the interim order is passed.

50. Clause 16 of the Agreement dated 13.08.2016 between the applicant and the respondent reads as under:-

> "16. All questions, disputes and differencs arising under or in relation to this Agreement shall be referred to the sole arbitration of an arbitration of an officer of the Corporation to be nominated by the Director (Marketing) of the Corporation. The arbitrator to whom the matter is originally referred by the Dirrector(Marketing) may designate any other officer to act as an arbitrator. It is also the express term of this Agreement that no person other than the officer designated by the Director (Marketing) as aforesaid shall act as arbitrator. The award of the Arbitrator so appointed shall be final, conclusive and binding on all the

> parties to the Agreement and provisions of the Arbitration & Conciliation Act 1996 or any statutory modification or re-enactment thereof and the Rules made there under for the time being in force shall apply to the arbitration proceedings under this clause.”

51. Under Section 12(5) read with VII Schedule of the Arbitration and Conciliation Act, 1996, an employee cannot be appointed as an arbitrator. At the same time, the respondent has a power to appoint an arbitrator in terms of clause 16 of the aforesaid agreement.

52. In my view the applicant has not made out a prima facie case for grant of interim relief in view of the overwhelming evidence on record. Requirement of OITDG, which is part of the contract cannot be frustrated and the power to blacklist an errant party to the contract cannot be curtailed by stating that the such as exercise can be carried only after the conclusion of the arbitration proceeding.

53. In the said proceeding, the applicant can establish that blacklisting was uncalled and claim damages and such other relief. Further, the contract is itself for a period of three years and has run almost run its course. The respondent also has a right to terminate the agreement even otherwise after giving two months notice without assigning any reason. In view of the findings recorded in the enquiry and

finding arrived, the respondent was *prima facie* justified in blacklisting the applicant's Tanker Truck.

54. In view of the above, this Court is inclined to dismiss the application with the following directions:

i) The respondent is directed to appoint a retired District Judge from the panel of arbitrator of the High Court Arbitration Centre within 15 days from the date of receipt of this order and intimate the said appointment to the applicant within 7 days thereof.

ii) The arbitrator shall complete the proceeding within a period of six months thereafter.

Sd/-C.S.N.J
28/09/2018

//Certified to be true copy//

Dated at Madras this the day of 2019.
JJ 18/03/2019

COURT OFFICER(O.S.)