

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No. 28170 of 2023

**M/s. Ashab Enterprise & Anr.
Vs.**

Hindustan Petroleum Corporation Ltd. & Ors.

For the petitioners : Mr. Debabrata Saha Roy,
Mr. Subhankar Das,
Mr. Neil Basu,
Mr. Sankha Biswas

For the
respondent nos. 1 to 6 : Mr. Kishore Dutta, Ld. Advocate General,
Mr. Biswanath Chatterjee,
Mr. Sobhan Kumar Pathak,
Mr. Soham Krishna Chatterjee

Hearing concluded on : 19.03.2024

Judgment on : 05.04.2024

Sabyasachi Bhattacharyya, J:-

1. The petitioner no. 1 is a partnership firm and the petitioner no. 2 is one of its partners. The firm participated in a tender floated by the respondent no. 1, the Hindustan Petroleum Corporation Ltd. (HPCL), for transportation of bulk petroleum products : MS/HSD and Branded fuels by road from ex-Haldia Terminal.
2. Accordingly, the petitioners, coming out successful in the tender process, were awarded the contract by a provisional Letter of Acceptance (LOA) issued by the respondents on February 11, 2019, the contractual period being specified at March 1, 2019 to February 29, 2024.

3. Accordingly, an agreement was entered into between the parties on February 20, 2019.
4. On November 30, 2022, one of the Tank Trucks (TTs) of the petitioners bearing no. WB781657 was loaded with 4000 LT Gasohol and 8000 LT HSD from ex-Haldia Terminal for being supplied to one M/s. Bisnupriya Filling Station in Paschim Medinipur.
5. The end customer, M/s. Bisnupriya, according to the petitioners, took a sample from the petitioners' TT and the products were thereafter unloaded, after which the TT returned to the ex-Haldia Terminal. M/s. Bisnupriya sold out the products to their customers according to the petitioners.
6. After about one and a half months on January 9, 2023 a sample test was conducted without prior intimation to the petitioners and in their absence. Thereafter a show-cause notice was issued on February 1, 2023 from which the petitioners learnt that the samples had failed the test, not meeting the required specifications. The petitioners gave a reply to the show-cause notice. Another show-cause notice was issued on March 24, 2023. Ultimately on May 15, 2023, the particular TT was blacklisted by HPCL. However, the remaining ten TTs of the petitioners remained in service and continued to transport petroleum products.
7. On August 30, 2023, another TT bearing no. WB11E1792 was loaded from ex-Haldia Terminal with 24 KL of HSD-BSVI for supply to one M/s. Bhubaneswari Coal Mines Limited.

- 8.** On September 9, 2023, samples were collected from the TT for laboratory test on the request of the customer. However, the sample test was done on September 14, 2023 without prior intimation to the petitioners and in their absence. The report of the said test indicated that the samples did not meet the specifications and failed. On September 28, 2023 a show-cause notice was issued, to which the petitioners made a representation praying for ten days' time for submitting reply and ultimately submitted such reply on October 9, 2023 indicating that the laboratory test was conducted in the absence of the petitioners and requesting a re-test in presence of the petitioners.
- 9.** On October 10, 2023 another show-cause notice was issued to which a further reply was given reiterating the petitioners' request to conduct laboratory test in their presence.
- 10.** On October 17, 2023, the petitioners were directed to be present and a re-sampling test was conducted on November 2, 2023. It is argued that the TT Retention Sample was used for the test, which was held in presence of the petitioners. However, the supply location sample was not tested. The petitioners were informed via e-mail on November 4, 2023 that the TT sample had failed the test.
- 11.** Despite further representations from the end of the petitioners, by an Order dated November 21, 2023, the HPCL terminated the agreement of the petitioners dated February 20, 2019 and blacklisted all the remaining ten TTs on industry basis and also imposed penalty/fine on the allegation that there was a second default on the part of the

petitioners in meeting the specified standards, which confers a right on the respondents as per agreement to blacklist the petitioners after terminating the contract.

- 12.** Learned counsel for the petitioners argues that regarding the first proceedings in respect of the single TT for the incident dated November 30, 2022, all the laboratory tests were held in the absence of the petitioners. It is further contended that the test was done two months after collection, which is contrary to Clause 2.10 of the Marketing Discipline Guidelines (MDG) dated January 8, 2013, governing retail outlet dealership/superior kerosene oil dealership. It is further argued that as per Clause 4.52 of the tender, a Marker Test had to be done in the presence of the transporter, which requirement was flouted in the present case.
- 13.** With regard to the second instance of blacklisting and termination of the petitioners' contract, it is argued that the premise of the same was the sample tests which did not fulfill the relevant criteria of the MDG as well as the Oil Industry Transport Discipline Guidelines (TDG).
- 14.** As per Clauses 4.3.1 and 4.3.2 of the TDG and Clauses 2.1, 2.2, 2.2.1 and 2.2.2 of the MDG, at the time of loading of petroleum products, the samples taken from the container at the supply location shall be kept with seal and signature. In terms of Clause 4.4 of the TDG and Clause 2.5 of the MDG, all samples are to be tested in the laboratory. Clause 4.5.2 of the TDG and Clause 2.5(G) of the MDG provide that the sample should be tested in the laboratory in presence of the oil company representative, representative of the transporter and the

customer. It is reiterated that in the first proceeding, no prior notice was given and the sample test was held more than two months after, which is contrary to Clause 2.10 of the MDG which stipulates that all samples should reach the laboratory preferably within 10 days from the date of drawal and the laboratory test should be completed preferably within the next 15 days. The results are to be communicated preferably within the next five days from the receipt of the test report by the oil company.

- 15.** In the second proceeding, it is argued, laboratory test was conducted on September 14, 2023 only in respect of a single TT behind the back of the petitioners. It is argued that the show-cause notices did not disclose that any supply location sample had been tested.
- 16.** It is next contended that if the sample taken from the TT or at the point of delivery fails, in terms of Clause 4.4 of the TDG, the supply location sample has to be tested, which was not done here.
- 17.** It is next contended that whereas the product was loaded on August 30, 2023, the supply location sample was taken on August 29, 2023, that is, a day before. The supply challan shows that the product was loaded on August 30, 2023. Such discrepancy, it is argued, remains unexplained.
- 18.** Insofar as the sample drawn on September 9, 2023 is concerned, the same was tested between 11th and 14th of September, 2023 but behind the back of the petitioners. But on the other hand, the sample which was tested subsequently in presence of the petitioners was drawn on November 2, 2023 behind the back of the petitioners. As such, the

norms set out in the relevant Guidelines were flouted by the respondents-HPCL, for which the impugned termination and blacklisting should be set aside.

- 19.** In reply, learned senior counsel for the HPCL argues that all the relevant Guidelines and the tender terms were complied with. It is explained that the drawing of sample on August 29, 2023, that is, a day prior to the loading does not vitiate the drawal of the sample as such, since a huge number of trucks are loaded and unloaded from the concerned site and the sample might very well have been drawn the day/night immediately prior to the challans being issued.
- 20.** Insofar as the Marker Test is concerned, learned senior counsel places reliance on Clause 4.5.2 of the agreement which itself clearly stipulates that the Marker Test is currently not applicable and the Clause would be applicable as and when the said test is reintroduced. It is submitted the test has not been introduced throughout the relevant period till now and as such the so-called requirement of ensuring the presence of the transporter at the time of the test is irrelevant, let alone mandatory.
- 21.** It is argued that all the sample tests were duly done in terms of the agreement and the extant Guidelines and due to the variation in quality, the HPCL was fully justified in taking the penal measures.
- 22.** Clause 8 of the agreement provides that the TT caught for having indulged in adulterations/malpractices/ irregularities shall be immediately suspended by the Location-in-Charge. However, an investigation shall be conducted as per procedure and if the

adulteration, etc., is established, penal action, as stipulated thereunder, shall be taken.

- 23.** Clause 8.1 stipulates the penalties in case of adulteration. In respect of carriers with multiple TTs, on the first instance of adulteration during the tenure of the contract, the particular TT shall be blacklisted on industry basis along with TT crew. In case of the second incident of adulteration, the whole contract comprising of all the TTs belonging to the concerned carrier shall be terminated and the concerned carrier and all of their TTs shall be blacklisted on industry basis, which has been precisely done in the present case.
- 24.** Clause 9(a) provides that the carrier shall be responsible for quantity and quality of the products received by him for transportation. Acknowledgment by any member of crew of the TT or authorized person of the carrier by signing on the challan or any other dispatched document would be sufficient proof of acceptance of product quantity and quality by the carrier.
- 25.** Clause 9(c)(ii) stipulates that in case of variation in quality, the company at its discretion may dispose of the contaminated product. Similarly, Clause 14(a) says that the carrier shall be responsible for any damage or loss caused to the company's product or property by negligence or default of its crew, authorized representative, etc. The company's decision in regard of breach of the contract shall be final as per Clause 17(f).

- 26.** It is further contended by learned senior counsel appearing for the respondents that the issues raised involve dispute questions of fact which cannot be gone into by a writ court.
- 27.** Insofar as the objection as to the disputes being factual, it is well-settled that the same, by itself, cannot tie the hands of the writ court in judicial review if arbitrariness, unreasonableness, *mala fides* or palpable illegalities are pointed out in the action of authorities coming under the purview of Article 12 of the Constitution of India. Hence, the issues raised in the writ petition are to be explored to ascertain whether such a case has been made out by the petitioners.
- 28.** At the outset, contrary to what has been submitted by the petitioners, Clause 4.5.2 of the agreement, which provides for testing for marker, clearly mentions that the Marker Test is currently not applicable and the said clause shall be applicable as and when Marker Test is reintroduced. In the teeth of the specific denial of the respondents that the Marker Test has since been reintroduced, which has not been disproved by the petitioners, there cannot be any reason why the respondents should be mandated to give prior notice before collection retained tank-lorry samples and testing the same in terms of Clause 4.5.2.
- 29.** Clause 4.4 provides that if the product fails in the lab test, the corresponding supply location retention samples shall be tested. In the show-cause notice issued by the respondents dated February 1, 2023 annexed at page 217 of the writ petition as well as that dated September 28, 2023 annexed at page 245 of the writ petition, it has

been clearly mentioned that supply location sample was tested and it met all the specifications required. The pre-unloading check at customer premises has also been indicated in the latter show-cause notice.

- 30.** Clause 4.1.5 of the agreement provides that the tank-lorry may be subjected to the Marker Test en route or at the dealer/direct customer location premises. In fact, there is nothing in the agreement between the parties or the tender to preclude a surprise check or a random check of the TT sample at any point of time during transit from the supply location to the retail outlet.
- 31.** The minutes of the meetings between HPCL and the customer, which clearly contains the signature of the TT driver/representative of the petitioner no. 1, clearly shows that on September 9, 2023, the samples were collected in presence of the said representative of the petitioners. The sampling was done duly. The delay of two months as alleged by the respondents is not fatal even as per the MDG Guidelines. Clause 2.5, sub-clause (G) provides for the same and the testing in presence of the transporter after due verification is made directory by using the prefix “preferably”, on the request of the transporter.
- 32.** The time of 10 days and 15 days and thereafter 5 days respectively for sending of the samples, conduct of the test and communication to the transporter is provided for in Clause 2.10 of the said Guidelines which also uses repeatedly the expression “preferably”. Thus, the time of about one and a half months taken by the respondents in completing

the tests was not far off from the 'preferable' timeline stipulated in the Guidelines and cannot be said to be vitiated on such count.

- 33.** In fact, upon the requests of the petitioners, the HPCL re-tested the sample in presence of the representative of the petitioners. It is an admitted position that the second test was done in presence of the petitioners' representative.
- 34.** The petitioners allege that the sample was drawn on November 2, 2023 for such second test behind the back of the petitioners. Such fact, however, is belied by the minutes of the details of the samples collected from TT No. WB11E1792 dated November 2, 2023, which is signed by a representative of the petitioner no. 1 nonetheless. Hence, contrary to the arguments made by the petitioners, one Ranjan Shaw, the representative of the petitioner no.1, was very much present when the sample was drawn and tested. Such retesting denudes the petitioners' argument, that the process of sampling and testing of the same was bad and contrary to the Guidelines and the agreement between the parties, of any efficacy.
- 35.** In fact, a comprehensive perusal of the pleadings of the parties and the annexures to the writ petition itself, read in conjunction with the explanation in the affidavit-in-opposition offered by the respondents, leaves no manner of doubt that there is no discrepancy and irregularity on the part of the respondents in collecting the samples and conducting the tests thereon, which were fully sanctioned by the extant guidelines and the agreement between the parties.

- 36.** Thus, the high tests of arbitrariness or unreasonableness and/or *mala fides* required to invoke Article 226 are not found in the facts of the present case. There is no illegality in the decision-making process of the respondents and as such, the quality of the decision cannot be interfered with by this Court.
- 37.** In the above context, the principle laid down in *ABL International Ltd. and another Vs. Export Credit Guarantee Corporation of India Ltd. and others*, reported at (2004) 3 SCC 553, cited by the petitioners, where it was held that the writ court has jurisdiction to entertain a writ petition involving disputed questions of facts, cannot help the petitioners. The limited scope of such interference, as held in *ABL International Ltd. (supra)*, is not met in the present case, since no arbitrary action on the part of the respondents is substantiated by the petitioners.
- 38.** It is well-settled that alternative remedy need not be an absolute bar if the tests of Article 226 are met, as held in *Harbanslal Sahnia and another Vs. Indian Oil Corpon. Ltd. and others*, reported at (2003) 2 SCC 107 and the plethora of other judgments cited by the petitioners on such proposition. The difficulty for the petitioners is not the availability of an alternative remedy, which is also found in the arbitration clause in the agreement concerned, but that the petitioners have failed to make out the high test justifying interference under Article 226 of the Constitution of India.
- 39.** Hence, on the facts of the case, one need not enter into a fact-finding exercise since on the face of the records no case of arbitrariness has

been made out by the petitioners. In fact, in *Unitech Limited and others Vs. Telangana State Industrial Infrastructure Corporation (TSIIC) and others*, reported at (2021) 16 SCC 35, the Supreme Court put in a word of caution that the plenary power under Article 226 must be used with circumspection when other remedies have been provided by contract, although as a matter of principle, Article 226 is not excluded even in contractual matters.

40. Thus, on a comprehensive consideration of the arguments of the parties and assessment of the judgments cited, I cannot convince myself that the petitioners have made out a case for interference under Article 226 of the Constitution of India.
41. Accordingly, WPA No. 28170 of 2023 is dismissed on contest without, however, any order as to costs.
42. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)