

(2011) 05 AHC CK 0053
In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 464 (M/B) of 2011

Atul Kumar Jain

APPELLANT

Vs

Hindustan Petroleum Corporation Ltd. and Others

RESPONDENT

Date of Decision : 31-05-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9

Citation : (2011) 10 ADJ 900

Hon'ble Judges : Ritu Raj Awasthi, J; Pradeep Kant, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Hon'ble Pradeep Kant, J.—Heard learned counsel for the petitioner Sri O.P. Srivastava and Sri Manish Jauhari, Sri Umesh Chandra, learned Senior Advocate assisted by Sri Sunil Sharma for the respondents.

2. This writ petition challenges the action of the respondent-Corporation (hereinafter referred to as "the Corporation"), showing all the tank trucks owned by the petitioner as black-listed on industry basis on the website, though no order of black-listing admittedly has been passed against these tank trucks or against the Carrier, namely, the transporter (petitioner).

3. Relevant facts for considering the present controversy are as under:

The petitioner had entered into a bulk petroleum products road transport agreement dated 30.3.2009 with the Corporation. The petitioner in the aforesaid agreement had provided five tank trucks bearing Registration numbers as (1) UP-78 AT 5614; (2) UP-44 C7767; (3) UP-78T9860; (4) UP-32 CZ 0997; and (5) UP-78 AN 7953.

4. While finalizing the tender of another depot at Barauni in Bihar, It was allegedly detected that another truck with the same Registration No. UP-78 AT 5614 was entered under the contract in the name of M/s. Maa Vindhya Vasini

Services.

5. Since the two vehicles cannot have the same registration number, therefore, it was noticed by the Corporation that one of the trucks is not the genuine tank truck. The Corporation, therefore, carried out some investigations with the bankers etc., which revealed that the petitioner was not the owner of the genuine Tank Truck No. UP-78 AT 5614 and, therefore, the information furnished by him about the said tank truck was false.

6. The conduct of the petitioner since was in violation of the provisions of the Transportation Agreement and the Transport Discipline Guidelines (hereinafter referred to as "TDG"), his agreement was terminated after issuing a show-cause notice dated 2.12.2009, vide order dated 31.12.2009. The reply submitted by the petitioner on 10.12.2009 to the show-cause notice was considered before terminating the agreement.

7. The petitioner preferred a writ petition bearing No. 206 (MB) of 2010 challenging the order of termination, which was dismissed by the Court on 12.1.2010, giving liberty to the petitioner to approach for arbitration, as per the terms of the agreement. The petitioner, thereafter, approached for the arbitration and a Sole Arbitrator was appointed by the Corporation on 12.3.2010. In these proceedings, a reference was made for adjudicating the dispute between the parties in regard to the order of termination in view of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Arbitration Act"). In the meantime, the Corporation stopped the operations of the trucks under the contract in view of the order of termination, aggrieved by which, the petitioner moved an application under Section-9 of the Arbitration Act, which was registered as Regular Suit No. 16 of 2010, in re: Atul Kumar Jain v. Hindustan Petroleum Corporation Ltd. and others.

8. The learned District Judge Lucknow, vide order dated 22.5.2010 allowed the petitioner to operate the tank trucks under the contract, till the passing of the award by the Arbitrator.

9. The order passed by the learned District Judge became the subject-matter of challenge in R.A.F.O. No. 728 of 2010 in re: M/s. Hindustan Petroleum Corporation Ltd. v. Atul Kumar Jain, wherein no interference was made by the Court, but affirmed the order passed by the learned District Judge, with the direction that the arbitration proceedings be concluded within two months. As a result of the aforesaid directives, the petitioner was allowed to operate all the five tank trucks under the contract, for the period given therein, during which period, his term of the contract ended and thus, though he was allowed to carry on the transportation work, till the term of his contract, but he has not been allowed to continue thereafter.

10. After the termination of the agreement, all the tank trucks owned by the petitioner were shown as black-listed on industry basis on the website in accordance with TDG, which forms part of the agreement dated 30.3.2009.

On the plea of the petitioner that, on mere termination of the contract by the Corporation, all the five tank trucks have been shown to be black-listed on industry basis on the website by the Corporation, though no order of black-listing has been passed, we inquired the learned counsel for the Corporation Sri Sunil Sharma about the factual position as to whether any order of black-listing has been passed separately or otherwise, to which he responded by saying that there is no order of black-listing passed separately. He further clarified that it was only because of the fact that the contract was terminated vide order dated 31.12.2009, therefore, in terms of the agreement, the petitioner firm was being treated as black-listed, and for that matter, it has been put on the website as such.

11. Submission in nutshell, is that, as a consequence of termination of the contract, the firm stands black-listed on industry basis.

12. The statement of the learned counsel for Corporation aforesaid thus, establishes beyond doubt that but for the order of termination of the agreement, no order of black-listing was passed or has been passed, but all the tank trucks of the petitioner are being treated as black-listed on industry basis, and for that matter, the same has been placed on the website also. The result of such placement of all the five tank trucks on industry basis is that, these tank trucks cannot be allowed to operate with any other Corporation, as they stand blacklisted for all purposes.

This Court framed questions for consideration, which can be summarized as under:

(1) In terms of Clause 8.2.2.2,7 of the TDG, which form part of the agreement, will there be automatic black-listing on termination of agreement, requiring no order of black-listing to be passed, either along with the termination order or separately;

(2) whether black-listing can be inferred on termination of the contract, as per the terms of the agreement, which action is taken under Clause-17 of the agreement and in the instant case has been taken under its sub-clause (d) and (e), including Clause-5 of the undertaking submitted by the petitioner;

(3) whether black-listing can be done without affording any opportunity and giving notice to the person concerned to show-cause as to why Carrier and/or tank trucks be not black-listed; and lastly, if the action of the Corporation, showing all the tank trucks of the petitioner as black-listed on industry basis on the website in the absence of any order of black-listing being passed is found to be arbitrary and against the terms of the agreement as well as TDG, which has resulted into loss to his business and reputation, then why-appropriate damages be not awarded to the petitioner.

13. Sri Umesh Chandra, learned Senior Advocate, appearing for the Corporation has vehemently urged that the Corporation has committed no illegality or

infirmity in showing all the tank trucks of the petitioner as black-listed on industry basis on the website, which is the natural consequence of termination of his agreement. His argument in other words, is that once a notice has been issued requiring the petitioner to show-cause as to why his agreement be not terminated on the grounds given therein, no further notice was required, requiring him to put his defense against the order of black-listing, as no separate order of black-listing was required to be passed, the black-listing being the natural corollary of termination of the contract.

14. Sri O.P. Srivastava, learned counsel for the petitioner, in response, urged that the black-listing cannot be inferred merely on the passing of the order of termination of the agreement, as it requires an order to be passed specifically for the purpose. He further submitted that before passing an order of black-listing, a notice necessarily has to be issued calling upon explanation and informing the petitioner as to why all the tank trucks be not black-listed.

15. The pleadings on record and the arguments raised from both the sides do establish that no order of black-listing was passed by the Corporation nor any notice for black-listing all the tank trucks was ever issued to the petitioner.

16. The only notice which was issued, was regarding the termination of agreement and the only order, which has been passed is that of termination of the agreement and nothing beyond that.

17. The fact of giving wrong information regarding one truck is being disputed by the petitioner and the said matter is under reference of the arbitration, which is still pending.

18. We thus, do not find it appropriate to comment upon the merit of the aforesaid claim of either of the parties, which is the subject-matter of arbitration.

19. It is also admitted to both the parties that after the passing of the order of termination of agreement, when the tank trucks of the petitioner were stopped from being carrying on the transportation, the petitioner approached u/s 9 of the Arbitration Act before the learned District Judge, where he was allowed to continue with the tank trucks, which order was upheld by the High Court in First Appeal From Order, preferred by the Corporation, as a consequence thereof, the petitioner was allowed to operate all the tank trucks under the contract.

20. The order of termination of the agreement could not thus be given effect to, for the entire period of contract, though it is a different matter that thereafter no contract has been given and the petitioner could not get the contract anywhere else, in any other Corporation because of the placement on the website, showing all the tank trucks black-listed on industry basis.

21. In regard to the plea of the respondent-Corporation that no order of blacklisting was needed to be passed and it is automatic black-listing on termination of the agreement, it would be of some advantage to put the relevant provisions of the agreement as well as TDG, on which reliance has been placed

by the Corporation.

Clause 17 of the agreement and in particular sub-clause (d) and (e) reads as under:

17. This Agreement would be valid for period of two years w.e.f. 1.10.2008 with option at the sole discretion of Company to extend the same up to one year on same terms and conditions. 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.

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

(d) If any of the information submitted by the Carrier in the tender is found incorrect at any time.

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

TDG, which is in fact, Industry Transport Discipline Guidelines, lay down many dos and don'ts for the Carrier and its tank trucks, of which, reliance is being placed upon Clause 8.2.2.2, which reads as under:

8.2.2.2. The carrier shall attract penalties for the malpractice/irregularities as given below and the TT mentioned in the following instances shall be along with TT crew. However, an investigation shall be conducted and if the malpractice/irregularity is established then penal action stipulated as under shall be taken:

SR. NO.

TYPE OF MALPRACTICE/ IRREGULARITY

NUMBER OF MALPRACTICE/ IRREGULARITY

First

Second

Third

6.2.2.2.1

Polluting environment due to product spillage from tilting or leaky vehicles on road, in case of accident/unsafe driving.

TT shall be suspended for one month.

TT shall be black-listed on Industry basis.

8.2.2.2.2

In case of accident involving injury or damages to facilities at the work place or accident involving injury during transportation on the road.

TT shall be suspended for one month.

TT shall be suspended for three month.

TT shall be black-listed on industry basis.

8.2.2.2.3

Fatal accident resulting in death at the work place.

TT shall be black-listed on industry basis.

8.2.2.2.4

Fatal accident resulting in death on the road.

TT shall be suspended for six month.

TT shall be black-listed on industry basis.

8.2.2.2.5

Irregularities under W & M Act, Tempering with standard fittings of TT, Unauthorized use of TT for products other than the petroleum products, entering into an agreement for the same TT with other oil companies, not lodging FIR with the Police in case of accident, not informing/submitting accident report to the Oil Company about the accident.

TT shall be black-listed on industry basis.

8.2.2.2.6

Pilferage/ short delivery of product.

The TT shall be black-listed on industry basis.

The TT shall be blacklisted on industry basis.

The carrier shall be black-listed on Industry basis.

8.2.2.2.7

Any act of the carrier/carrier's representative that may be harmful to the good name/ image of the Oil Company, its products or its services.

As decided by the company.

However, if the complicity of the carrier is detected in case of occurrence of any of above malpractice/irregularity, the whole contract comprising of all the TTs belonging to the concerned carrier shall be terminated and the concerned carrier & their all TTs shall be black-listed on industry basis.

22. A perusal of Clause 17 of the agreement leaves no doubt that the company has a right to terminate the agreement by giving two months advance notice without being liable to give any reason or pay any compensation, and there is a

non-abstante clause which gives right to the company to terminate the agreement forthwith upon or at any time after happening of any of the following:

- (a) If the Carrier, its" proprietor or any partner is adjudicated insolvent or become bankrupt or goes into liquidation whether voluntary or otherwise;
- (b) If attachment in execution of a decree is passed against the Carrier, its proprietor or any of its" partners;
- (c) If road permits or statutory licenses/permissions granted to Carrier/ it's Tank Trucks by transport or any statutory authorities is cancelled or revoked;
- (d) If any of the information submitted by the Carrier in the tender is found incorrect at any time;
- (e) Breach of any of the terms or conditions of this Agreement by the Carrier;
- (f) If the Carrier commits or suffers to be committed any act which in the opinion of the Company whose decision shall be final, is prejudicial to the good name/ image of the Company or its" products or its services;
- (g) If the Carrier causes disruption in transportation of bulk petroleum products. The decision of Company will be final and binding on the Carrier;
- (h) On the death or retirement of proprietor or any of the partners of the Carrier firm. However, in case, Company does not exercise this opinion, the Agreement shall continue as between the Company and surviving/continuing partners of the Carrier. The legal representatives of the deceased partner or the retiring partner himself shall be liable for all the obligation of the carrier incurred up to the date of death or retirement but shall not be entitled to claim from the company any portion of Security Deposit.

Company shall account for Security Deposit to the surviving or continuing partners. The death or retirement of any partners shall be notified by the Carriers to the Company in writing within 24 hours of such death or retirement

23. The Corporation in the instant case, has exercised its power under the non-abstante clause aforesaid on finding that the information submitted by the Carrier (petitioner) in the tender was found incorrect, and that it was breach of the terms and conditions of the agreement by the Carrier.

24. The Corporation thus, has not exercised its power under the general power of Clause 17, which authorizes the Corporation to terminate the contract without giving any reason or pay any compensation after giving two months notice. Power has been exercised by the Corporation under sub-clause (d) and (e).

As a result of the aforesaid alleged incorrect information being submitted by the petitioner with respect to one tank truck, a show-cause notice was issued to the petitioner to show-cause as to why his agreement be not terminated and, thereafter, on considering his reply, the order of termination of his agreement was passed.

The challenge to the aforesaid order of termination before the High Court failed, as the petitioner was given liberty to seek remedy under the arbitration clause of the agreement, which he has chosen to avail and as already observed, the matter is pending before the Sole Arbitrator.

25. In the entire agreement aforesaid and in particular Clause 17, there is no whisper that on termination of the agreement, the Carrier and/or the tank trucks would stand black-listed or would be deemed to be black-listed. In fact, this agreement entered into between the parties, but for the TDG annexed thereto, does not say anything about the black-listing of the Carrier and/or tank trucks for breach of the terms of the agreement.

The plea, therefore, that mere termination of the agreement would entail the consequence of black-listing without further action being taken in this regard, does not flow from the transportation agreement itself.

True, black-listing can be ordered in terms of the TDG which forms part of the aforesaid agreement and, therefore, it cannot be said that if there is a breach of the terms of the agreement by the Carrier and/or any information given by him is found to be incorrect, then the only course open to the Corporation is to terminate the agreement and not to blacklist. The black-listing can well be ordered in terms of the TDG and it also cannot be said that it does not form part of the agreement, but the relevant clause of the TDG has to be taken into consideration for blacklisting the Carrier and/or tank trucks.

26. A perusal of the TDG which has been quoted above, shows that for given breaches, specific penalty has been proposed and provided.

Black-listing thus, is a penalty, which can be imposed, if the Carrier is found guilty of malpractice/irregularity, as given in the chart aforesaid.

27. Learned counsel for the Corporation has very clearly and very specifically stated that the petitioner was not found guilty of any malpractice/irregularity, as given in Clauses 8.2.2.2.1 to 8.2.2.2.6, but it is only Clause 8.2.2.2.7, which stands attracted and was made applicable in this case.

The aforesaid clause says that "if any act of the Carrier/Carrier's representative is harmful to the good name/image of the Oil Company, its products or its services, then penalty can be imposed, "as may be decided by the Company"."

28. In other clauses, referred to above, different penalties have been provided for first, second and third breach/malpractice/irregularity. It has been specifically mentioned therein that the TT (tank trucks) shall be black-listed on industry basis, either for a given period or otherwise, may be permanently. But so far Clause 8.2.2.2.7 is concerned, it does not speak about black-listing at all, but only says that "if any act of the Carrier/Carrier's representative is harmful to the good name/ image of the Oil Company, its products or its services, then penalty can be imposed, as may be decided by the Company"

29. Further, the aforesaid provisions of the TDG give power to the Corporation to terminate the whole contract comprising of all the tank trucks belonging to the concerned Carrier and to blacklist the Carrier & their all tank trucks on industry basis, in case of occurrence of any of malpractice/irregularity, as given in the chart aforesaid.

30. A conjoint reading of the aforesaid Clause 8.2.2.2.7 read with Para below therein, referred to above, makes it clear that if any act of the Carrier/Carrier's representative is found to be harmful to the good name/image of the Oil Company, its products or its services, then action can be taken on detection of such malpractice/irregularity, for terminating the entire contract comprising of all the tank trucks, and also to blacklist all the tank trucks on industry basis. This penalty has to be imposed on a decision being taken by the Company.

Two penalties thus, have been provided under the aforesaid clause, namely, termination of the contract and to blacklist the concerned Carrier and their all tank trucks, as per the decision of the Company.

The phrase "concerned carrier & their all TTs shall be black-listed on industry basis" falling after the words "shall be terminated" have to be given their full meaning. It authorizes the Corporation, not only to terminate the contract on detection of any of the malpractice/irregularity given therein, but also to blacklist the Carrier and/or all its TTs. This means that merely passing an order of termination of the contract would not automatically mean black-listing, unless an order of blacklisting of the Carrier and/or all its TTs is passed by the Company. The words "shall be black-listed" means that there has to be an order of black-listing, which in the instant case, has not been passed. The words "shall be terminated" speak of termination of the agreement and the words "and their all TTs shall be black-listed on industry basis" means an order to be passed of "black-listing".

31. The words "concerned carrier shall be terminated" and the words "concerned carrier & their all TTs shall be black-listed", have got some significance. The use of these words exclude any legal fiction or deemed black-listing on termination of the agreement.

32. This provision can also be viewed with another angle, namely, the discretion of the Company, either to terminate and/or blacklist the Carrier and all its TTs at the same time, on occurrence of any of the malpractice/irregularity given in Clauses 8.2.2.2.1, 8.2.2.2.2, 8.2.2.2.3, 8.2.2.2.4, 8.2.2.2.5, 8.2.2.2.6 and 8.2.2.2.7 of the TDG

Clause 8.2.2.2.7 does not necessarily mean that the Company is bound to blacklist the carrier and all its TTs, in case the said clause is attracted. It would be the discretion of the Company to only terminate the contract without passing any order of black-listing or to blacklist it also. Unless an order of black-listing is passed, the Carrier would not know that the Company has black-listed Its TTs on industry basis.

33. It can thus be safely concluded that in the absence of any order of black-listing being passed, the Carrier and/or the tank trucks cannot be treated to be black-listed nor was there any occasion or authority with the Corporation to place the tank trucks of the petitioner as black-listed on industry basis on the website.

Placement of the Carrier and/or the tank trucks as black-listed on industry basis on the website, is an intimation to all concerned, namely, the Oil Companies that a particular Carrier and/or its tank trucks have been black-listed by the Corporation. Placing them on the website as black-listed on industry basis would presume that an order of black-listing has been passed and such a Carrier and/or its TTs has been black-listed. It is only when, the Carrier and/or its tank trucks are black-listed by a specific order, then the said fact is to be brought on the website for knowledge of others.

34. It is the own case of the respondent-Corporation that when an order of black-listing is to be passed under the TDG as a penalty, then a show-cause notice is required to be given before passing an order of black-listing. But in case of termination of agreement, black-listing is a sequel, therefore, a show-cause notice issued prior to the passing of the order of termination will be sufficient and no separate notice for black-listing is required to be given.

The aforesaid plea is self contradictory. TDG specifically provides for blacklisting by way of penalty, which admittedly requires prior notice to be given, but there is no provision of black-listing in the clause of "termination of agreement", therefore, merely because the agreement is terminated, after giving notice, as per the requirement therein, will not result into automatic black-listing.

35. Another argument has been raised by the learned counsel for the Corporation that this petition is not maintainable for the reason that the petitioner has already taken recourse to arbitration clause, where order of termination is under consideration and there the issue of black-listing can also be decided.

In support of his submission, learned counsel for the Corporation has placed reliance upon the judgment of the apex Court in the case of Rashtriya Ispat Nigam Limited and Another Vs. Verma Transport Company, , where the High Court interfered with order of black-listing of the firm on the ground that no notice was issued prior to the passing of the order" of black-listing, whereas in fact, no order of black-listing was passed but only show-cause notice was issued and the final decision was yet to be taken. The apex Court found that such a dispute could have been raised in the arbitration proceedings also.

36. The aforesaid was a case where the High Court interfered with the order of black-listing on the ground that no notice was issued before passing the order of black-listing though, in fact, no order of black-listing was passed, whereas in the instant case, there is no notice of black-listing nor any order of black-listing has been passed, so as to raise the dispute before the Arbitrator but even in the absence of any order of black-listing, the firm has been shown blacklisted on the website on industry basis apparently on misconstruing the provisions of the

agreement and T.D.S., therefore, the present petition would be maintainable.

37. In the instant case, no steps have been taken by the Corporation either of issuing notice for black-listing or any order of black-listing has been passed, therefore, such an act of the Corporation does not fall within the terms of the agreement or under the TDG which forms part of the agreement.

38. The petitioner cannot be made to suffer for such an act, where no order of black-listing has been passed and the petitioner's all the tank trucks have been shown as black-listed on industry basis on the website.

Before parting, we would like to deal with the plea of damages to the petitioner for making his image bad in the eyes of the Oil Companies, and for loss of reputation. Learned counsel for the respondents has strenuously urged that there is no foundation in the writ petition, so as to infer that the petitioner had ever applied for the contract before any other firm and he was refused the contract because of the aforesaid placement on the website, but in the counter-affidavit filed by the Corporation itself, in Para-11, it has been specifically stated that on stay order being granted by the learned District Judge, the display of black-listing was removed from the portal w.e.f. 15.7.2010, which continued to be so, till the term of the contract expired on 30.9.2010, therefore, this Court leaves the aforesaid issue open with liberty to the petitioner to seek damages; if permissible in law, by approaching the appropriate forum.

39. We have already taken into consideration the terms of the agreement and the TDG and we fail to find any such clause in the said agreement where any provision of black-listing has been provided. It is only under the penalty clause of TDG that the Carrier and/or its tank trucks can be black-listed. In fact, it is the respondent-Corporation's case that the order of black-listing has been passed under Clause 8.2.2.2.7 of the TDG and, therefore, the plea aforesaid that the black-listing envisages under two circumstances viz. (i) as a natural consequence of termination of agreement, as per the terms of the agreement given in Clause 17 and (ii) by way of penalty as given in TDG cannot be accepted nor does it flow from the aforesaid documents/agreements. In other words, there is no provision under the agreement, to treat the Carrier and its tank trucks, black-listed, as termination of his agreement/contract automatically, unless an order of blacklisting is passed by way of penalty. Termination of agreement is not black-listing. In fact there is no provision of black-listing in the agreement but for in the penalty clause of TDG, which also forms part.

40. Black-listing can be done only under Clause 8.2.2.2 of the TDG in the given circumstances and in the manner provided therein, the same having not been followed, the Carrier (petitioner) and its tank trucks cannot be treated to be black-listed.

41. For the reasons aforesaid, the respondents are restrained from treating the petitioner and its tank trucks as black-listed on industry basis nor the same would be displayed as such, on the website henceforth.

The writ petition is allowed.