

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Before:

**The Hon'ble The Chief Justice T. S. Sivagnanam
and**

The Hon'ble Justice Hiranmay Bhattacharyya

M.A.T. 731 of 2024

With

I.A. No. CAN 1 of 2024

M/s. Ashab Enterprise

Versus

Hindustan Petroleum Corporation Ltd. & Ors.

For the Appellant : Mr. Debabrata Saha Roy
Mr. Pingal Bhattacharyya
Mr. Subhankar Das
Mr. Neil Basu
Mr. Sankha Biswasadvocates

For Respondent nos. 1 to 6 : Mr. Kishore Dutta, ld. A.G.
Mr. Biswanath Chatterjee
Mr. Sobhan Kumar Pathak
Mr. Soham Krishna Chatterjeeadvocates

Reserved on : 05.08.2024

Judgment on : 26.09.2024

Hiranmay Bhattacharyya, J.:-

1. This intra Court appeal is at the instance of the writ petitioners and is directed against the Judgment and Order dated 05.04.2024 passed by the learned Single Judge in WPA 28170 of 2023.
2. The appellants herein approached the Writ Court praying for setting aside the order of blacklisting dated 15.05.2023 and the order of termination dated 21.11.2023 both issued by the 3rd respondent herein and for issuance of a mandamus to command the respondents to allow the appellants to continue as transporter in terms of the agreement dated 20.02.2019.
3. The writ petition stood dismissed by the impugned judgment and order.
4. Facts giving rise to the writ petition, in a nutshell, are as follows.
5. The 1st appellant came out successful in the tender floated by Hindustan Petroleum Corporation Ltd (for short "HPCL"), being the 1st respondent herein

for transportation of bulk petroleum products by road from ex-Haldia Terminal. A provisional Letter of Acceptance (for short "LOA") was issued by the respondents on 11.02.2019 for the contractual period from 01.03.2019 to 29.02.2024. An agreement was entered into between the parties on 20.02.2019. As per the provisional LOA dated 11.02.2019, the appellants supplied the original documents with regard to 11 Tank Trucks (for short "TTs") to HPCL and the authorities of HPCL after verification expressed their satisfaction.

6. On 30.11.2022, one TT of the appellant being No. WB 78 1657 was loaded with 4000 litres Gasohol and 8000 litres HSD from ex-Haldia Terminal for supplying the same to the customer namely M/s. Bisnupriya Filling Station. Before unloading the products, M/s. Bisnupriya Filling Station took samples and thereafter the products have been unloaded.
7. A show cause notice dated 01.02.2023 was issued by the 3rd respondent alleging that a laboratory test was held on 09.01.2023 and it was found that the sample did not meet the specification, hence the sample failed. The appellants replied to the show cause notice on 09.03.2023 through Electronic Mail. A second show cause notice dated 24.03.2023 was issued directing the appellants to explain as to why TT No. WB 78 1657 should not be blacklisted for two years. The said TT was, however, blacklisted on 15.05.2023.
8. The remaining 10 TTs of the appellants were in service.
9. On 30.08.2023 another TT being No. WB 11E 1792 was loaded from ex-Haldia Terminal for supply to customer namely M/s. Bhubaneswari Coal Mines Ltd.
10. A show cause notice dated 28.09.2023 was issued alleging that joint sampling was carried out on 09.09.2023 and after testing it was reported that the sample does not meet the parameters. On 09.10.2023, the appellants submitted their reply to the show cause notice. The 3rd respondent issued a second show cause notice dated 10.10.2023. Appellants replied to the said show cause notice stating that the testing was done in violation of the principles of natural justice. Thereafter the appellants were directed to be present at the laboratory for re-sampling test of TT No. WB 11E 1792 to be held on 02.11.2023 and the appellants were informed vide e-mail dated 04.11.2023 that re-sampling test had failed.
11. Appellants claim to have submitted several representations. The termination order dated 21.11.2023 was issued by the 3rd respondent and served upon the appellants.
12. Being aggrieved, by the aforesaid action of the respondent authorities, the writ petition was filed.

13. Mr. Saha Ray, learned Advocate appearing in support of this appeal referred to Clauses 4.3.1 and 4.3.2 of Oil Industry Transport Discipline Guidelines (for short "TDG") and Clauses 2.1, 2.2, 2.2.1 and 2.2.2 of the Marketing Discipline Guidelines (for short "MDG") and highlighted the procedures for collection of samples at the time of loading of petroleum products in TT and also after reaching the delivery point. He contended that all the samples collected are to be tested in a laboratory in terms of Clause 4.4 of TDG and Clause 4.5.2 of TDG and Clause 2.5(G) of MDG in presence of Oil Company representative, representative of transporter and customer.
14. Mr. Saha Ray contended that in the first proceeding in connection with TT No. WB 78 1657 no prior notice had been given to the appellants and the sample test had been conducted more than two months after collection of the samples in violation of Clause 2.10 of MDG.
15. Mr. Saha Ray further contended that in the second proceeding in connection with TT No. WB 11E 1792, the laboratory test was conducted on 14.09.2023 in respect of sample collected from the said TT and such test was conducted behind the back of the appellants. He submitted that the show cause notice did not state that the supply location sample had been tested. He submitted that the product was loaded on 30.08.2023 and the supply location sample was collected on the previous day i.e., on 29.08.2023. According to Mr. Saha Ray, such discrepancy has not been explained by the respondents. He further contended that TT sample which was collected on 09.09.2023 was also tested behind the back of the appellants between 11.09.2023 and 14.09.2023.
16. Mr. Saha Ray concluded by submitting that the respondent authorities have acted *de hors* the relevant guidelines and, therefore, the orders of blacklisting and termination of contract are liable to be set aside.
17. The learned Senior Counsel representing HPCL submitted that a large number of trucks are loaded from the supply location and collection of samples on the day/night immediately prior to issuance of challans does not vitiate the relevant guidelines. He further contended that Marker Test as contemplated in Clause 4.5.2 of the TDG is currently not applicable and such Clause would be applicable when the said test is re-introduced. He further submitted that the Marker Test has not been re-introduced and, therefore, the requirement of ensuring presence of the transporter at the time of testing cannot be said to be a mandatory requirement. He contended that the sample tests were done strictly in accordance with the terms of the agreement and the relevant guidelines. The learned Senior Counsel placed reliance upon Clause 8 of the agreement which provides for suspension if the TT is caught for having indulged in adulteration/malpractices/irregularities. He also

placed reliance upon Clause 8.1 which stipulates the penalties in case of adulteration. The learned Senior Counsel further referred to Clause 9(a), 9(c)(ii), 14(a), 17(e) and 17(f) of the said agreement. The learned Senior Counsel concluded by submitting that the instant appeal should be dismissed *in limine*.

18. Heard the learned advocates for the parties and perused the materials placed.
19. It is now judicially settled that the Writ Court in exercise of powers of judicial review can enter into issues involving disputed questions of fact if it is found that the action of the authorities coming within the purview of Article 12 of the Constitution of India suffer from arbitrariness, unreasonableness or suffer from *mala fides* or palpable illegalities.
20. Clause 4.5.2 of TDG states that if the product samples drawn from the retail outlet is found failing in the Marker Test then the last "retained tank lorry samples" kept at the retail outlet shall be tested for Marker Test and such test will be carried out after giving prior notice to the dealer and the concerned carrier so that they can be present at the test venue if they so desire for witnessing the testing. It was further stated therein that Marker test is currently not applicable. However the same will be applicable as and when Marker test is re-introduced.
21. It is the specific case of the respondents that the Marker Test has not been re-introduced. Nothing has been produced by the appellants in course of hearing of the appeal to indicate that the Marker test was re-introduced and the same was applicable at the relevant point of time.
22. The argument of the appellant that the sample ought to have been tested in the laboratory in the presence of the oil company representative, representative of the transporter and the customer is based on the mandate under Clause 4.5.2. Since there is nothing on record to indicate that the Marker Test was applicable at the relevant point of time, this Court is not inclined to accept the contention of the learned advocate of the appellant that the sample testing in the first proceeding got vitiated as no prior notice was given to the appellants.
23. Clause 4.4 of TDG states that if the product fails in the laboratory test, then the corresponding supply location retention sample shall be tested.
24. In the show cause notice dated 01.02.2023 it was specifically stated that the supply location sample meets all the specifications; TT sample did not meet the specification in (a) distillation, (b) total Sulfur & (c) RON test parameters, hence the sample fails and the test result of RO sample are found outside reproducibility/permissible limit with reference sample in distillation and hence the sample is deemed to have failed.

25. Clause 4.4 further states that if the supply location retention sample passes in the laboratory test then it would be construed as malpractices done by the carrier and action shall be taken as outlined in Clause 8.
26. Clause 8 deals with adulteration /malpractices /irregularities /penalties. Clause 8.1 deals with penalties in case of adulteration. Clause 8.1(a)(ii) deals with carriers with multiple TTs. It provides that on the first instance (during the tenure of the contract) of adulteration, the particular TT shall be blacklisted on industry basis along with TT crew.
27. The show cause notice dated 01.02.2023 relates to TT No. WB 78 1657. Since the same was the first incident, the appellant was directed to show cause as to why the said TT should not be blacklisted along with TT crew on industry basis for violation of terms and conditions of TDG and the bulk petroleum transport agreement.
28. The points raised by the appellants in the reply through e-mail dated 09.03.2023 was considered in details by the 3rd respondent in the order dated 15.05.2023 and such reply was found to be not satisfactory and, therefore, the same was not accepted. The 3rd respondent after noting that the proceeding in respect of TT No. WB 78 1657 being the case of first instance of adulteration and the transporter was having multiple TTs, the order of blacklisting of the particular TT on industry basis along with TT crew for two years was passed.
29. The learned Single Judge noted the expression "preferably" used in Clause 2.10 of MDG and was right in holding that time of about one and a half months taken by the respondents in completing the tests cannot be said to be in violation of the time limit specified in the said guideline. The learned Single Judge further noted that it was recorded in the minutes of the meeting between the HPCL and the customer that on 09.09.2023 the samples were collected in the presence of the representative of the appellants and the sampling was done duly. It was further recorded in the impugned order that the TT driver/representative of the appellant no. 1 signed in the minutes of the said meeting.
30. With regard to the second proceeding relating to TT No. WB 11E 1792 the said tank truck was loaded with 24 KL of HSD-BS VI for supply to customer namely M/s Bhabaneshwari Coal Mills Limited and during pre-unloading check at the customer premises, a complaint was raised by the customer on the quality of the product since density was not matching with the density printed in the invoice. Joint sampling was carried out on 09.09.2023 as per the procedure from each of the 5 chambers of the said TT in presence of TT driver, customer representative and Assistant Sales Manager of HPCL. The samples were sent for laboratory test and as per the laboratory test report dated 14.9.2023 the sample of TT compartment nos. 1, 2, 3 and 4 did not

meet product quality specification and failed in parameter i.e., total sulfur. The said laboratory test reports were furnished to the appellant seeking his explanation.

31. One e-mail reply was sent by the appellant on 26.9.2023 wherein it was stated that the said tank truck was loaded with a secure EM locking system and the lock was opened at the customer premises.
32. The reply of the appellant was found to be vague by HPCL and accordingly a second show cause notice dated 10.10.2023 was issued.
33. The appellant in the letter dated 12.10.2023 alleged that the result of testing of sample as conducted in the laboratory of HPCL is not the actual result and if such laboratory test is conducted in the presence of the appellant such test must pass as there was no adulteration in the product carried in the said TT.
34. The said reply was not accepted on the ground that the sample was again taken on 02.11.2023 from each of the 4 chambers being nos. 1, 2, 3, and 4 of TT No. WB 11E 1792 in the presence of the appellants, representative of HPCL Officers and were sent for laboratory test. As per the laboratory test report dated 03.11.2023 sample of TT Compartment nos. 1, 2, 3, and 4 did not meet product quality specification and again failed in total sulfur.
35. The learned advocate for the appellant, in course of his argument, did not dispute the fact that the testing on 02.11.2023 was done in the presence of the appellant.
36. HPCL, by a letter dated 21.11.2023, held that the appellant has violated various Clauses of the Transport Agreement executed between the parties and hence liable for action as per the Clause 17(e) of the Transport Agreement. It was also stated that the action of the appellants are also in violation of Clause 9(b) and 14(b) of the said Agreement which provide that the transporter shall comply with the TDG and also liable for action as per Clause 8.1.a (ii), 8.1.c, 8.1.d and 8.1.e of the TDG. Accordingly the Transport Agreement dated 20.02.2019 stood terminated.
37. The learned Single Judge rightly noted that upon request of the appellant, HPCL retested the sample in the presence of the representatives of the appellant and admittedly the second test was done in the presence of the appellant's representatives.
38. The learned Single Judge after considering the pleadings of the parties and the documents produced arrived at a factual finding that there is no discrepancy and irregularity on the part of the respondents/HPCL in collecting the samples and conducting the tests thereon and the same were done as per the extant guidelines and the Agreement between the parties. The learned Single Judge further observed that there is no illegality in the decision making process.

39. The learned Single Judge assigned cogent reasons in support of the ultimate conclusion.
40. Before this Court, the appellant failed to demonstrate any violation of the provision of the TDG and MDG. The principles of natural justice have been followed as the appellants were given opportunity to explain its conduct at various stages. The factual findings arrived at by the learned Single Judge could not be controverted by the appellant in course of hearing of this appeal. The decision making process also does not suffer from infirmity.
41. For all the reasons as aforesaid, this Court is not inclined to interfere with the impugned order. The appeal stands dismissed. The application stands disposed of accordingly. There shall be, however, no order as to costs.
42. Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

I agree.

(T.S. Sivagnanam, C.J.)

(Hiranmay Bhattacharyya, J.)