IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.12695 of 2017

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M/s Ganpati Roadways a proprietorship firm having its office at Barauni Oil Refinery, Gate No. 10, Mosadpur, P.O. Tilrath, P.S.- Barauni, District- Begusrai through it's proprietor namely, Ramanuj Singh son of late Satya Narayan Singh Resident of Village- Mosadpur, P.O. Tilrath, P.S. Barauni, District- Begusarai. ... ... Petitioner

Versus

1. The Indian Oil Corporation Ltd. Company incorporated under the Companies Act, 1956 having its registered office at G-9, Ali Yavar Jung Marg, Bandra, (East), Mumbail-400051
2. The General Manager (Operations) Bihar State Office, Indian Oil Corporation (Marketing Division) Lok Nayak Jai Prakash Bhawan Dakbunglow chowk, Patna- 800001
3. The Chief Refinery Coordinator, India Oil Corporation, Barauni Terminal, Begusarai.
4. The Area Sales Officer, Indian Oil Corporation, Muzaffarpur.
5. The Area Sales Officer, Indian Oil Corporation , Saharsa.

... ... Respondents

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Appearance :
For the Petitioner/s : Mr.Gautam Kumar Kejriwal, Advocate
For the Respondent/s : Mr. Ankit Katriar, Advocate

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
C.A.V. JUDGMENT

Date : 25-11-2019

The petitioner in the present case is engaged in transportation of bulk petroleum products. In course of it's business the petitioner participated in a tender floated by the respondents Indian Oil Corporation Limited (hereinafter referred to as 'the Corporation'). In the year 2014 the petitioner got the tender for the transportation work for a period of two years beginning from Ist July, 2014. The contract was extended for a period of one year and as it appears from the statements made in the writ application the contract came to an end on or about Ist of July, 2017.

2. It is the case of the petitioner that suddenly in the month of September, 2016, it was served with a show cause notice bearing Ref. No. BSO/)PS/317/7 dated 19.09.2016 seeking explanation regarding three of the

Tankers, out of 18 Tankers, provided by the petitioner in the contract work. It was alleged that the Tankers bearing registration no. BR09H 6032, BR09J 8032 and BR 09H 8032 while carrying three different consignments under the invoice dated 04.08.2016, 17.08.2016 and 10.09.2016 respectively did not report at their destination being RCD (Saharsha). By another communication dated 22.09.2016, the petitioner received a complaint that Tank Truck ('TT') bearing registration no. BR09M 8032 did not reach the destination RCD (Muzaffarpur) and an explanation was sought for in this regard.

3. It is the case of the petitioner that while the petitioner firm inquired into the matter, in the meantime the authorities of the Corporation at Barauni compelled the petitioner to make payment of the cost of the product carried by the aforesaid four Tank Trucks. The petitioner submits that he paid the amount against the product cost vide Demand Draft no. 531509 dated 28.09.2016 for a sum of Rs. 5 lacs. In this regard the letter written by the petitioner as contained in Annexure '4' to the writ application has been referred to. The petitioner admits that in terms of the prevailing practice at Barauni Terminal of the respondent Corporation as well as in terms of the guidelines, no fresh load could have been given to any Tank Truck which failed in reporting the delivery of previous load at the destination. But the petitioner claims that since he never had any knowledge of non-delivery of product till receiving of the show cause notice dated 19.09.2016, 22.09.2016 and 23.09.2016 from the Corporation, the two Tank Trucks against whom there were allegations of default were placed before the Barauni Terminal of the Corporation which were loaded with fresh product and released for another destination. This was followed until the last show cause notice dated 23.09.2016.

3. It is further stated that the respondent corporation vide its letter No. BJU/OPS/2016-17 dated 04.10.2016 (Annexure '6' to the writ application) once again called for an explanation showing the justification of non-reporting of the Four Tank Trucks at the consumer destination. The petitioner was informed that a sum of Rs. 40,09,833/- is the total cost of the product which was required to be delivered and the non-delivery of the same made the petitioner liable for the payment of the amount. Since the petitioner had paid Rs. 5 lacs only, the respondent Corporation demanded rest of the payment amounting to Rs. 35,09,833/- by 07.10.2016 failing which the petitioner was threatened with termination of the existing transportation agreement and forfeiture of the security deposit as also other actions which may be deemed fit in ITDG/Tender Agreement.

4. In response to the aforesaid letter of the Corporation, the petitioner deposited a demand draft for Rs. 28,90,000/- against the cost of the product and requested the respondent Corporation to deduct the balance amount from his bill for September, 2016. It is the case of the petitioner that upon an exhaustive inquiry, the petitioner learnt about the conspiracy of the respective drivers of the Tank Trucks in diverting the product loads to some other places and that they had disposed of the same for their own benefit. Accordingly, the petitioner lodged a First Information Report vide Barauni (Refinery) P.S. Case No. 377 of 2016 under Sections 406, 420, 467, 468 and 471 of the Indian Penal Code against the concerned drivers. Copy of the FIR lodged by the petitioner has been placed on record as Annexure '8' to the writ application. Thereafter, according to the petitioner, no further correspondence took place and the authorities of the respondent Corporation continued to

avail the services from the petitioner except four Tank Trucks complained of being involved in the alleged non-delivery of the product.

5. It is stated that since the month of January and February, 2017 un-explained deduction from the Bill of the petitioner started taking place and some of the Bills of the petitioner were withheld which were objected to by the petitioner vide letter dated 11.05.2017 (Annexure '9' to the writ application). The petitioner is said to have received a letter dated 23.06.2017 issued under the signature of the respondent no. 2 calling upon the petitioner to appear before him on 29.06.2017 to explain and submit with regard to non-delivery of product at the destination of Saharsa and Muzaffarpur by specified Tankers. By the said letter (Annexure '10' to the writ application) respondent Corporation sought to take action towards black listing of Tank Trucks and imposition of penalty in terms of Clause 8.2.2.8 of the guidelines (Annexure '10' to the writ application).

6. Clause 8.2.2.8 deals with "**Established case of pilferage/non-delivery of product".** By the same letter (Annexure '10'), the respondent Corporation proposed the penalty and black listing of the Tank Trucks. Each of the malpractice has been taken as one after another instance and thereby the non-delivery of goods by Tank Truck No. BR09M -8032 has been taken as 4th instance of non-delivery of product to the customer. It is one of the submissions of the learned counsel for the petitioner that the manner in which the first, second, third and fourth instance have been decided to impose the penalty and black listing are not in accordance with the guidelines and the quantum of punishment has been unduly enhanced by adding the default of one Tank Truck on the default of the another Tank Truck. It is submitted that such additions are completely dehors to the disciplinry guidelines.

7. Mr. Gautam Kejriwal, learned counsel for the petitioner has submitted that it would appear from the contents of the Annexure '10' to the writ application, that although Annexure '10' refers to the reply dated 28.09.2016 of the petitioner but it no where discusses or considers the reply of the petitioner. It is also submitted that in its letter dated 04.10.2016 (Annexure '6'to the writ application) the respondent Corporation had clearly provided that in case of failure of the petitioner to make payment of the rest of the amount the Corporation shall be constrained to recover the same by forfeiting the security amount deposited and thereafter action towards termination, forfeiture and deemed action of ITDG/Tender Agreement shall be taken. Since the petitioner had already made payment, there was no reason for taking any action towards blacklisting of the petitioner's Tank Trucks and imposition of penalty in terms of money. It is submitted that the second part of Clause 8.2.2.2 of 'ITDG' provides for imposition of damages which has been wrongly applied as penalty by the Corporation.

8. It is further submitted that the amount of damages as indicated for 1st, 2nd, 3rd and 4th instance of default are not based on pre-estimation, thus, it is not in fact a liquidated damage. Thus, imposition of penalty by blacklisting of 11 TTs of the petitioner for two years and further imposition of a penalty of Rs. 17 lacs is highly excessive, unjust and improper, thus, in the light of the judgment of the Hon'ble Apex Court in the case of **M/s Kulja Industries Limited v. Chief Gen. Manager, W.T. Proj., BSNL & others** reported in **AIR 2014 Supreme Court page 9,** the impugned order is fit to be set-aside.

9. It is submitted that the petitioner had on receipt of letter contained at Annexure '10' submitted its reply as contained in Annexure '11'

to the writ application. Thereafter, the respondent Corporation issued the impugned letter dated 18.07.2017 (Annexure '12' to the writ application).

10. In the impugned order, after referring to the replies of the petitioner, the respondent Corporation has recorded a finding that the petitioner had voluntarily deposited the amount towards the product loss and also took action against the erring drivers while lodging the FIR but then the respondent Corporation took a view that even considering the submission that the petitioner was not in collusion with the erring drivers, the responsibilities of the drivers' act could not be attributable to anyone else but the petitioner firm. Taking this as an established case of pilferage/non-delivery of product, the respondent Corporation passed order of penalty to black list the Tank Trucks and in fact, what was proposed as penalty in the show cause notice (Annexure '10') has been finally imposed vide order dated 18.07.2017 (Annexure '12'). Eleven Tank Trucks have been black listed and a total penalty of Rs. 17 lacs has been imposed upon the petitioner. The black listing has been done for a period of two years.

11. While assailing the impugned order as contained in Annexure '12' to the writ application, learned counsel for the petitioner has contended as under:

(i) that the respondent Corporation was not justified in passing an order of black listing on 18.07.2017 when the contractual period of three years (with extension) had expired on or about 1st of April, 2017;

(ii) the respondent Corporation had themselves given the petitioner to understand vide Annexure '6' to the writ application vide his letter dated 04.10.2016 that on failure of the petitioner in paying the rest of the amount i.e. Rs. 35,09,833/-, further action towards termination of contract

and forfeiture and deemed under ITDG/Tender Agreement shall be taken. Once the petitioner complied with the direction and paid the rest of the amount within the stipulated period and the same was accepted and the respondent Corporation continued to take work from the petitioner except for loading all those Tank Trucks who had diverted, there was no reason for taking a harsh action of black listing of 11 Tank Trucks by calculating each of the default of one Tank Truck as a default of another Tank Truck and such manner of imposition of penalty is not envisaged in the discipline guidelines (ITDG).

(iii) It is not an established case of pilferage/non-delivery of product and once respondent Corporation itself agrees with the submission of the petitioner that the petitioner firm was not in collusion with the erring drivers, the respondent Corporation would not be justified in attributing the act of non-delivery of product upon the petitioner firm by taking it a case of vicarious liability of the petitioner for the act of the erring drivers. It is submitted that the order of blacklisting has a grave impact on the livelihood of the petitioner, it amounts to causing a civil death to a business entity and such orders cannot be passed without holding proper enquiry and without establishing a case against the petitioner firm.

12. Learned counsel has relied upon the judgment of this Court in the case of **Deepak Kumar Vs.** reported in **2019 (2) BLJ 479** and in the case of **Piyush Kumar (C.W.J.C. No. 12554 of 2019) dated 21.08.2019** to submit that in these two cases this Court has taken a view that black listing on a mere presumption as per specific clause in the agreement is not permissible.

13. It is submitted that in the present case principles of natural justice has not been followed inasmuch as even before considering the reply

of the petitioner the respondent Corporation had proposed the quantum of punishment and it shows that the respondent Corporation had been pre-determined to impose penalty which is disproportionate and have been imposed in a staggered and in a piecemeal manner. It is submitted that unless the complicity of the petitioner firm is established, the order of black listing and imposition of penalty upon the petitioner are not justified.

14. Learned counsel has submitted that in the case of **Bombay Burmah Trading Corporation Vs Mirza Mahomed, 4, cal 116 (PC)** it has been held that the master of a servant can be held answerable for all such acts of his agent which belong to the class of acts for which master has placed that agent to perform. The submission is that unless it is held that the servant has committed the acts or omission incidentally in the course of exercise of his authority as an agent for that class of work, the master of the servant cannot be made liable for the acts of the servant. He has further relied upon the judgment of the Hon'ble Calcutta High Court in the case of **Ishwar Chunder V Satis Chunder, 30, Cal, 207** in which it has been held that the principal or master to an agent would be liable for the wrong done by such agent to third parties in the following circumstances:

(a) The act in question is done on behalf of the principal.

(b) The act done is with an intention of serving the purposes of the principal.

15. Learned counsel has argued on the principle of vicarious liability citing the English decision of **Barwick Vs English Joint-Stock Bank (1867) LR 2Exch 259** and the judgment in the case of **Mclaren Morrison V Verschoyle, 6, CWN, 429.**

16. It is submitted that the discipline guidelines are to be read only in accordance with the law settled by judicial pronouncements and any attempt to apply the guidelines do hors the law would be virtually interfering with the fundamental right of the petitioner to trade and business and thereby to earn its livelihood.

17. It is submitted that clause 8.2.2.8 of ITDG talks of an established case of pilferage/non-delivery of product in which damages are to be imposed in addition to the recovery of product quantity found short or recovery due to contaminated product involving the cost of product, expenses and losses incured as determined by the company. In the same clause it is provided that "…….. in case, complicity of the transporter is established even in first instance of malpractice, the entire fleet will be blacklisted, contract terminated & carrier blacklisted along with forfeiture of SD."

It is submitted that at the outset clause 8.2.2.8 would not be applicable in the present case because it is not an established case of pilferage and non-delivery of product due to complicity of the transporter. For the non-delivery of the product so far as cost of the product is concerned, the same has already been deposited by the petitioner and to that extent there was no issue and the petitioner had taken upon itself the liability for the alleged act and omission of the drivers of the Tank Trucks but blacklisting would be permissible only when the complicity of the transporter is established and in that case even in the first instance the entire fleet will be liable to be blacklisted, contract terminated and carrier blacklisted along with forfeiture of the security deposit.

18. It is further submitted that by the time the writ petition was filed, a Notice Inviting Tender published by the respondent Corporation for

appointment of transporters for a period of five years commencing from 2017 till 2022 was already on way. The petitioner had submitted its bid on 01.07.2017 and it was found technically qualified at the technical bid assessment process. It is submitted that the respondent Corporation had determined the L-1 rate from within the financial bids of the participants and vide mail dated 01.2.2017 called upon the petitioner to offer acceptance of said L-1 rate but the petitioner refused to accept the L-1 rate in response to the mail of the respondent Corporation. It is submitted that the respondent Corporation once again called upon the petitioner to offer acceptance of the second lowest i.e. L-2 rate sorted out from amongst the financial bids and this time the petitioner accepted the L-2 rate. The petitioner was one of the successful bidders in the whole tender process finalized after due scrutiny of the both technical as well as financial bids which consisted of all credentials of the petitioner for the verification of the antecedent and efficiency records. In the final result of the aforesaid tender, the name of the petitioner was removed from the amongst the list of the awarded bidders. It is submitted that the name of the petitioner was removed because of the blacklisting of the Tank Trucks. The petitioner thereafter, filed I. A. No. 3216 of 2018 for a consequential writ or direction upon the respondent Corporation to consider the case of the petitioner for award of the contract of transportation.

STAND OF THE CORPORATION

19. The respondent Corporation has opposed the writ application. It is submitted that the respondent Corporation has taken the impugned action in accordance with the discipline guidelines and before passing the impugned order a personal hearing was given to the petitioner on 06.07.2017. It is submitted that in terms of Clause ‘12’ of the Bulk Petroleum Products Road

Transport Agreement ('R/1' to the counter affidavit), it is the carrier's responsibility for any damage or loss caused to the Corporation's product or property by reliance or defaults of it's TT Crew. It is submitted that the petitioner cannot be allowed to take plea that it has filed an FIR against it's crew and in view of the proved case of irregularities, the impugned action has been taken. The respondent Corporation submits that the impugned action is wholly justified.

20. It is further submitted that in terms of Clause 10 (e) of the agreement ('R/1') it is the responsibility of the carrier to ensure for working of the VMU for tracking system. In the present case, it is not in dispute that the product was not delivered to the consignee. Regarding deductions from the Bills of the petitioner it is submitted that the petitioner had himself requested the IOCL to recover the balance amount of non-delivered product value through the current transportation bill. The IOCL had to recover the non-delivered product value at retail selling price in line with Clause 9 (C) (I) of the Agreement. It is submitted that since the product was never delivered, the IOCL had to deduct the transportation charges which were paid to the petitioner earlier. Accordingly, after adjustment of the amounts arising out of the aforesaid head, the balance penalty amount that remained against the petitioner after deposit of the demand draft was adjusted in his monthly bills. Regarding withholding of Rs. 9 lacs out of the total amount of the current transportation bill of the petitioner it is the stand of the Corporation that the Corporation had put a hold of Rs. 9 lakhs out of the total amount of current transport bill of the petitioner as the investigation was under way regarding blacklisting of the Tank Trucks. Regarding the four stages of malpractice, it is submitted that it has been done in view of clause 8.2.2.8 of the ITDG.

According to the respondent Corporation, all the four instances of the malpractice cannot be clubbed together to be understood as one instance of malpractice and therefore, each of them has to be considered independently. It is submitted that petitioner cannot be absolved on the ground that he had taken action against the erring crew members.

21. In course of argument Mr. Ankit Katriar, learned counsel for the respondent Corporation has relied upon the judgment of the Hon'ble Division Bench of Punjab & Haryana High Court in the case of **Ravi Oil Carries vs. Union of India & Ors.** reported in **MANU/PH/0358/2015** to submit that in the said case the Hon'ble Division Bench has held that the petitioner was vicariously responsible for all misconduct of it's employees except minor offences and that the penalty may be deterrent for other transporters to ensure complete delivery of the petroleum product. The order of blacklisting of the vehicle was held to be valid and the same was not interfered with. Learned counsel has submitted that a special leave petition being SLP No. 20135 of 2015 was preferred before the Hon'ble Supreme Court in which the Hon'ble Dvision Bench Judgment of Punjab & Haryana High Court was challenged but the special leave petition was dismissed.

22. Learned counsel has also relied upon the judgment of the Hon'ble Apex Court in the case of **Municipal Council Neemuch Vs. Mahadeo Real Estate** 2019 SCC Online SC 1215 (Civil Appeal Nos. 7319-7320 of 2019) to submit that the scope of judicial review of an administrative action is very limited and any interference by the High Court would be required only when the impugned decision is found to be vitiated by an apparent error of law.

23. On the issue of vicarious liability, learned counsel relied upon the judgment in the case of **Morris v CW Martin @ Sons Ltd** reported in **(1965) 2 AER 725 (A)** in which it has been held that the defendants as master of his servant would be responsible for his tortious act. It has been further contended that in the case of **United Africa C. Ltd. Vs Saka Owoade (1957) 3 AER 216, PC** the employer was held responsible for an act of the servant of transport contractor.

24. Learned counsel has contended that imposition of penalty for blacklisting of 11 TTs and further imposition of a penalty of Rs. 17 lakhs are in accordance with the disciplinary guidelines and that these decisions would support the contentions of the respondent Corporation.

CONSIDERATION

25. Having heard learned counsel for the parties and upon careful reading of the records, this Court finds that in the present case Clause 8.2.2. which provides for blacklisting of the TTs along with the crew and again provides for imposition of damages have fallen for consideration. Before this Court begins to consider Clause 8.2.2., it would be necessary to produce Clause 8.2.2. in its entirety hereunder:-

> **"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
8.2.2.1	a)Reported non-wearing of retractable seat belt while driving.	TT shall be suspended	TT shall be suspended	TT shall be blacklisted.

	(b)Repetitive / Habitual Over speeding. (c)Driving vehicle without cleaner/helper	for one week	for 3months	
8.2.2.2	(a)Established repetitive un-authorized stoppage en route. (b)Established repetitive un-authorized diversion from specified route. (c)Refusal to carry loads allocated by the location. (d)Irregular reporting of TT at loading location without permission of the location.	TT shall be suspended for 3 months	TT shall be blacklisted	
8.2.2.3	Short delivery of product for established malpractice.	TT shall be blacklisted.		
8.2.2.4	(a)Non-availability/non-functioning of TT fire extinguisher. (b)TT crew found in intoxicated state while on duty. (c)Not wearing uniform.(d)Not wearing PPEs at loading/un-loading locations.	TT shall be suspended for one week.	TT shall be suspended for 3 months.	TT shall be blacklisted.
8.2.2.5	(a)Established tampering/ damaging of VMU. (b)Established disconnection of power/cable of VMU enroute. (c)Removal of VMU from original mounting.	TT shall be blacklisted		
8.2.2.6	Accident at the location leading to injury of persons or damages to the facilities.	TT shall be suspended for 3 months.	TT shall be blacklisted.	
8.2.2.7	Polluting environment due to product spillage from TT.	TT shall be suspended for 3 months.	TT shall be blacklisted.	
8.2.2.8	Established case of pilferage/non-delivery of product.	TT shall be blacklisted.		
8.2.2.9	Fatal accident at the work place.	TT shall be blacklisted.		
8.2.2.10	Irregularities under W&M Act.	TT shall be blacklisted.		
8.2.2.11	Tampering with standard fitting of TT including the sealing, security locks, security locking system, Calibration.	TT shall be blacklisted.		
8.2.2.12	Unauthorized use of TT outside the contract	TT shall be blacklisted.		
8.2.2.13	Entering into contract based on forged documents/false information	TT shall be blacklisted.		
8.2.2.14	Entering into an agreement for the same	TT shall be		

	TT with other oil companies.	blacklisted.		
8.2.2.15	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 blacklisted.		
8.2.2.16	Any act of the carrier/carrier's representative that may be harmful to the good name/image of the Oil Company, it's products or its services.	As decided by the company.		

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 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 be 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 transporter 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.

In the following irregularities, the complicity of the carrier shall be deemed to be existent and the whole contract comprising of all the TTs belonging to the concerned carrier shall be terminated, security deposit forfeited and the concerned carrier & their all TTs shall be blacklisted on Industry basis:

1.False/hidden compartment, unauthorized fittings or alteration in standard fittings affecting Quality and Quantity.
2.Illegal/un-authorised duplicate keys of security locks.
3.Duplicate dip rod/calibration card."

26. It is evident from a reading of Clause 8.2.2. that as far as the provision for blacklisting is concerned, it has been described as the 'Penalties' for the malpractice / irregularities', to be established upon an investigation wherever required.

27. In course of hearing learned counsel for both the parties have addressed this Court on the principles of vicarious liability. While it is the contention of learned counsel for the petitioner that for any unauthorized act of the driver which has not been done for the benefit of the employer, if the Corporation has suffered a loss in terms of money, the petitioner may be held liable for the loss and to that extent the Bulk Petroleum Products Road Transport Agreement as contained in Annexure 'R/1/1' to the counter affidavit takes care of the interest of the respondent Corporation. The stand of the petitioner, however, is that the order of blacklisting and imposition of damages is in the nature of a penal provision and such penal provision may be invoked against the petitioner only when the complicity of the petitioner is established in course of investigation.

28. In the present case, it is submitted that the complicity of the petitioner has not been established, therefore, the respondent Corporation could not have proceeded to blacklist the petitioner and impose damages that too in the manner it has been sought to be done by taking each default as an instance of blacklisting.

29. To this Court, it appears that so far as the vicarious liability of the employer and petitioner on account of loss and damages are concerned, the

same is not in dispute. In fact the petitioner has deposited the cost of product as demanded by the respondent Corporation and the respondent Corporation has realized the non-delivered product value at retail selling price in term with Clause 9(1) (i) of the agreement as contained in Annexure 'R/1/1/' to the counter affidavit. In paragraph '13' of the counter affidavit the respondent Corporation has admitted that they have made an adjustment of the amounts within the bills of the petitioner on those heads and the balance penalty amount that remained against the petitioner after deposit of the demand draft was adjusted in his monthly bills. It is, thus, crystal clear that the respondent Corporation has acted in terms of the agreement and realized the amount as stated above. The petitioner did not challenge the demand raised by the respondent Corporation and has admitted it's liability to make good the loss to the respondent Corporation in terms of agreement for the failure of driver to deliver the product at the destination. Since these are admitted facts, this Court finds no reason to go into the issues of 'vicarious liability' for the present in this case.

30. To this Court, it appears that the second part of the Clause 8.2.2. is required to be read carefully and based on that a view is required to be taken on the impugned order of blacklisting and imposition of damages vide Annexure '12' to the writ application.

31. The second part of Clause 8.2.2 starts with 'during the validity of transportation of contract' and it further talks of first instance of blacklisting, second instance of blacklisting, third instance of blacklisting and 4th instance of blacklisting. A bare reading of those parts show that the disciplinary guidelines envisages blacklisting during the validity of transportation contract. On perusal of the statements made in the writ application and the

counter affidavit no clear statement could be found as to on which date the transportation contract came into effect and what was the last date when it came to an end. In terms of Clause '15' of 'R/1/1' to the counter affidavit the agreement shall be valid for a period of two years from the effective date as given in the LOI/work order with option at the sole discretion of the company to extend the same up to one year on same terms and conditions. In this case the copy of LOI or the work order is not available on the record. Annexure 'R/1/1' which is said to the copy of the agreement does not disclose the date on which it has been signed. In fact the agreement bears signature of the proprietor of the petitioner firm alone. This Court has, however, gathered from the records that the agreement was initially valid for a period of two years from Ist of July, 2014 and thereafter, it was extended for another period of one year in terms of tender conditions. If it is so, the contract between the parties would come to an end on 30th June, 2017.

32. A close reading of second part of Clause 8.2.2. would show that the guideline envisages blacklisting during the validity of transportation contract. Thus, the first question which would arise for consideration is as to whether the impugned order of blacklisting and imposition of damages has been passed during the validity of transportation contract ?

33. A further reading of the said part would lead to a literal interpretation that it talks of Ist instance of blacklisting which, in the opinion of this Court, has been thoroughly misunderstood by the respondent Corporation as it would appear from the impugned order that they have proceeded to pass the order of blacklisting, though for the first time, but have taken four instances of violation of Clause No. 8.2.2.8 of the disciplinary guidelines as four instances of blacklisting. It is well settled that if the parties

to a contract have chosen the terms and conditions of the contract for themselves, the same has to be read in the same terms which the parties understood at the time of making of the documents.

34. To this Court, there is no doubt in it's mind that the second part of Clause 8.2.2 clearly talks of first instance of blacklisting and not the first instance of violation /breach of the contract. It talks of second instance of blacklisting, third instance of blacklisting and fourth instance of blacklisting which have got some significance. A mere breach of the terms of the contract cannot on it's own be taken as an instance of blacklisting. For purpose of blacklisting, a show cause notice is required to be issued to the contractor and after giving him an opportunity of hearing an order of blacklisting is to be passed. If that is not done and the employer chooses to start a blacklisting proceeding only after fourth instance of breach of contract, the order which will be passed by the employer pursuant to the said blacklisting proceeding cannot become 4th instance of blacklisting. It would be only the first instance of blacklisting because prior to that no order of blacklisting has been passed by the employer.

35. To this Court, it appears that the respondent Corporation has taken the default of four different tankers of the petitioner as if those are fourth instance of blacklisting which is wholly incorrect approach on the part of the respondent Corporation. The terms of the disciplinary guidelines have been very specific, the mere default by one tanker cannot become an instance of blacklisting on its own if the employer has not proceeded to take a blacklisting proceeding against the contractor for the default and blacklist the TT after following the procedure.

36. In the present case by taking each default as a separate instance of blacklisting, the respondent Corporation has gone on to add the amount of damages calling the same 'penalty' in the impugned order. Since this court has upon reading of the second part of the Clause 8.2.2 found that it specifically talks of the first, second, third and fourth instance of blacklisting and prior to the passing of the impugned order no earlier order of blacklisting was in existence, it has to be held that the impugned order is the first instance of blacklisting though for default on the part of the four TTs. In the opinion of this Court, the respondent Corporation has completely misunderstood the second part of the Clause 8.2.2 of the guidelines.

37. To elaborate the aforesaid issue, this Court would proceed to take an example. Suppose during the validity of the contract a TT fails to deliver the product, in terms of clause 8.2.2.8 the respondent Corporation could have proceeded to pass an order of blacklisting of that TT and imposition of damage of Rs. 1 lakh being the first instance of blacklisting. This could have been done in addition to recovery of product cost, expenses and losses. Next time for a default on the part of the another TT to deliver the product again the employer could have passed an order of blacklisting in terms of Clause 8.2.2.8 and this would have been the second instance of blacklisting with damage of Rs. 3 lakhs and other consequences, likewise third and fourth instances of blacklisting and damages could have been imposed. But suppose on failure of a TT to deliver the product, the Corporation called upon the Transporter to deposit the product cost, failing which action towards cancellation of contract and forfeiture of security deposit are threatened and on receipt of such communication the transporter deposits the amount, thereafter no proceeding for blacklisting is initiated and no order of

blacklisting is passed. Thereafter, another TT commits default and this time a proceeding for blacklisting is taken up citing the first default as first instance of blacklisting, could it be permissible in terms of Clause 8.2.2. of the guidelines ?

38. In the opinion of this Court, while passing the order of blacklisting after second default it cannot be said to be the second instance of blacklisting for there must exist a first instance of blacklisting and by no stretch of imagination the first default could automatically be treated as first instance of blacklisting. In the present case, it is not in dispute that prior to passing of the impugned order vide Annexure '12' to the writ application there was no actual order of blacklisting against the petitioner.

39. The respondent Corporation has misconstrued the disciplinary guidelines is apparent on a reading of the last paragraph of the impugned order which reads as under:

> "Therefore, for four instances of violation of above Clause No. 8.2.2.8 of the ITDG (i.e. First Instance on 04.08.2016, Second Instance – 17.08.2016, Third Instance – 27.08.2016 and Fourth Instance – 10.09.2016), TTs No. BR09H 6032, BR09J8032, BR09P8032 & BR09M8032 are hereby blacklisted for a period of two years (staring from ----------) and also 25% of balance TTs for third instance and 50% of the balance TTs for the fourth instance i.e. seven more TTs (JH05T6031, JH05V4036, BR09H4621, BR09H4221, BR9E6032, BR9E6031 and BR09H4721) are blacklisted along with the involved TT. Beside that a total penalty of Rs. 1700000/- (Rs. Seventeen Lakhs only) is hereby also imposed which is to be duly realized by the IOCL."

40. This Court finds from the record that the Corporation had floated a fresh tender No. RCC/ERO/37/2017-18/PT-35 with due date for tender submission till 04.07.2017, opening date of tender was on 05.07.2017, till this

time the petitioner was not blacklisted, therefore, the petitioner was allowed to participate in the fresh tender, the technical bid of the petitioner was opened on 18.07.2017 and on the same day the impugned letter as contained in Annexure '12' was issued. In it's reply (Annexure '11' to the writ application) the petitioner made a categorical statement as under:

> "g) In my case it is for the first time that each of my TTs as aforesaid have been alleged of violation of the terms of agreement and as such it could at best be a case of first instance of non-delivery product by each of the TTs and not first, second, third and fourth instance as has been held in the notice under reply. As such there could by no means be a damage/penalty for a sum of Rs. 17.00 lacs imposed against me which renders the entire proceeding liable to be dropped as misconceived."

The aforesaid submission of the petitioner has not been considered while passing the impugned order. To this Court, therefore, it appears that the non-consideration of the submissions of the petitioner and a complete misconstruction of the second part of the disciplinary guidelines have together led to passing of a totally arbitrary order. Imposition of penalty taking the four cases of non-delivery of product as four instances of blacklisting even though there was no earlier order of blacklisting has rendered the impugned order unsustainable and is liable to be set-aside.

41. In case of **M/s Kulja Industries Limited v. Chief Gen. Manager, W.T. Proj., BSNL & others** reported in **AIR 2014 Supreme Court page 9** their Lordships of the Hon'ble Supreme Court while discussing the principles of blacklisting observed that the legal proposition on the subject is settled by a long line of decisions starting from the case of **Erusian Equipment & Chemical Ltd. v. State of West Bengal and Anr.** reported in **(1975) 1 SCC 70** wherein the Hon'ble Apex Court held that

blacklisting has the effect of preventing a person from entering into lawful relationship with the Government for purposes of gains and that the Authority passing any such order was required to give a fair hearing before passing an order blacklisting a certain entity. The order of blacklisting creates a disability and as such their Lordships in **Kulja Industries Ltd.** (supra) held that every action of the of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary. It has been held that where there is an arbitrariness in State action, Article 14 of the Constitution of India springs up and judicial review strikes such an action down. Referring to the judgment of the Hon'ble Supreme Court in the case of **Miss Radha Krishna Agarwal and Ors. v. State of Bihar and Ors.** reported in **AIR 1977 SC 1496** their Lordships reminded that "even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing ……."

42. Their Lordships in the case of **Kulja Industries Ltd.** (Supra) interfered with the punishment imposed upon the appellant-company by way of permanent blacklisting by holding that such permanent debarment for all times to come may sound too harsh and heavy a punishment to be considered reasonable especially when (a) the appellant is supplying bulk of its manufactured products to the respondent-BSNL and (b) the excess amount received by it has already been paid back. Both these considerations are present here. Petitioner is engaged in providing its transportation services and

the respondent Corporation has recovered the entire product cost at the rate of retail seller and expenses etc. From the petitioner.

43. In course of hearing learned counsel for the respondent Corporation has heavily relied upon the judgment of the Hon'ble Punjab & Haryana High Court in the case of **Ravi Oil Carriers** (supra).

44. In the case of **Ravi Oil Carriers** (supra) which had fallen for consideration before the Hon'ble Punjab and Haryana High Court, a clear and categorical finding was that while checking the dip and cross-checking of calibration chart when doubt was raised about the quantity of the product being delivered by the Tank Truck, the dip rod was verified with the calibration chart, it was found that there was large variation in the proof line as stamped. The driver of the Tank Truck was carrying two dip rods i.e. one was stamped by the Weights and Measuring Depot, whereas the second rod was unstamped. A Committee was constituted, which found that the Tank Truck was having one forged dip rod; there was total difference of 180.6 CM from that of the calibration and that there was shortage of 5890 lts. As per calibration chart. In the said case as per the guidelines of Clause 2.3.6 the Corporation claimed damages of Rs. 2.31 Crores. There was no argument before the Hon'ble Punjab and Haryana High Court that the amounts sought to be recovered from the petitioner of the said case was not in the nature of damages. In paragraph '12' of the said judgment their Lordships while rejecting the plea of the petitioner that penalty of blacklisting of the entire Tank Trucks of the Carrier was disproportionate to the misconduct, categorically held inter alia as under:

> "……..the fact that the Tank Truck had two dip rods gives an impression that it was a practice with the crew to hoodwink the Oil Company in respect of quantity of the oil carried and delivered to

> the destination. The fact that the crew of the petitioner has been caught stealing the petroleum product is sufficient to give inference that it can be a practice. Therefore, the Oil Company has claimed damages from the date of last calibration till the date of checking. The petitioner is responsible for proper distribution of public property……..”

45. The contention of learned counsel for the respondent Corporation that the petitioner was vicariously responsible for all misconduct of its employees is acceptable to this Court by holding that if the driver of the carrier fled away with the vehicle and did not deliver the petroleum product at the destination, the proprietor of the carrier shall definitely be liable to pay the cost of the product, damages and may also be liable to suffer penalty. In such circumstance, the damage may be determined either on the general principles governing the proof of ‘damages’ or the ‘liquidated damages’ based on pre-estimation of loss which must be reasonable and within the knowledge of the carrier. In this case, the respondent Corporation has admitted to have realized the cost, expenses etc. It is not their case that the amount of damages incorporated in the second part of Clause 8.2.2 is in the nature of liquidated damages based on pre-estimation. What has been sought to be imposed upon the petitioner is in the nature of ‘penalty’.

46. In the first part of Clause 8.2.2 in fact it is clearly provided that the blacklisting would be by way of ‘penalty’. In an established case of pilferage/non-delivery of the product, the Tank Truck is liable to be blacklisted (Clause 8.2.2.8). The present one is not a case of pilferage. It is a case of non-delivery of product, therefore, the Tank Truck which fails to deliver the product is liable to be blacklisted by way of penalty and in case, the complicity of the transporter is established, even in first instance of malpractice, the entire fleet will be blacklisted, contract terminated and carrier

blacklisted along with forfeiture of the security deposit. There is a further stipulation that in the following cases of irregularities, the complicity of the carriers shall be deemed to be existent and the whole contract comprising of all the TTs belonging to the concerned carrier shall be terminated, security deposit forfeited and the concerned carrier and their all TTs shall be blacklisted on industry basis: (1) False/hidden compartment, unauthorized fittings or alteration in standard fittings affecting Quality and Quantity. (2) Illegal/un-authorized duplicate keys of security locks. (3) Duplicate dip rod/calibration chart.

The case of **Rail Oil Carriers** (supra) was falling under this clause. But, the present case would not come within the purview of these assumptions and deemed existent. It would appear from the impugned order itself that the respondent Corporation has while considering the replies of the petitioner found that he had voluntarily deposited the amount towards product loss and had taken action against the erring drivers by lodging an FIR on 20.10.2016. The impugned order admits to have received the entire payment but then has taken a view that even considering the submission that the petitioner was not in collusion with the erring drivers, the responsibility for the driver's act would not be attributable to anyone else but to the firm. Having taken that view, the respondent Corporation has held that the incident in the present case comes under Clause 8.2.2.8 and the penalty would be of blacklisting of the Tank Truck.

47. So far as power of blacklisting is concerned, it definitely lies with the respondent Corporation but such drastic powers must be exercised on the touchstone of reasonableness in terms of the contract alone. This Court has already highlighted the second part of the Clause 8.2.2 of the disciplinary

guidelines. This being a case where the petitioner has been able to demonstrate non-consideration of materials available on the record leading to passing of an order of punishment which is extreme and is totally based on the misconstruction of the provision of the disciplinary guidelines, this Court finds it just and proper to exercise it's extra ordinary writ jurisdiction under Article 226 of the Constitution of India to interfere with the impugned order as contained in Annexure '12' to the writ application.

48. The impugned order as contained in Letter dated 18.07.2017 issued under the signature of General Manager (Ops), BSO of the respondent Corporation available at Annexure '12' to the writ application is hereby set-aside.

49. The matter is remitted to the respondent Corporation to take a re-look on the entire issues and after giving appropriate opportunity of hearing to the petitioner, if so advised, may pass a fresh order in accordance with law keeping in view the terms of the contract and disciplinary guidelines as also the observations and discussions made hereinabove.

50. This writ application is thus, allowed to the extent indicated above.

51. In the facts and circumstances of this case no relief as prayed in the Interlocutory Application No. 3216 of 2018 may be granted to the petitioner. The Interlocutory application is, thus, dismissed.

(Rajeev Ranjan Prasad, J)

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AFR/NAFR	AFR
CAV DATE	14.10.2019
Uploading Date	25.11.2019
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