

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 16.01.2020
Date of Decision: 12.02.2020

+ **W.P.(C) 82/2015 & CM No.131/2015**

INDRAPRASTHA GAS LIMITED Petitioner
Through Mr.K.K. Rai, Sr. Adv. with
Mr.S.K. Panday, Mr.Awanish
Kumar, Mr.Chandrashekhar
A.Chakalabbi, Mr.Anshul Rai,
Mr.Sreoshi Chatterjee, Mr.Ram
Krishna Veerendra and
Mr.D.P.S. Rajesh, Advs.

versus

UNION OF INDIA & ANR. Respondents
Through Ms.Padma Priya and Mr.Dhruv
Nayar, Advs.
Mr.Mankh Mohan, Adv. for
UOI.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition challenges the Guidelines/Norms dated 24.07.2013 for access permission to Fuel Stations, Private Properties, Rest Area Complexes and such other facilities along National Highways, issued by the respondent no.1, to the limited extent insofar as it prescribes levy of a penalty of Rs.25 lacs on existing Fuel Stations constructed without prior approval of the respondent no.1. The petition further challenges the order dated 11.08.2014 passed by the Court of Highway Administration levying the penalty of Rs.25 lacs on the petitioner.

2. The ground of challenge to the Circular and the Impugned Order is that Section 29 (4) of the Control of National Highways (Land and Traffic) Act, 2002 (hereinafter referred to as the 'Act') does not provide for levy of any penalty on the person gaining access to a Highway without permission of the Highway Administration. Relying upon the judgment of the Supreme court in *State of U.P. and Ors. v. Saraya Industries Ltd*, (2006) 11 SCC 129 and *State of Bihar and Ors. v. Industrial Corporation (P) Ltd. & Others*, (2003) 11 SCC 465, the learned senior counsel for the petitioner submits that where the Act itself does not prescribe for levy of a penalty on the contravention of any provision, such penalty cannot be prescribed by way of a mere Circular.

3. On the other hand, the learned counsel for the respondents submits that in the present case, apart from the petitioner gaining access to the Highway without the permission of the Highway Authority, it was also found to be in "unauthorized occupation" of 63.40 sq. mtrs of the highway land. She submits that therefore, the penalty has been rightly levied on the petitioner in terms of Section 26(6) of the Act.

4. In the alternative, the learned counsel for the respondents submits that Section 28(2) of the Act provides for grant of access to the highways subject to the guidelines and instructions issued by the Central Government from time to time. Section 29 (2) of the Act further provides that such permission to access the highways shall be granted with or without the terms and conditions as may be prescribed. In view of these provisions, the Circular, insofar as it prescribes

imposition of penalty for regularization of the earlier unauthorized access as a condition for grant of licence, cannot be faulted. Placing reliance on the judgment of the Supreme Court in *Pallawi Resources Ltd. v. Protos Engineering Company Pvt. Ltd.*, MANU/SC/0205/2010, she submits that the Act must be read as a whole and not in isolation. As the land is forming part of the highway that vests in the Central Government, the prescription of penalty as a condition for grant of licence to access the highways cannot be faulted.

5. Lastly, she submits that in any case, mere use of the word “penalty” in the Impugned Circular is not determinative of the nature of the demand. She submits that the nature of the demand is in fact of regularization charge and is therefore a fee.

6. I have considered the submissions made by the learned counsels for the parties. Section 23 of the Act prescribes that all land forming part of the Highways vests in the Central Government. Section 24(1) of the Act provides that no person shall occupy any Highway Land or discharge any material through drain on such land without obtaining prior permission, in writing, of the Highway Administration. Section 26 of the Act provides for removal of “unauthorized occupation” from Highway Land.

7. “Unauthorized Occupation” is defined in Section 2(m) of the Act as under:

“(m) “unauthorised occupation” means any occupation of the highway land, without permission under this Act for such purpose, by a person who—

(i) is trespasser on the Highway; or

(ii) for the time being is paying or is liable to pay to other person rent or any portion of the rent of the premises on a Highway; or
(iii) lives in or otherwise uses any premises on a Highway; or
(iv) is a rent-free tenant of any premises on a Highway; or
(v) is a licensee of any premises on a Highway for its possession; or
(vi) is liable to pay damages to the owner of any premises on a Highway for the use or possession of such premises.”

8. Sub-section (6) of Section 26 of the Act further empowers the Highway Administration to impose penalty on any person for the failure of such person in removing the “unauthorized occupation” in spite of notice in this regard being issued by the Highway Administration under Sub-section (2) of Section 26 of the Act. Sub-section 6 of Section 26 of the Act is reproduced hereinbelow:

“Section 26 Removal of unauthorized occupation.

xxxxxx

“(6) Where the service of notice under sub-section (2) has been made under sub-section (4) or sub-section (5) and the unauthorised occupation on the highway land in respect of which such notice is served has not been removed within the time specified in the notice for such purpose and no reasonable cause has been shown before the Highway Administration or the officer authorised by such Administration in this behalf for not so removing unauthorised occupation, the Highway Administration or such officer as the case may be, shall cause such unauthorised occupation to be removed at the expenses of the Central Government or the State Government, as the case may be, and impose penalty on the person to whom

the notice is addressed which shall be five hundred rupees per square metre of the land so unauthorisedly occupied and where the penalty so imposed is less than the cost of such land, the penalty may be extended equal to such cost.”

9. Control of access to the National Highways is dealt by Chapter IV of the Act. Section 28 of the Act prescribes that no person shall have the right to access a Highway except with the permission of the Highway Administration granted either generally or specifically and subject to the Guidelines and Instructions issued by the Central Government from time to time. Section 29 of the Act prescribes the procedure for permission to access to highway. In terms of Section 29(2) of the Act, specific permission to access highway may be granted by the Highway Administration with or without terms and conditions as may be prescribed.

10. Section 29(4) of the Act further provides that where any person contravenes the conditions on which the permission has been granted by the Highway Administration to access the highway, the Highway Administration or the officer authorized by such Administration shall have the power to remove the access of such person, even with use of necessary force with assistance of police.

11. Sections 28 and 29 of the Act are reproduced hereinbelow:

*“28. **Right of access.**—(1) No person shall have right of access to a Highway either through any vehicle or on foot by a group of five or more persons except permitted by the Highway Administration either generally or specifically in the manner specified in section 29. (2) The access to a Highway under sub-section (1) shall be subject to the guidelines and instructions issued by the Central*

Government from time to time. (3) The Highway Administration may, by notification in the Official Gazette, declare a Highway or any portion thereof to be limited for access in the manner as specified in such notification and may also impose any restriction or control on such access to, from or across such Highway as specified in that notification.

29. Procedure for permission to access to Highway.—*(1) The general permission under sub-section (1) of section 28 shall be given by issuing notification in the Official Gazette for such purpose and specific permission under that sub-section shall be given in the manner specified hereinafter under this section.*

(2) Any person desirous of obtaining specific permission referred to in sub-section (1) may make an application in the prescribed form to the Highway Administration specifying therein the means of access to which such permission relates and shall also be accompanied with such fees as may be prescribed and the Highway Administration shall, after considering the application either give the permission with or without the terms and conditions as may be prescribed or reject the application as it may deem fit.

(3) In case, where the permission has been given in respect of the application made under sub-section (2), the person to whom such permission has been given shall obtain the licence from the Highway Administration in the prescribed form enumerating therein the terms and conditions, if any, subject to which such permission has been given, and such permission shall be renewed after such period and in such manner as may be prescribed.

(4) If any person contravenes the provisions of sub-section (1) of section 28 or violates any terms and conditions subject to which permission has been given under sub-section (2) including non-renewal of licence obtained under sub-section (3), his access to Highway under the permission under sub-section (1) or sub-section (3), as the case may be, shall be deemed to be unauthorised access and the Highway

Administration or the officer authorised by such Administration shall have the power to remove such access and where necessary, the Highway Administration or such officer may use the necessary force with the assistance of the police to remove such access.”

12. A reading of the above provisions would clearly show that penalty can be imposed only on the person who, in spite of notice to remove “unauthorized occupation” issued by the Highway Administration, fails to remove such unauthorized occupation within the time specified in the notice for such purpose and for no reasonable cause. As far as the unauthorized access to the highways is concerned, there is no power to levy penalty. The only power vested in Highway Administration is to remove such access, even with use of necessary force.

13. As held by the Supreme Court in ***Saraya Industies*** (supra) and ***Industrial Corporation (P) Ltd.*** (supra), power to levy penalty must be prescribed in the Statute or in a valid Subordinate Legislation and cannot be vested by way of issuance of a Circular/Letter.

14. The Impugned Guidelines, which are mere Administrative Instructions provide for imposition of penalty on existing Fuel Stations which, though constructed as per Ministry norms, do not have prior approval obtained from the Ministry. In view of the law enunciated by the above judgments, imposition of such penalty cannot be sustained.

15. Clause 7 of the Impugned Circular is reproduced hereinbelow:

“7. In case of existing fuel stations constructed as per Ministry's norms but for which prior approval has not

been obtained from the Ministry, a penalty of Rs.25,00,000/- shall be imposed on the Oil Company to regularize such fuel stations. However, in case of fuel stations existing on newly declared National Highways, there shall be no penalty but, such Oil Companies shall have to pay the processing fee of Rs.10,000/- to the Highway Administration and will be granted 6 months' time to comply with the Ministry's norms. If the deviations from Ministry's norms are non-rectifiable, such cases shall be dealt on case to case basis."

16. A reading of the above clause would clearly show that Rs.25 lacs is being demanded as a "penalty" for regularizing the prior default of the Fuel Stations in not obtaining permission under Section 29(2) of the Act for right to access to Highway. It is not a 'fee' prescribed for considering the application of such Fuel Stations for grant of such permission.

17. The true nature of the imposition is further evident from the Impugned Order itself, which, while levying such charges, states as under:

"It is established that the fuel station is being operated presently without a valid license deed issued by Ministry, IGL has failed to justify their inability to obtain license from Ministry till date.

The aforesaid fuel station deserves to be de-energized immediately. However keeping in view the fact that the fuel facility is of utmost public concern and de-energizing the defaulting fuel station immediately is likely to put the road users to severe hardship and inconvenience, IGL is given fast opportunity to get the access to their GN station regularized. The instant complaint is finally disposed off with following directions:

i. Since IGL has been operating the fuel station unauthorizedly since its commissioning on 27.09.2001 i.e. after declaration of the road as NH-8, without even paying license fee or any NH land rent, thereby causing loss of revenue to the Central Govt, they are liable to pay a penalty of Rs.25. Lacs as per para 7 of Ministry's guidelines dated 24.07.2013 to regularize their access permission. The penalty recovered from IGL shall be creditable to central revenue head 1054-CR.”

18. The submission of the learned counsel for the respondents that imposition of such penalty can find its source under Section 28(2) or Section 29(2) of the Act, also cannot be accepted. Section 28(2) of the Act states that the ‘access’ to a Highway shall be subject to the ‘guidelines and instructions’ issued by the Central Government. Similarly, Section 29(2) of the Act states that permission to access a Highway may be given ‘with or without the terms and conditions as may be prescribed’. Both these provisions merely provide for manner and mode in which applications seeking permission to access Highways are to be considered and what conditions are to be imposed for grant of such permission. They do not empower the administrative authority to levy penalty for any contravention of the Act. In fact, the Central Government has also framed the Highways Administration Rules, 2004. Rule 15 of these Rules lay down the terms and conditions for permission to access a Highway. Rule 15(v) speaks about guidelines relating to safety and convenience of traffic on the Highway, hygiene, prevention of nuisance and pollution on the

Highway. Clearly therefore, the penalty for past violations cannot be prescribed in the name of 'Guidelines' or 'terms and conditions'.

19. The submissions of the learned counsel for the respondents that the levy of penalty in the Impugned Order was for unauthorized occupation and not for having an unauthorized access to the Highway also cannot be accepted. While it is correct that the Show Cause Notice dated 21.03.2014 was issued to the petitioner under Section 26(2) of the Act and the Status Report dated 06.05.2014 stated that an area of 63.40 sq.mtrs of the National Highways was being used by the petitioner, the Impugned Order rendered no finding on this issue. As would be evident from the quotation of the Impugned Order reproduced hereinabove, the penalty was levied only because of the failure of the petitioner to obtain the licence for the earlier years while it was in operation.

20. In view of the above, Clause 7 of the Impugned Circular dated 24.07.2013 and imposition of penalty under the Order dated 11.08.2014 cannot be sustained and are set aside.

21. This Court by an interim order dated 06.01.2015 had directed the petitioner to submit a Bank Guarantee in favour of the Registrar General of this Court in the sum of Rs.25 lacs. As the Impugned Demand has been set aside, the same be released back to the petitioner.

22. The petition is allowed. There shall be no order as to costs.

NAVIN CHAWLA, J

FEBRUARY 12, 2020/Arya