
(2014) 03 AHC CK 0155

In the Allahabad High Court

Case No : Civil Misc. Writ Petition Nos. 28351 and 48837 of 2012

Anil Kumar Jaiswal

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 13-03-2014

Acts Referred:

Citation : (2014) 3 ADJ 690 : (2014) 5 ALJ 473 : (2014) 3 AWC 2799

Hon'ble Judges : Vivek Kumar Birla, J; Amreshwar Pratap Sahi, J

Bench : Division Bench

Advocate : Radha Kant Ojha, V.N. Pandey and Sanjeev Singh, Advocate for the Appellant; Jyotsna Srivastava, Pradeep Upadhyaya and Vikas Budhwar, Advocate for the Respondent

Final Decision : Allowed

Judgement

1. The present dispute relates to the allotment and award of a Petrol Pump dealership by the Bharat Petroleum Corporation Ltd. where Subhas Chandra Upadhyay, respondent No. 6 in Civil Misc. Writ Petition No. 48837 of 2012 has now succeeded in getting a Letter of Intent and has commissioned the petrol pump during the pendency of these two writ petitions. The petitioner Anil Kumar Jaiswal was also an applicant alongwith the said Subhas Chandra Upadhyay. The advertisement that was issued specified 6.8.2009 as the last date for submission of the application form. The petitioner Anil Kumar Jaiswal obtained a lease dated 27.3.2009 of the land proposing to set up a petrol pump that was offered by him.

2. This land according to the petitioner was the property of one Dudh Nath from whom Smt. Sirjawati is said to have purchased the same. The mutation in the name of the purchaser was carried out whereafter the petitioner obtained the lease from Smt. Sirjawati wife of Shiv Kumar Sharma.

3. The applications for award of dealership were processed and an interview was conducted on 25.11.2009. Subhas Chandra Upadhyay was placed at serial No. 1 and the petitioner had been placed at serial No. 2. The results so declared were

objected to by the petitioner on the ground that the marks had not been appropriately awarded. The objections were entertained and disposed of vide order dated 14.4.2010 recording that the marks to the petitioner were not correctly awarded. Therefore, the matter requires a review. So far as the objection to the land offered by the respondent Subhas Chandra Upadhyay is concerned, it was found that the same was not sustainable.

4. However, no challenge was raised to this order passed on 14.4.2010 and consequently a second interview took place on 20.8.2010. In this interview, the petitioner was empanelled at serial No. 1 and Subhas Chandra Upadhyay was placed at serial No. 2.

5. At this juncture, it would be relevant to mention that a suit had been filed on 30.9.2009 in respect of same land which had been offered by the petitioner for setting up the petrol pump. This suit was filed by Bijli, wife of Dudhnath, the previous tenure holder who had sold it to Smt. Sirjawati, praying that the sale-deed executed by her husband Dudhnath in favour of Sirajwati be cancelled. However, there were no orders passed in the said suit neither the petitioner, nor the respondent Subhas Chandra Upadhyay or the Petroleum Corporation were parties to the same.

6. On the declaration of the new panel in which the petitioner had succeeded, the respondent Subhas Chandra Upadhyay appears to have moved an application before the District Magistrate on 16.9.2010 alleging that the land offered by the petitioner belonged to a person whose husband had acquired the same by unlawful means and as such there being cases pending against him in criminal Courts, the land deserves to be attached under the provisions of U.P. Gangsters Act. The District Magistrate appears to have entertained the said application.

7. However, before any such order could be passed either in the civil suit referred to hereinabove, or the application before the District Magistrate under the U.P. Gangster Act, the respondent corporation offered a Letter of Intent to the petitioner on 9.10.2010.

8. The petitioner thereafter approached the respondent Petroleum Corporation on 7.11.2010 praying for further action in the matter so as to commission the petrol pump whereupon the Petroleum Corporation proceeded to file an application on 10.11.2010 before the District Magistrate, Kushinagar to provide a no objection certificate so that the respondent Petroleum Corporation after issuance of Letter of Intent could proceed to take steps for commissioning of the petrol pump by the petitioner.

9. The petrol pump does not appear to have been commissioned by then, and in the meantime the police authorities on the application filed by Subhas Chandra Upadhyay before the District Magistrate, proceeded to submit a report on 23.12.2010 for attaching the land offered by the petitioner indicating that the said land was acquired by unlawful means by Shiv Kumar Sharma, husband of Sirajwati who had leased the land to the petitioner which deserves to be attached.

10. On this report having been submitted the matter proceeded before the District Magistrate and in between the suit which was filed referred to hereinabove was taken up on 19.2.2011 and an ex parte interim injunction for maintaining status quo was passed. Since neither of the contesting parties who are before this Court were either parties to the said litigation nor does it appear that the said order was brought to the notice of the Petroleum Corporation, the respondent Subhas Chandra Upadhyay pressed the application before the District Magistrate who passed an order of attachment on 15.4.2011 under the U.P. Gangster Act.

11. From the facts which have been brought on record it is thus clear that the respondent Subhas Chandra Upadhyay had not challenged the Letter of Intent issued in favour of the petitioner on 9.10.2010. Instead he took recourse to deliberately initiate the proceedings before the District Magistrate to involve the land offered by the petitioner and obtain an order of attachment. The respondent Corporation appears to have received a complaint from Subhas Chandra Upadhyay on 19.6.2011 informing the corporation that the land offered by the petitioner had been attached by the District Magistrate on 15.4.2011 and therefore, it is he, who is now entitled to be offered the Letter of Intent for setting up the petrol pump as he was at serial No. 2 in the panel. The respondent Petroleum Corporation appears to have dispatched a notice to the petitioner on 29.9.2011 to which a reply appears to have been sent by the petitioner.

12. The petitioner aggrieved by the order of attachment dated 15.4.2011 filed Writ Petition No. 8266 of 2011 which was dismissed on 10.5.2011 with the observation that the order of District Magistrate is subject to any final orders to be passed by the learned Special Judge and accordingly observed that the matter shall be considered in accordance with law. The petitioner also appears to have filed SLP No. 5587 of 2011 against the same which was dismissed on 8.8.2011. The same therefore remained pending consideration before the learned Special Judge.

13. The respondent Subhas Chandra Upadhyay in between on 23.8.2011 filed writ petition No. 47171 of 2011 which was disposed of with a direction to the authority to consider his grievance and pass an order. The said order dated 23.11.2011 is extracted hereinbelow:

Heard learned counsel for the petitioner and Shri Vikas Budhwar learned counsel appearing for the respondent Nos. 2, 3 and 4 and Shri K.K. Singh appearing for respondent No. 5.

By this petition the petitioner has prayed to issue a writ in the nature of mandamus commanding/directing the respondent Nos. 2, 3 and 4 to proceed for allotment of the retail outlet dealership/petrol pump to the petitioner forthwith.

The petitioner's case is that the petitioner was placed at Sl. No. 1 and respondent No. 5 was placed at Sl. No. 2 in the interview. But in the re-interview petitioner was placed at Sl. No. 2 and respondent No. 5 was placed at Sl. No. 1.

The petitioner submits that land which was offered by respondent No. 5 for retail outlet has been attached under U.P. Gangster Act and a Civil Suit is also pending regarding the land in dispute in which an order of status quo has also been passed.

The petitioner submits that the corporation ought to have taken decision in this matter. The petitioner in this context submitted a representation before the respondent Corporation, which is annexed as Annexure-7 to the writ petition.

Without expressing any opinion on the merits of the case, we direct the Corporation to take a decision in accordance with law within a period of four weeks from the date of receipt of a certified copy of this order.

The writ petition is disposed of.

14. On this mandamus having been issued by the High Court the respondent Corporation sent a letter to the petitioner on 15.9.2011 for clarifying the status of the land offered by him. The petitioner appears to have informed the pendency of the matter as noted above whereupon the respondent Corporation sent a letter to Subhas Chandra Upadhyay on 5.10.2011 informing him that his request cannot be considered and the corporation would await any future decision in the matter.

15. The respondent Corporation again issued a show-cause notice to the petitioner on 19.11.2011 intending to cancel the Letter of Intent issued to the petitioner on which a reply was given by the petitioner on 15.12.2011 indicating the pendency of the aforesaid litigation before the competent Court relating to the attachment of the land offered by the petitioner. The respondent Corporation in spite of this information having been given proceeded to cancel the Letter of Intent vide order dated 21.2.2012 on the ground that the petitioner has not been able to make the land available within the period prescribed, i.e. two months, from the date of issuance of Letter of Intent.

16. The petitioner then filed writ petition No. 28351 of 2012 on 28th May, 2012 before this Court challenging the said order dated 21.2.2012 which is the first writ petition. The said petition was fixed in July, 2012 on three dates where Subhas Chandra Upadhyay was not arrayed as a respondent therein presumably because of the fact that the Letter of Intent had not been issued in his favour by that time.

17. The petition was taken up on 18th July, 2012, when the Court was informed that a Letter of Intent has been issued to Subhas Chandra Upadhyay on 12.7.2012 as he was the second empanelled candidate.

18. Thus, the Letter of Intent was issued to Subhas Chandra Upadhyay, the second empanelled candidate which was made subject to the result of first writ petition vide order dated 18.7.2012.

19. The petitioner filed the second writ Petition No. 48837 of 2012 questioning

and challenging the Letter of Intent of Subhas Chandra Upadhyay after impleading him as respondent No. 6 therein and affidavits were exchanged between the parties.

20. The case took a turn thereafter when on 14 August, 2012 the learned Special Judge, Gangster Act set aside the order of attachment passed by the District Magistrate on 15.4.2011 and recorded findings to the effect that the allegations were not proved on the basis of evidence on record and since Shiv Kumar Sharma was not a gangster, the property of his wife Smt. Sirjawati (lessor of the petitioner) which was disclosed as having been acquired on making genuine payment, could not have been attached. The learned Special Judge also recorded findings about the statement made by Smt. Sirjawati indicating that the application for attachment had been moved at the instance of Subhas Chandra Upadhyay that resulted in attachment of the land which otherwise had been lawfully acquired. This judgment has been brought on record.

21. Sri Pradeep Upadhyay, learned counsel for the respondent No. 6 has stated that the State has filed a time barred Government appeal against the order of the learned Special Judge being Appeal No. 747 of 2013 which is pending before this Court.

22. We have heard Sri Sanjeev Singh, learned counsel for the petitioner, Sri Pradeep Upadhyay for the contesting respondent No. 6 Subhas Chandra Upadhyay in the second writ petition and Sri Vikas Budhwar for the respondent Hindustan Petroleum Corporation Ltd.

23. Sri Sanjeev Singh, learned counsel for the petitioner submits that the mala fides of the contesting respondents are clearly made out who made all efforts to generate litigation in order to dislodge the candidature of the petitioner which had been finalized on 9.10.2010. He submits that instead of challenging the said empanelment, the contesting respondent chose an indirect method subsequently to disqualify him by getting his land attached. The contention is that in the absence of any such challenge raised to the empanelment, the respondent corporation was not justified in acting upon the malicious conduct of the respondent No. 6 to dislodge the petitioner and cancel his dealership.

24. Sri Sanjeev Singh then submitted that the institution of the suit on 29.9.2009 is a date which is after the last date of the application form. This suit was filed by Bijli Devi wife of Dudh Nath the previous tenure holder against her husband for cancellation of the sale-deed in favour of Smt. Sirjawati Devi. The contention of Sri Sanjeev Singh, learned counsel for the petitioner is that the case of Bijli also appears to have been set up by Subhas Chandra Upadhyay which is evident from the fact that the suit was got filed after the last date of the application form. He submitted that when they failed to get an interim order therein, a second round of litigation was generated by filing an application before the District Magistrate to attach the property under Gangster Act alleging it to have been purchased by unlawful means by the husband of Sirjawati Devi. Thus,

this two pronged litigation about the land was purportedly created at the instance of the respondent No. 6.

25. Sri Singh further submits that any order of status quo passed in the said suit is not binding on the petitioner or the Petroleum Corporation nor any such plea was taken by the Petroleum Corporation to disqualify the petitioner. The order of status quo in a suit filed for cancellation of the sale-deed in favour of the lessor, does not dissolve the lease of the petitioner. It is only the order of attachment of the District Magistrate which has been made the basis for depriving the petitioner of the Letter of Intent, and such attachment order having already been set aside, the same could not have been a reason to cancel the letter of intent of the petitioner. Even otherwise the Corporation ought to have waited and not act in such a hurry.

26. He further submits that even thereafter the respondent Corporation does not appear to have acted bonafidely inasmuch as once the writ petition was filed in this Court in May, 2012, the respondent Corporation should have awaited the result thereof but a Letter of Intent was issued to Subhas Chandra Upadhyay on 12.7.2012. This circumstance is being pointed out to urge that the Corporation was also acting malafidely to the advantage of Subhas Chandra Upadhyay. It is for this reason that the Court had passed orders making the Letter of Intent dated 12.7.2012 subject to the result of the writ petition.

27. The sheet anchor of the submission of Sri Sanjeev Singh, learned counsel for the petitioner is that all the aforesaid facts clearly indicate that there were reasons beyond the control of the petitioner that resulted in the delay in making land available which was already available with the petitioner. He further submits that there was no defect with regard to the nature of the land or its status of availability to the petitioner after the letter of intent was issued to him on 9.10.2010. He contends that all these obstructions were created long thereafter and the application for attaching the property had been malafidely moved which had been discussed in the order of learned Special Judge dated 14.8.2010. Sri Singh has relied on the Division Bench Judgment in the case of Inter College Kusmaul, Gorakhpur and another v. State of U.P. and others, 2006 (1) ESC 472 (para 31 to 40) to advance his submission that the principle of impossibilities beyond one's control are clearly attracted in the present case.

28. Sri Vikas Budhwar, learned counsel for the Hindustan Petroleum Corporation Ltd. on the other hand contends that so far as the Corporation is concerned the letter issued by it on 15.9.2011 and again on 5.10.2011, which are on record clearly indicates that the Corporation was awaiting a positive response after a final decision in the matter before proceeding further. Sri Budhwar, therefore, submits that this was in aid of the letter of intent issued to the petitioner on 9.10.2010 and there was no mala fide or collusion with the respondent Subhas Chandra Upadhyay established so as to conclude that the corporation acted hastily.

29. He further submits that since there was no interim order in the writ petition as such there was no legal impediment in issuing the Letter of Intent to the respondent Subhas Chandra Upadhyay which was done almost after five months of the cancellation of the letter of intent of the petitioner. He contends that the Corporation is under an obligation to get the petrol pump commissioned within the time frame under the brochure and in such circumstances, no mala fides can be imputed on the Corporation. On mala fides he urges that it is admitted to the petitioner that he had been unable to provide the land on account of it being involved in a criminal case and its attachment, and in such circumstances the Corporation is fully justified in offering the dealership to the second empanelled candidate. He has further urged that the Corporation is in no way involved in the civil suit or in the contest between the petitioner and the respondent Subhas Chandra Upadhyay and in such circumstances, there is no reason to gather any remote bias on the part of the Corporation to side with one party or the other.

30. He then contends that in view of the judgment in the case of Smt. Rita Singh v. Central General Manager Indian Oil Corporation Ltd. and others, in Writ Petition No. 28373 of 2012 decided on 19.2.2014, the period of two months having been found to be compulsory and the petitioner having failed to provide the land, the cancellation order as assailed in the first writ petition cannot be interfered with and consequently the award of dealership to the respondent Subhas Chandra Upadhyay deserves to be upheld.

31. Sri Vikas Budhwar, learned counsel for the Corporation further submits that the stand of the Corporation is otherwise also clear inasmuch as a show-cause notice issued to the petitioner on 19.11.2011 to give a reply whereafter the cancellation order was passed on 21.2.2012. Thus there is no mala fide established against the Corporation or to conclude that the commissioning of the petrol pump by the petitioner was deliberately delayed by the Corporation.

32. Sri Pradeep Upadhyay, learned counsel for the contesting respondent has urged that no mala fides can be gathered on the basis of the judgment of the learned Special Judge dated 14.8.2012 as the judgment is palpably wrong and subject to appeal before the High Court which is pending. He further submits that the respondent No. 6 was not impleaded in the first writ petition, and in the absence of violation of any guidelines, the award of Letter of Intent to his client does not suffer from any infirmity. He, therefore, submits that apart from the aforesaid facts and the pendency of the civil suit filed by Bijli Devi and the order of status quo, the petitioner did not offer any land free from encumbrances, and consequently no relief can be granted to the petitioner. He submits that there is no requirement to challenge the empanelment dated 9.10.2010 inasmuch as the answering respondent by virtue of his second position in the empanelment was rightly given the letter of intent when the petitioner failed to provide the land as per the guidelines prescribed.

33. He further submits that the land which was offered by the petitioner was subject to a serious dispute and the matter being sub-judice, the decision of the

respondent Corporation cannot be faulted with.

34. We have considered the submissions so raised as well as the documents on record. The first issue with regard to the allegation of malafidely instituting a litigation to oust the petitioner deserves to be dealt with. The civil suit filed by Bijli Devi against her husband Dudh Nath, the previous owner of the land was a suit which was admittedly filed after the last date of the application form and was instituted on 30.9.2009. This clearly indicates that the previous owner had filed this suit in between themselves, but it is quite possible that this litigation was generated in relation to the land, after the applications had been set into motion for award of petrol pump dealership.

35. The suit did not yield any interim order at that stage or even when the letter of intent was issued to the petitioner on 9.10.2010. It is evident that the respondent-Subhas Chandra Upadhyay himself moved an application under the Gangster Act for attaching the land of the petitioner. This clearly reflects on the mala fides of the respondent who made it a point motivatedly to somehow the other create a dispute about the land offered by the petitioner. The ground taken for getting it involved also appears to be in the background that Subhash Chandra Upadhyay was also an applicant empanelled at Serial No. 2.

36. Admittedly Upadhyay had not challenged the empanelment in which the petitioner was placed at Serial No. 1. It is thus clear that a new line of approach was adopted by Subhas Chandra Upadhyay to eliminate the petitioner by involving his land in this generated litigation. The District Magistrate appears to have fallen into a trap to this, and a police report was hurriedly prepared that was submitted on 23.12.2010 whereupon the District Magistrate passed the orders of attachment on 15.4.2011.

37. Even though the petitioner diligently challenged the same before the High Court yet his petition was dismissed on the ground on 10.5.2011 that it was subject to the final orders of the Special Judge and hence no interference was called for. An SLP was also filed by the petitioner which was dismissed on 8.8.2011 as such the matter became pending before the Special Judge.

38. The ex parte interim injunction granted on 19.2.2011 was in the suit filed by Bijli Devi against her husband for cancellation of the sale-deed in favour of Smt. Sirjawati, the lessor of the petitioner. The sale-deed has not been cancelled as yet nor is there anything on record to indicate the same. The lease in favour of the petitioner is intact.

39. In our opinion even if the status quo order is there, the same enures to the benefits of the tenure holder as the sale-deed is still intact. The lease in favour of the petitioner therefore does not get automatically dissolved by pendency of such a litigation to which neither the petitioner is a party nor any of the rights of the Petroleum Corporation are affected. The outcome of the cancellation of the sale-deed therefore may have an impact but that is not the situation that was existing when the letter of intent was issued to the petitioner on 9.10.2010. There was no

interim order then nor has the respondent Petroleum Corporation taken that to be a ground to cancel the latter of intent of the petitioner. The only ground taken is on the strength of the complaint of respondent-Subhas Chandra Upadhyay about the attachment under the Gangster Act which order as noted above has already been set aside, even though during the pendency of these writ petitions, on 14.8.2012. The filing of a time barred appeal by the State Government against the same which is pending before this Court is of no consequence as no orders have been passed therein.

40. Sri Subhas Chandra Upadhyay, against whom the deposing witnesses had levelled allegations of mala fide in the proceedings before the Special Judge, has not chosen to file any petition against the findings that have been recorded in this regard by the learned Special Judge in the order dated 14.8.2012.

41. It is thus clear from a perusal of the said judgment that the entire litigation under the Gangster Act had been generated by Subhas Chandra Upadhyay and this establishes a clear mala fide and motivated attempt to jeopardize the candidature of the petitioner. The argument of Sri Pradeep Upadhyay for the contesting respondent that no mala fides are established, therefore, deserves to be rejected. The conduct of Subhas Chandra Upadhyay right from the beginning was to somehow the other find fault with the candidature of the petitioner and to pursue his evil designs, he deliberately generated the said litigation which is evident from the facts indicated above.

42. We therefore are of the opinion that the respondent Petroleum Corporation should have waited the outcome of the present two writ petitions instead of issuing a letter of intent to the respondent during the pendency of the writ petition on 12.7.2012. To this extent, the Petroleum Corporation does not appear to have acted bonafidely and this fact was clearly an act on the part of the Petroleum Corporation to benefit the respondent No. 6. We do not wish to say that the Petroleum Corporation was in collusion with the respondent No. 6 or bore any personal mala fides against the petitioner but the issuance of a letter of intent in the manner aforesaid appears to be unjust and a hasty step in the name of commissioning the petrol pump.

43. It is also to be noted that such allotment in favour of the respondent No. 6 was clearly made subject to any final orders of the first writ petition as is evident from the order of this Court dated 18.7.2012. The plea of Sri Vikas Budhwar that the petrol pump has been commissioned and therefore no relief can be granted at this stage therefore is untenable inasmuch as the parties to the litigation were well aware of the writ petition having been filed in May 2012 itself. It is correct that earlier the respondent-Corporation had waited for the clarification in respect of the land offered by the petitioner which indicates the bonafides of the corporation, but at the same time the patience of the Corporation gave way at a juncture when the matter was actively engaging the attention of this Court as indicated above. The stand of the petitioner stood vindicated with the passing of the order by the Special Judge on 14.8.2012 which still holds the filed. It is thus

clear that the entire effort of Subhas Chandra Upadhyay to eliminate the consideration of the land offered by the petitioner inspite of the letter of intent having been issued by the Corporation in favour of the petitioner was a mala fide attempt without challenging the empanelment of the petitioner at Serial No. 1.

44. It is further to note that the contention of the petitioner's counsel Sri Sanjeev Singh that there were situations beyond the control of the petitioner also deserves to be accepted. The petitioner was bonafidely contesting eagerly to get the order of the District Magistrate attaching the land set aside. The petitioner therefore was facing an almost impossible situation not within his control inspite of his best efforts to contest the matter before the appropriate forum. The petitioner did ultimately succeed on 14.8.2012 as indicated above. The said argument therefore also goes to the advantage of the petitioner inasmuch as he was caught in a web that was created by his own rival in business.

45. The Petroleum Corporation even though has proceeded to grant the letter of intent to Upadhyay as per its own terms and conditions, but the same does not appear to have been coordinated with the facts indicated hereinabove. It is true that the Corporation had to get the petrol pump commissioned but at the same time it was under an obligation to observe that no injustice is caused to either of the applicants, moreso when the writ petition had already been filed and was pending before this Court.

46. In the background of the aforesaid facts we find that the petitioner has been unjustifiably eliminated inspite of the fact that he was empanelled at Serial No. 1 and the panel resulting in the issuance of letter of intent on 9.10.2010 did not require any interference nor had it been challenged. We accordingly allow the petitions and set aside the order dated 21.2.2012 as also the letter of intent issued to the respondent No. 6 dated 12.7.2012. Both the writ petitions are allowed and the empanelment dated 9.10.2010 is directed to be reconsidered subject to the availability of land with the petitioner which shall be assessed by the Corporation and orders will be passed within a period of two months.