SL No. 1

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:
The Hon'ble Justice Joymalya Bagchi
And
The Hon'ble Justice Gaurang Kanth

MAT 1905 of 2024
(CAN 1 of 2024)

Indian Oil Corporation Ltd. & Ors.
-Vs-
Ajit Kumar Murmu

For the Appellants	:	Mr. Amit Kumar Nag, Adv. Ms. Pritha Bhaumik, Adv.
For the Respondent/ writ petitioner	:	Mr. Debabrata Saha Roy, Adv. Mr. Subhankar Das, Adv. Mr. Neil Basu, Adv. Mr. Sankha Biswas
Heard on	:	04.10.2024 & 07.10.2024
Judgment on	:	08.10.2024

Joymalya Bagchi, J. :-

1. Appellate Indian Oil Corporation Ltd. ('IOCL' for short) has assailed the judgment and order dated 17.07.2024 whereby the order of termination and blacklisting dated 10.09.2024 was set aside and the writ petitioner

was permitted to supply four tank trucks ('TTs' for short) in terms of the agreement dated 31.12.2024.

Facts:-

Factual matrix giving rise to the appeal is as follows:-

2. Appellant IOCL floated a tender for road transport of bulk petroleum products like MS/HSD/Branded Fuels etc. for *Mourigram* terminal. Clause 1.1(a) of the tender document provided the estimated requirement of TTs were in two different clusters i.e. 12-16 KL and 18-24 KL. Tender conditions also provided tenderer offering maximum TTs in 1:8 ratio in the aforesaid categories shall be ranked at the top and in case of a tie, average age of the fleet would be the determining factor.

3. In response to the advertisement, writ petitioner submitted bid in Scheduled Tribe category by offering 18 TTs (two in 18-24 KL and sixteen in 12-16 KL category). The writ petitioner was declared as the successful bidder and appellant IOCL by a Memo dated 11.11.2021 issued a letter of acceptance in favour of the writ petitioner.

4. After completion of formalities an agreement was executed between the appellant IOCL and the writ petitioner on 26.11.2021 for supply of 14 TTs (two in 18-24 KL and twelve in 12-16b KL category). Thereafter, the work order dated 27.12.2021 was issued in favour of the writ petitioner. As per the request of the appellant oil company, the writ petitioner continued to transport petroleum products in fourteen TTs for one and half years.

Thereafter due to various circumstances, the writ petitioner was unable to place ten out of the fourteen TTs for transportation in a regular manner. Appellant Oil Company called upon the writ petitioner to show cause why penal action shall not be taken against him for irregular placement of TTs. Ten TTs were suspended for three months. On 03.08.2023 writ petitioner was served with another show cause notice calling upon him to show cause why action shall not be taken against him for submission of incorrect documents with regard to month and year of manufacture of seven out of the 14 TTs and also for irregular reporting of the TTs at loading stations in violation of Clauses 8.2.2.2(d) and 8.2.2.13 of the Industry Transport Discipline Guidelines ('ITDG' for short), Clause15(d)(f) of the Transport Agreement and Clauses 17,18 and 19 of the tender terms and conditions.

5. Writ petitioner duly submitted his reply to the said show cause notice. A personal hearing was also conducted over video conference, writ petitioner sought time to replace the old ten TTs.

6. Finally, by an impugned order dated 10.09.2024 the appellant Oil Company held inspite of repeated requests the writ petitioner had failed to place 10 TTs regularly at various locations for supply of petroleum products and had submitted false manufacturing month and year in respect of Tank Trunk bearing No. WB11C5642. Thereby he had violated clause 19 of the Tender Document, Clause 8.2.2.2(d) and 8.2.2.13 of ITDG. Accordingly, the road transport agreement dated 31.12.2024 was

terminated and fourteen TTs were blacklisted on an industry basis till 13.12.2026. Security deposit of Rs. 50,000/- was also forfeited.

Findings of the Hon'ble Single Bench :-

7. This was challenged before this Court. Hon'ble Single Judge, *inter alia,* held due to financial stringencies the writ petitioner was unable to replace old vehicles which were not regularly reporting at different localities. Hon'ble Judge further held incorrect disclosure of the month and year of manufacture of one Tank Truck bearing No. WB11C5642 was an inadvertent mistake and not an intentional misrepresentation. Accordingly, dishonest complicity of the constructor had not been established and order of termination of agreement dated 31.12.2024 and blacklisting of the fourteen TTs were quashed. Writ petitioner was permitted to continue with the agreement in relation to the four TTs till 31.12.2024.

Arguments at the Bar:-

8. Mr. Nag for the appellant Oil Company contends Hon'ble Single Judge failed to take into consideration the fact that writ petitioner had repeatedly failed to place the ten TTs for loading and inspite of opportunity did not replace them. This was in breach of clause 4(a) of the Agreement. Clause 15(e) of the said Agreement entitles the Oil Company to terminate the agreement in case of breach of any of its terms and conditions. In addition thereto, writ petitioner had furnished false certificate and information with

regard to month and year of manufacture of TT bearing No. WB11C5642 as November, 2014 instead of October, 2014. Submission of forged document and false information violates clause 8.2.2.13 of the ITDG and as per Clause 19 of the tender conditions the Oil Company was entitled to terminate the entire contract and black list all fourteen TTs.

9. On the other hand, Mr. Saha Roy contends penalties envisaged in the aforesaid clauses are of graded nature. Clauses 8.2.2.2(d) of ITDG unequivocally states, irregular reporting at the loading station of a TT would entail its blacklisting only and not termination of the entire agreement. Similarly, as per clause 8.2.2.13 of ITDG submission of forged documents/false information to enter into a contract would amount to blacklisting of the TT concerned and not the entire fleet.

10. Appellant authority could not place on record any material to show *mala fide* complicity of the contractor would justify the aggravated penalty prescribed in Clause 8.2.2 of ITDG.

Relevant Clauses:-

11. For better appreciation of the issues, relevant clauses of the tender documents, agreement and ITDG are set out below:-

Tender Conditions:

"*19. If the contract is awarded and case of false/forged information/ document is detected subsequent to award of contract, the contract shall be liable to be terminated, all TTs blacklisted on industry basis and IOCL shall be entitled to recover such damages/ losses/ claims/ etc. as the IOCL may undergo. In such cases the Security Deposit (SD) shall also be forfeited.*"

<u>Terms of the Agreement:-</u>

"4.(a) the Tank Trucks listed in the LOA/ Work Order shall be made available to the Company at all times during the Agreement period at the loading location. In case of non/ irregular reporting action will be taken as per as ITDG including blacklisting of TTs/Termination of contract.

(b) If a TT does not report to loading location for loading for a continuous period of 7 days in a calendar month or 10 days cumulative in a calendar month, a penalty of Rs 20,000/- plus applicable GST will be levied by way of auto debit from the transferred bill.

(c) If TT remains non-reported for continuous 90 days, the TT will automatically be removed from contract and a penalty of Rs 2,00,000/- plus applicable GST will be imposed on the carrier by way of auto debit and further action as per ITDG shall be taken.

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15….

Notwithstanding anything to the contrary contained hereinabove, Company reserves the right to terminate this Agreement forthwith upon or at any time after happening of any of the following :-

…

(e) Breach of any of the terms or conditions of this Agreement by the Carrier."

<u>Industry Transport Discipline Guidelines</u>

"8.2.2. Penalties upon detection of malpractice/irregularities

The carrier shall attract penalties for the malpractice/irregularities as given below and the TT mentioned in the following instances shall be suspended/blacklisted along with TT crew. However, an investigation, wherever required, shall be conducted and if the malpractice/irregularity is established then penal actions stipulated as under shall be taken, including blacklisting:-

Clause No.	Type of malpractice / irregularity	Penalty against number of instance		
		First	Second	Third
…	…	…	…	…
8.2.2.2	a) **** b) **** c) **** d) Irregular reporting of TT at loading location without permission of the location.	TT shall be suspended for 3 months	TT shall be blacklisted	…
…	…	…	…	…
8.2.2.13	Entering into Contract based on forged documents/ false information	TT shall be blacklisted.	…	…

During the validity of transportation contract, in the first instance of blacklisting for a Contractor, as per the above provisions, damage of Rs. 1 lakh will be imposed on the Contractor apart from blacklisting of the involved TT. In second instance of blacklisting, a damage of Rs 3 lakhs will be imposed and the involved TT will be blacklisted. In third instance of blacklisting, a damage of Rs. 5 lakhs will be imposed and 25% of the remaining TTs will be blacklisted alongwith the involved TT. In fourth instance, a penalty of Rs. 8 lakhs will be imposed and 50% of remaining TTs will be blacklisted along with involved TT. In case of any further incident of malpractice, the entire fleet will be blacklisted and the SD will be forfeited and the transportation contract will terminated. The percentage of TT blacklisted will be in proportion of own & attached offered and will be rounded off to the higher numerical.

Above damages imposed are in addition to the recovery of the product quantity found short or recovery due to contaminated product involving the cost of product, expenses and losses incurred as determined by the company.

However, in case complicity of the Contractor is established even in first instance of malpractice, the entire fleet will be blacklisted, contract terminated & carrier blacklisted along with forfeiture of SD.

The blacklisting of TTs shall be on Industry basis."

Whether the order of termination and blacklisting is justified?

12. In this backdrop, we need to examine whether impugned order of termination of the entire contract and blacklisting of all 14 TTs was justified. The order of termination is based on two grounds:-

i. Irregular reporting of 10 TTs at various locations since May, 2023;

ii. Use of fake documents and false declaration with regard to month and year of manufacture of TT bearing registration mark WB11C5642.

(i) Irregular Reporting of TTs:-

13. Writ petitioner had been awarded with a work order to place 14 TTs for transportation of bulk petroleum from *Mourigram*. Initially, for one and a half years he placed the TTs regularly. Thereafter, he failed to do so and 10 TTs were temporarily suspended for three months since 20.04.2023. Thereafter, writ petitioner again failed to place the said TTs at various locations as per request of IOCL. Under such circumstances, show-cause notice was issued upon the writ petitioner. By letters dated 15.09.2023 and 07.12.2023 writ petitioner stated the vehicles had become old and due to financial stringency he was unable to immediately repair and replace them. He sought time. Thereafter, by letter dated 09.02.2024 as well as

during oral hearing 03.06.2024 writ petitioner offered to replace the 10 TTs with new vehicles and prayed for time.

14. In this backdrop, the Oil Company terminated the entire contract and blacklisted the entire fleet. Consequence of irregular placing of TTs is spelt out in Clause 4 of the agreement and Clause 8.2.2.2(d) of the ITDG. Clause 4(a) states TTs shall be made available at all times by the contractor to the company at the loading locations. Failure to do so would attract action as per ITDG including the blacklisting of TTs and termination of contract. Sub-Clause (a) provides for imposition of penalty of Rs.20,000/- if a TT does not report for a continuous period of 7 days. Sub-Clause (c) provides for an enhanced penalty of 2 lakhs in the event the TT is not reporting for continuous 90 days. Clause 8.2.2.2(d) of ITDG deals with penalty in respect of irregular reporting of TTs and provides the TT concerned shall be blacklisted.

15. Conjoint reading of the aforesaid Clauses show in the event of irregular reporting of TTs would attract monetary penalty including blacklisting of the TTs concerned. None of these Clauses would permit the Oil Company to terminate the entire contract as a whole and blacklist the entire fleet for non-reporting of one or some of the TTs covered by the said agreement.

16. However, Mr. Nag would seek to trace such power to Clause 15 of the agreement which, inter alia, provides for termination of the agreement as a whole in case of breach of any of its terms and conditions. It is true Clause

15 of the agreement begins with a non-obstante clause and reserves the right of the oil company to terminate the agreement as a consequence of breach of its terms by the carrier. But this clause has to be read harmoniously with other clauses of the agreement particularly Clause 4(b) and (c) and Clause 8.2.2.2(d) of ITDG which specifically deals with the consequences of irregular reporting of TTs and provides for lesser penalty. A proper construction of all the clauses of the agreement would not empower the oil company to terminate the entire agreement for irregular reporting of TTs in all cases. Only in exceptional cases where for cogent reasons the Company comes to a finding that the lesser penalties prescribed in clause 4 of the agreement and clause 8.2.2.2(d) of ITDG may not suffice, the oil company would be justified to resort to terminate the entire agreement under Clause 15 thereof.

17. In the event the Oil Company chooses to resort to the more harsh provision under Clause 15, it is incumbent upon them to state the special and exceptional reasons which had prompted them to resort to the harsher provision over and above the specific penalties prescribed for the breach in question. Perusal of the order shows there is no application of mind to the prescribed graded penalty scheme laid down in Clause 4 of the agreement and Clause 8.2.2.2(d) of ITDG while passing the impugned order of termination of the agreement as a whole and blacklisting the entire fleet. This renders the impugned order vulnerable to judicial review.

(ii) Use of forged document/false declaration in respect of one TT bearing registration mark WB11C5642:-

18. Initially, the show-cause notice called upon the writ petitioner to submit documents to justify the declaration of month and year of manufacture of 7 out of the 14 TTs offered by them. Writ petitioner submitted documents and the Oil Company was satisfied there was no incorrect declaration with regard to 6 of the TTs. However, the month and year of manufacture of one TT bearing registration no. WB11C5642 was found to be incorrectly made as November, 2011 instead of October 2014 as appearing from registration office records. As per Clause 8.2.2.13 of ITDG, this would justify the blacklisting of this TT only. However, Mr. Nag relies on a sub-para in Clause 8.2.2.2 which, inter alia, provides in case complicity of the contractor is established even in first instance of malpractice, entire fleet shall be blacklisted, contract terminated and security deposit forfeited. He also relies on Clause 19 of the tender conditions which, inter alia, provides in case false, forged information is detected subsequent to award of contract, the contract is liable to be terminated.

19. Aforesaid clauses make it amply clear mere submission of a forged/false information with regard to one or some of the TTs would not *ipso facto* lead to termination of the contract as a whole or blacklisting of the entire fleet. It must be borne in mind that an order of blacklisting on an industry basis would tantamount to a commercial death of the contractor. This extreme penalty is reserved for those egregious cases where the Oil Company is

able to establish complicity of the contractor in the malpractice. The word 'complicity'[1] means active connivance or participation in wrong doing or a crime. That is to say, fake document or false information relied upon by the contractor must be used with the requisite intention to deceive or defraud the Oil Company and thereby gain unfair advantage.

20. In the present case, the contractor had submitted a fake registration certificate and declared month and year of manufacture of one of the TTs as November, 2014 instead of October, 2014. It is for the Oil Company to establish that this false declaration, if detected, had deceived the company and helped the contractor to gain unfair advantage.

21. Mr. Nag argued the false declaration helped the writ petitioner in offering the batch of TTs on a 1:8 ratio and thereby secure first position. Writ petitioner had offered two trucks in 18 to 24 kilolitres and 16 trucks in 12 to 16 kilolitres category. The offers in the respective categories were based on the capacity of the trucks and not the age of their manufacture. As per the tender conditions under the heading 'Ranking in Lot System', age of manufacture is relevant only when two contractors in Lot 1 (offering trucks in the two categories on a 1:8 ratio) are jointly ranked in the top. It is nobody's case that *Joy Mataji*, the other contractor was ranked at the top along with the writ petitioner.

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[1] Shorter OXFORD English Dictionary, Fifth Edn., O.U Press 2002, 469;
Black's Law Dictionary, Sixth Edn., 285.

22. In this backdrop, incorrect declaration with regard to the month and year of one of the TT's by the writ petitioner did not give any unfair advantage to secure the contract. On the contrary, such declaration, if detected, would visit him with undesirable consequences. In such view of the matter, it belies logic why a prudent businessman would intentionally provide false information with regard to the month and year of manufacture of his TT and expose himself to unnecessary disqualification.

23. The aforesaid factual matrix clearly shows the incorrect declaration with regard to the TT in question was either due to reckless overzealousness without any perceptible benefit to the contractor or sheer negligence on his part. No doubt, this would visit him with the penalty of blacklisting of the TT concerned but cannot transcend to a case of complicity which would entail cancellation of the agreement as a whole and blacklisting of the entire fleet. Respondent authority failed to consider these relevant factors and mechanically cancelled the entire agreement and blacklisted the entire fleet.

24. In the light of the aforesaid facts, we are constrained to observe though the order of termination of the contract and blacklisting of 10 TTs including the one in respect of which false declaration was made is justified, there is no justification for the imposition of the extreme penalty of cancellation of the agreement as a whole, and blacklisting of the entire fleet till 31.12.2026.

Conclusion

25. Accordingly, we modify the impugned order of termination and *en bloc* blacklisting and direct the same shall operate with regard to 10 TTs in question. Writ petitioner shall be permitted to ply 4 TTs as per the agreement.

26. With these directions, appeal and the connected application are disposed of.

27. There shall be no order as to costs.

28. Order is pronounced in open Court in presence of the parties. Parties are at liberty to communicate the gist of the order to the Oil Company for necessary compliance.

29. Photostat certified copy of this judgment, if applied for, be given to the parties on compliance of all formalities.

I agree.

(Gaurang Kanth, J.) **(Joymalya Bagchi, J.)**

SG/as