IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE SUJOY PAUL

&

HON'BLE SHRI JUSTICE PRAKASH CHANDRA GUPTA

ON THE 24th OF AUGUST, 2022

ARBITRATION APPEAL No. 56 of 2022

Between:-

M/S ROYAL SALES AND SERVICE THROUGH PROPRIETOR MANJU AGRAWAL W/O SHRI VIRENDRA KUMAR AGRAWAL AGED ABOUT 52 YEARS OCCUPATION BUSINESS A.B. ROAD RUTHIYAHI DISTT. GUNA PRESENTLY AT BHOPAL (MADHYA PRADESH)

.....APPELLANT

(BY Ms. JUNE CHOUDHARY - SENIOR ADVOCATE WITH Ms. JAYALAKSHMI AIYER - ADVOCATE)

AND

1 AMIT KUMAR GADODIYA CHIEF REGIONAL MANAGER (RETAIL) HINDUSTAN PETROLEUM CORPORATION LTD. KAPAS BHAWAN, RAISE COURSE ROAD, INDORE (MADHYA PRADESH)

2 YESHPAL ANEJA, D.G.M. (MANGLIYA DEPOT) HINDUSTAN PETROLEUM

CORPORATION LTD. MANGLIYA, INDORE (MADHYA PRADESH)

L.S. RAMTEKE, CHIEF REGIONAL MANAGER HINDUSTAN
3 PETROLEUM CORPORATION LTD. REGIONAL OFFICE, GAUTAM NAGAR, BHOPAL (MADHYA PRADESH)

.....RESPONDENTS

(BY SHRI NAVEEN KUMAR SALUNKE - ADVOCATE)

This appeal coming on for hearing this day, ***JUSTICE SUJOY PAUL*** *passed the following:*

ORDER

This appeal filed under Section 37 of Arbitration and Reconciliation Act, 1966 (hereinafter referred as 'Arbitration Act') assails the order dated 25.06.2022 whereby the application preferred by the appellant under Section 9 of the Arbitration Act was rejected by the Court below.

2. In short, the admitted facts between the parties are that the appellant is a transporter and having licence and contract of plying 2 Oil Tankers. The terms and conditions to supply the tankers are specifically laid down.

3. The appellant's tankers were suspended by order dated 29.05.2021 (Annexure P/4). The same was followed by show cause notice dated 15.07.2021 (Annexure A/6). In turn, the appellant filed its reply to the show cause notice on 04.08.2021 (Anexure A/7) followed by reminder letter No.1 dated 05.09.2021 (Annexure A/8).

4. By the impugned order dated 07.10.2021 (Annexure A/9) passed by the respondent/Corporation, one Tanker of appellant was

blacklisted and in addition, a damage of Rs.1,00,000/- was also imposed on the appellant.

5. The appellant feeling aggrieved by the suspension order and order of blacklisting, filed the application under Section 9 of the Arbitration Act before the Court below.

6. The respondents upon receiving notices, submitted their reply. The Court below heard the parties, rejected the application by impugned order dated 25.06.2022 which is called in question in the present appeal.

7. Ms. June Choudhary, learned Senior Counsel assisted by Ms. Jayalaxmi Aiyer, learned counsel for the appellant submits that the impugned order of suspension dated 29.05.2021 and order of blacklisting and imposition of damages dated 07.10.2021 are called in question mainly on three counts. *Firstly*, the impugned orders were passed without properly following the principles of natural justice. *Secondly*, the impugned orders are disproportionate and harsh in nature and *thirdly*, the appellant was subjected to hostile discrimination, if his case is tested with the case of another dealer namely M/s.Nathmal of Shahdol.

8. To elaborate, learned Senior Counsel submits that the appellant's tankers were suspended and thereafter show cause notices were admittedly issued to him. However, before passing the final order of blacklisting and imposition of damages, the petitioner was not given any personal hearing. For this purpose, the judgment of **S.S. Perumal Vs. The Senior Regional Manager, Hindustan Petroleum Corporation Ltd.** passed by Madras High Court on **22nd July 2016** and judgment of the Supreme Court in **Kulja Industries Ltd. v. Western Telecom Project BSNL, (2014) 14 SCC**

731 were relied upon. Thus, first contention is regarding procedural impropriety in the decision making process.

9. The next submission is that no loss was caused to the corporation because of alleged tampering of one lock of one Tanker of the appellant. Every Tanker has two locks, if one was found tampered, in absence of any material to show that any loss is caused to the corporation, the penalty of blacklisting coupled with damages is harsh and excessive and amounts to imposition of double punishment.

10. Lastly, a comparison is drawn with one M/s. Nathmal Sarogi of Shahdol for which pleadings are mentioned in Para-11 of the application filed under Section 9 of the Act. It is argued that the Court below has committed an error in rejecting the application under Section 9 of the Act.

11. Learned counsel for the Corporation, Shri Naveen Salunke urged that the application under Section 9 itself was not maintainable. Section 9 talks about 'interim measure' whereas the relief claimed in the application under Section 9 clearly shows that the appellant prayed for setting aside the suspension order dated 29.05.2021 and blacklisting order dated 07.10.2021. Although, Court below has not gone into these aspects, the fact remains that the application was not maintainable.

12. On the question of procedural impropriety, learned counsel for the Corporation submits that as per the agreement dated 18.12.2017 and other enabling and governing provisions the Corporation had a right to suspend the operation of Tankers and accordingly, the order dated 29.05.2021 was passed. The appellant was put to notice. After receiving the reply of appellant, wherein it was categorically admitted that tampering of locks had taken place, the locks were sent

to independent expert agency namely M/s. T.U.V. India Pvt. Ltd. The said expert body gave its finding and it was found that one lock no. 8193 was found to be tampered. Accordingly, the relevant Tanker in which said lock existed was blacklisted and as per relevant provision, the damages were also imposed. Since, the relevant provisions further permits that cost of said lock can also be recovered from the appellant, the cost was also duly recovered. The entire action is founded upon the enabling provisions and corporation has not acted beyond its authority, competence or jurisdiction.

13. So far the question of discrimination is concerned, Shri Salunke placed reliance on his reply filed before the Court below and urged that there is no similarity between the case of present appellant and that of M/s Nathmal. In M/s Nathmal's case, the same expert body opined that lock suffered "corrosion" whereas in the appellant's case, lock was "tampered". M/s.Nathmal did not admit that the defect in the lock is because of their mistake. Indeed, the stand of M/s Nathmal was that the problem must have arisen when Tankers were travelling. Thus, both the cases are of different nature.

14. In rejoinder submissions, Ms. Choudhary, learned Senior Counsel has taken pains to submit that case of present appellant and M/s Nathmal is same. The use of word 'corrosion' will not make any difference because ultimately it is 'tampering'.

15. The parties confined their arguments to the extent indicated above.

16. We have heard the parties at length and perused the record.

17. Since before the Court below, the Corporation did not plead, pursue and argue the question of maintainability of application under Section 9 of the Arbitration Act and Court below decided the matter on merits, we are not inclined to deal with the said aspect. The legal

question raised by the appellant will remain open to be decided in an appropriate case.

The principles of natural justice :-

18. The appellant was placed under suspension and said suspension order was followed by the show-cause notices mentioned hereinabove. The appellant, in turn, filed its reply (Annexure A/7) and reminder letter/reply dated 05.09.2021 (Annexure A/8). It is apt to quote the relevant portion of the reply:-

> "Sir, it is pertinent to mention here **that when such type of tempered activity was done by drivers of our consortium TT**, that time was the second hot & critical wave of the Covid-19 period, and most of the people were suffering from this serious diseases and they were fighting/trying to save their lives at any cost."

In the same reply, it is again averred as under :-

> "**Against the sheer negligence and inexcusable offence/act of TT drivers, we have taken strict legal recourses of action** and have lodged an FIR against him before the police station."
>
> **(Emphasis Supplied)**

19. The respondents considered the reply of the appellant and also considered the expert report regarding tampering of lock submitted by M/s TUV India Private Ltd. On the basis of aforesaid, the appellant was blacklisted and damages to the tune of Rs.1,00,000/- was imposed. In addition, cost of lock was also directed to be deposited.

20. So far procedural part is concerned, we do not find any procedural impropriety which vitiates the decision making process.

Moreso, when petitioner did not dispute that the lock was indeed tampered by its drivers. No prejudice is caused to the appellant, if appellant was not given any personal hearing. In personal hearing, appellant would not have been in a position to improve its case after having taken a candid stand in the reply and additional reply that aforesaid tampering activity was done by driver of our consortium. Apart from this, in view of the judgment of Supreme Court in the case of **(Gorkha Security Services Vs. Government (NCT of Delhi) and others) (2014) 9 SCC 105** the personal hearing was not required in a case of blacklisting. The relevant para reads thus :-

> "Thus there is no dispute about the requirement of serving show-cause notice. We may also hasten to add that once the show-cause notice is given and opportunity to reply to the show-cause notice is afforded, **it is not even necessary to give an oral hearing**. The High Court has rightly repudiated the appellant's attempt in finding foul with the impugned order on this ground. Such a contention was specifically repelled in Patel Engg."

The governing provisions also do not provide any kind of personal hearing in the matter of blacklisting in the instant case.

Proportionality of action and discrimination :-

21. The argument of learned Senior Counsel that when no loss is caused and established, the blacklisting and imposition of damages is harsh and excessive on the first blush appears to be attractive but lost much of its shine when examined in the teeth of relevant provisions.

22. As per **Oil Industry Transport Discipline Guidelines (in short 'Guidelines')** which are admittedly binding in this case, the relevant clauses read thus:-

> "3.2.2 Carrier to ensure that the integrity of the security locking system is intact at all times.
> 3.2.3 Carrier shall ensure that the TT is always in locked condition (as per security locking system) including on its return journey except during loading/unloading operation. **Any act of tampering with the security locking system shall be construct as malpractice and action shall be taken against the carrier.**
> **(Emphasis Supplied)**

23. Similarly, clause 8.2.1 has following heading **'Malpractices/ Irregularities' will cover any of the following**- the relevant clauses reads as under:

> **"k**. Tampering with standard fittings of TT including the sealing, security locks, security locking system, calibration, Vehicle Mounted Unit or its fittings/ fixtures.
> **r.** 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."

24. Clause 8.2.2 deals with penalties which can be imposed upon detection of Malpractices/ Irregularities.

Clause 8.2.2.11 reads as under:-

8.2.2.11	**Tampering** with standard fittings of TT including the sealing, security locks, security locking system, Calibration.	**TT shall be blacklisted.**		

25. In the said guidelines, after relevant clauses the following clause was inserted:-

> "During the validity of transportation contract, **in the first instance of blacklisting for a transporter, as per the above provisions, damage of Rs.1 Lakh will be imposed on the Transporter 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 along with 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 be terminated. The percentage of TT blacklisted will be in proportion of own & attached offered and will be rounded off to the higher numerical."
>
> **(Emphasis Supplied)**

26. A careful and conjoint reading of these provisions of guidelines makes it crystal clear that for tampering with standard fitting or security locks, the penalty of blacklisting can be imposed. The clause 8.2.2.2 and 8.2.2.11 in no uncertain terms, give power to the Corporation to blacklist the tanker in the event of tampering of standard fitting and locks. Pertinently, the word employed is 'shall' for the purpose of imposition of punishment of 'blacklisting'.

27. The relevant sentence reads thus:- "*TT shall be blacklisted"*. Thus, the provision is couched in a mandatory language and, therefore, no fault can be found in the action of Corporation in blacklisting one tanker. Apart from this, there exists an enabling provision for imposition of damage of Rs.1 Lakh in the first instance of blacklisting and, therefore, we are unable to persuade ourselves with the line of argument that the blacklisting and imposition of damages amounts to double punishment or extremely

disproportionate in nature. The Corporation exercised its powers well within the four-corners of enabling provisions.

28. So far the question of parity with M/s Nathmal is concerned, we have examined the pleadings of the parties in this regard made before the Court below.

29. In addition, Shri Salunke, learned counsel for the Corporation produced the show-cause notice, dated 17.07.2021, the report of M/s TUV India Private Limited and the final order in the case of M/s Nathmal Saraogi of Shahdol. No doubt, in the show-cause notice allegation of 'tampering' of lock was alleged against the M/s Nathmal, the expert report of independent agency namely TUV India Private Limited shows as under:-

> **"<u>Areas of concern</u>:-**
> 1) Functional inspection of EM lock (Authorized and Unauthorized key) checked and observed authorized key was not opening the EM lock HE 9513. Also rotating of 90º only.
> 2) After sectioning of EM lock, visual inspection was carried out and observed presence of **corroding in the cylinder disc assembly.**
> 3) Cylinder disc assembly found **corroded** thereby preventing functionality of the EM lock HE 9513."
>
> **(Emphasis Supplied)**

30. In view of this, finding given by independent agency, the Corporation came to hold that its a case of 'corrosion' and not of tampering. Thus, we are satisfied with the distinction shown by Shri Salunke between the case of present appellant and that of M/s Nathmal Saraogi.

31. At the cost of repetition, it is noteworthy that appellant expressly admitted that their drivers tampered with the lock whereas there was no such admission in the case of M/s Nathmal Saraogi. We

are therefore unable to hold that appellant was given any step motherly treatment and their cases were similar. It is worth mentioning that cl(r) of 8.2.1 clearly covers the act of carrier's representative and brings it within the ambit of malpractice/irregularity. The Court below rightly based its findings on a Punjab and Haryana High Court judgment in **WP No.21882/2014 (Ravi Oil Carriers Vs. UOI)**, relevant portion of which reads as under :-

> "Therefore, though as per clause 8.2.2.5, the black listing is of the tank truck but in terms of sub clause (a)(c) of clause 9 read with note to 8.2.2, it is the carrier, who is responsible for delivery of the petroleum products to the destination. The petitioner can no take shelter alleging it to be a misconduct of the driver of the Tank Truck or its crew. In term of Clause 9(c) of the Agreement, the carrier i.e. the petitioner, is not permitted to raise any dispute even in case of any misconduct on the part of the crew. Even otherwise, the crew consists of employees of the petitioner all authorized and unauthorized acts of the servant are binding on the employer. <u>The petitioner is vicariously responsible for all the misconducts of its employees.</u> It is only the criminal offence for which employer cannot be vicariously made responsible, but in respect of all civil wrongs, the employer is

> wholly responsible. Therefore, even in terms of unrevised Guidelines, which are admittedly applicable to the petitioner, the penalty of blacklisting of the entire Tank Trucks of the Carrier i.e. the petitioner could be imposed and has been rightly imposed."

32. In view of foregoing analysis, no fault can be found in the impugned order, the appeal sans substance and is hereby **dismissed.**

(SUJOY PAUL)
JUDGE

(PRAKASH CHANDRA GUPTA)
JUDGE