

(2012) 02 DEL CK 0037

In the Delhi High Court

Case No : LPA 7 of 2010 and LPA 176 of 2011

Basant Bagde

APPELLANT

Vs

Hindustan Prefab Limited and Others

RESPONDENT

Date of Decision : 03-02-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2012) 4 AD 508

Hon'ble Judges : A.K. Sikri, Acting C.J.; Siddharth Mridul, J

Bench : Division Bench

Advocate : Amit Anand Tiwari with Mr. Ajay Kumar Singh, for the Appellant; Radhakant Tripathy, Advocate for R. 1 and 2, Mr. A.P. Mayee, Advocate with Ms. Praveena Gautam, Advocate for R. 3, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, Acting Chief Justice

1. The appellant herein had filed Writ Petition (C) 13836/2009 seeking following prayers:-

(i) Issue a writ of certiorari quashing the order dated 30.6.2009 passed by respondent no.1;

(ii) Issue a writ of mandamus directing the respondents to apply the amendment no.26 dated 1.4.2008 by way of which the rate of steel was increased from Rs. 24/- to Rs. 50/- to present contract awarded to the Appellant for 11 packages;

(iii) Issue a writ of mandamus directing the respondents to make the payment to the appellant after calculating the rate of steel @ Rs. 50/- per kg;

(iv) Issue a writ of certiorari quashing the letter dated 16.9.2009 of respondent no.1 canceling six packages out of total 11 packages awarded to the appellant;

(v) Issue a writ of mandamus directing the respondents not to cancel the

contract of the appellant in respect of remaining 5 packages;

(vi) Pass such other writ, order or orders or direction, which may be deemed fit and proper in the facts and circumstances of the case and in the interest of justice.

2. When this writ petition came up for preliminary hearing on 17th December, 2009 before the learned Single Judge, the learned Single Judge issued limited notice pertaining to prayer (iv) and (v) only and refused to issue notice in respect of prayers (i) to (iii).

As far as prayers (i) to (iii) are concerned, the appellant herein had sought direction against the respondents to make the payment at the increased rate from Rs. 24/- to Rs. 50/- in respect of the contract awarded by the respondent to the appellant. We may state that the respondent had floated tenders for construction of Houses with Infrastructure under BSUP Scheme of JNNURM in Raipur City. The tenderers were required to submit their bid on percentage basis at par, over or below the rates based upon Chhattisgarh PWD Schedule of Rates (SOR 1999). The appellant was awarded the contract on rates quoted by him @ 59% above SOR 1999. However, between 21st March, 2008 and 3rd April, 2008, the rate of steel was increased from Rs. 24 per kg to Rs. 50 per kg in the SOR 1999. On that basis the appellant had claimed that he was entitled to the benefit of the said enhanced rate in steel from Rs. 24 per kg to Rs. 50 per kg w.e.f. 1st April, 1999. This demand was rejected by the respondent. That was the reason for making a prayer for payment @ Rs. 50 per kg instead of Rs. 24 per kg against the consumption of the steel in the contract. The learned Single Judge refused to issue the notice on these prayers in his order dated 17th December, 2009 and took the view that the stand taken by the respondent does not require interference while exercising power of judicial review under Article 226 of the Constitution of India. At best there is a commercial dispute between the appellant and the respondent M/s Hindustan Prefab Ltd. to which the appellant had adequate remedy by invoking arbitration clause or invoking jurisdiction of a civil court. Challenging this order dated 9th December, 2009 whereby the notice was issued to limited extent, the appellants have filed LPA 7/2010.

3. While this appeal was pending, the writ petition on which notice was issued in respect of prayers (iv) and (v) was ultimately decided by the learned Single Judge after the completion of pleadings on that aspect and hearing the oral submissions of the parties. It has culminated in the judgment dated 27th September, 2010 rendered by the learned Single Judge dismissing the writ petition even as regards prayer (iv) and (v) finding no merits in those prayers as well. It is for this reason, two appeals i.e. LPA 7/2010 and 176/2011 were clubbed and heard together which we propose to decide by means of present judgment.

4. First, facts in brief:

(i) On 20th March, 2008, the respondent issued a notice inviting sealed

percentage rate tender (NIT) for construction of houses with infrastructure under BSUP Scheme of JNNURM in Raipur City. Under this Scheme, houses at low cost were to be constructed in 11 packages in two lots of five and six packages at Raipur in Chhattisgarh. Scheme was that of State of Chhattisgarh for which the respondent no.1, a Government of India Undertaking was chosen as an executing agency by the State/respondent no.3.

(ii) The tenders were to be submitted between 21st March, 2008 and 3rd April, 2008. Clause 5 of the Special Conditions of Contract (SCC) required the tenderer to quote rates on percentage basis "below/at par/over) Madhya Pradesh (Chhattisgarh) Schedule of Rates, 1999". Clause 11.01 of the NIT provided that in case of percentage rate tenders, "the tenderer should quote a unique single percentage (plus/at par/minus) over the total estimated amount given in the schedule/bill of quantities." It is further stated that "under no circumstances, such a tenderer is allowed to quote separate percentages for individual items, trades or group of items." As per the appellant, four attempts were made on earlier occasions by the respondent HPL to award the contract but the bids received were non-competitive. It is for this reason, on 1st April, 2008 the Competent Authority i.e. the Engineer-in-Chief of Public works Department (PWD), Chhattisgarh amended the Madhya Pradesh (Chhattisgarh) Schedule of Rates, 1999 (SOR) for building works by enhancing the rate of steel from Rs. 24 per kg to Rs. 50 per kg.

(iii) The appellant submitted six tenders on percentage basis. The quoted rates were 109% above the SOR, the tenders were opened and the lowest bidder was awarded seven packages out of total 18 packages at the rate of 59% of SOR. Thereafter, the HPL negotiated with the appellant as well in terms of Clause 7 of NIT. The appellant agreed for L-I price which was 59% above SOR, subject to grant of a minimum of five packages. It was in these circumstances, contract relating to five packages was awarded to the appellant by the HPL vide agreement dated 7th June, 2008. As per this contract, the appellant was required to construct in each package 1536 dwelling units within a period of 18 months. Thereafter, another supplementary agreement dated 23rd August, 2008 was also signed between the appellant and the HPL awarding the appellant remaining six packages of the NIT as well.

(iv) The appellant states that he commenced the work and submitted his first running account bill to the HPL. In the said bill, the appellant while quoting the rates of steel, took into account the rate of steel as amended up to 1st April, 2008 by the Competent Authority. However, HPL refused to entertain any claim on the basis of the revised rates of steel, and conveyed this by its letter dated 18th September, 2008.

(v) Aggrieved by the above decision dated 18th September, 2008 the appellant filed a W.P.(C) 7044/2008 before this Court. On 19th March, 2009 the learned Single Judge dismissed the writ petition on the ground that the appellant had an alternative remedy by way of arbitration. It was further held that this Court did

not have territorial jurisdiction merely because HPL was located in Delhi. Also, the failure to implead the State of Chhattisgarh was held to be fatal to the appellant.

(vi) Aggrieved by the above order dismissing his writ petition, the appellant filed a LPA No. 182/2009 before the Division Bench of this Court on 15th April, 2009. By an order dated 21st May, 2009 in the LPA, the Division Bench impleaded the State of Chhattisgarh as a party. By a detailed judgment dated 28th May, 2009, the Division Bench allowed the LPA and directed HPL to consider the claim of the appellant for grant of increased rate of steel @ Rs. 50 per kg. The Division Bench held the writ petition projecting disputes arising out of a contract to be nevertheless maintainable in view of the decision of the Supreme Court in ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, .

(vii) As per the appellant, the HPL informed him that pursuant to the aforesaid directions of the Division Bench of this Court in LPA, the case of the appellant for grant of amended rate of steel had been recommended to the State of Chhattisgarh. However, the State of Chhattisgarh (R-3) reiterated that the appellant should accept Rs. 24 per kg and the petitioner also gave an undertaking on 29th June, 2009 that he would not be approaching this Court for adjudication of his grievances. On this basis, order dated 30th June, 2009 was passed by the HPL stating that the appellant was not entitled to the amended rate of steel.

(vii) In the writ petition filed by the appellant claiming this rate of Rs. 50 per kg, the appellant has alleged that since he was facing huge losses on account of denial of the payment of work already completed by him and his business virtually came to halt for want of money, he accepted the rate of Rs. 24 per kg under unrelenting coercion. He filed two CMs in the disposed of LPA alleging that the respondents were neither making payment on the basis of the admitted rate of steel and had also stopped making land available for the construction of the houses. Prayer was made for grant of amended rate of steel at Rs. 50 per kg. In these applications, notice was issued on 15th September, 2009. On 16th September, 2009, HPL cancelled the six packages out of total 11 packages awarded to the appellant on the ground that the appellant had failed to comply with one of the terms of contract which required him to furnish a performance guarantee. Suffice it to state that one more application was filed by the appellant challenging the order dated 16th September, 2009 which was taken up on 10th November, 2009. The appellant withdrew these applications with liberty to file substantive writ petition. It was in this backdrop that the writ petition was filed which has met the aforesaid fate and is now the subject matter of the present appeals.

5. It is clear from the aforesaid narration that two aspects of the issue were taken up by the appellant namely; (i) payment of steel at the increased rate from Rs. 24 per kg to Rs. 50 per kg in respect of which no notice had been

issued by the learned Single Judge holding that the same can be agitated in the arbitration proceedings or civil proceedings;(ii) to challenge the orders dated 16th September, 2009 whereby 6 packages out of 11 were cancelled and the appellant also wanted restrain order against the respondent for not canceling the remaining 5 packages as well. Since the two issues are the subject of two appeals, we take up these issues in each of these appeals.

LPA 7 OF 2010

6. The short question in this appeal is as to whether issue of payment at increased rates from Rs. 24 per kg to Rs. 50 per kg could be dealt with in the writ proceedings or the appellant is required to initiate arbitration/civil proceedings to agitate this claim. The learned Single Judge while relegating the appellant to civil proceedings has given the following rationale:

At best there is a commercial dispute between the petition and the respondent M/s Hindustan Prefab Ltd. to which the appellant has adequate remedy by invoking arbitration clause, if any, or invoking jurisdiction of a civil court. This is not a case in which the stand taken by the respondents can be per se categorized as arbitrary, which requires interference of the writ court. The respondents are entitled to take a commercial decision and have to be given sufficient latitude when they take administrative decision in commercial matter in the interest of the respondents company. As per the letter dated 30th June, 2009, the terms of SOR 1999 before amendment dated 1st April, 1999 are applicable and on this basis the tender of the appellant was found to be lowest. In LPA No. 182 of 2009, the Division Bench interfered and held that writ jurisdiction could be invoked as "no decision has been (was) taken on the bills raised...as per revised rates". It was held that "indecision and inaction was unacceptable and unreasonable". The respondent has now taken their decision and the appellant if aggrieved and has any dispute, should invoke ordinary civil jurisdiction.

7. Assailing the aforesaid reasoning given by the learned Single Judge, argument of the appellant was that there was no dispute of facts and only interpretation of certain Clauses of the contract was involved. He argued that admittedly last date for submitting the tender was 3rd April, 2008 and the tenderer were required to submit their bid on percentage basis at par, over and below the rates based upon SOR 1999. The aforesaid schedule of rates i.e. SOR 1999 was revised on 1st April, 2008 i.e. before the last date of submission of the tenders and the rate of steel was increased from Rs. 24 to Rs. 50 per kg. The rates submitted on the basis of which contract was entered between the HPL and the appellant was 59% above SOR 1999. The learned counsel for the appellant argued that in these circumstances, the only question was as to whether the original rates under SOR 1999 were applicable or SOR 1999 as amended on 1.4.2008 were applicable when the last date of submission of tender was 3.4.2008? This, contended the learned counsel, was a pure question of law and, therefore could have been gone in the writ proceedings. He argued that the SOR 1999 as amended on 1.4.2008 was clearly applicable as per which the appellant was entitled to the increased

price rate of steel @ Rs. 50 per kg and non-payment thereof was clearly arbitrary action of the respondents and in these circumstances provision of Article 14 stood attracted and thus the writ petition was maintainable. He also relied upon the earlier judgment of the Division Bench dated 15th September, 2009 and according to him the Division Bench had already held in the said case that the writ petition was maintainable. He thus submitted that this order pertaining to the same contract between the same parties rendered by the Division Bench was binding on the learned Single Judge.

8. The facts which emerged on record disclose that the appellant had earlier filed writ petition No. 7044/2008 seeking identical relief namely payment at increased rate of Rs. 50 per kg instead of Rs. 24 per kg. This was dismissed by the learned Single Judge vide order dated 19th March, 2009 on two grounds:-

(a) The issue could be a subject matter under Article 226 of the Constitution and proper mechanism in resolving the issue is either the arbitration or civil proceedings as the case may be;

(b) The High Court of Delhi did not have territorial jurisdiction merely because the HPL had its office in Delhi. More so, HPL was an executable agency in respect of work for the principal namely State of Chhattisgarh and was to be performed at Raipur, Chhattisgarh and when the State of Chhattisgarh which was a necessary party was not even impleaded.

9. In the LPA 182/2009 filed by the appellant challenging this order of the learned Single Judge, the Division Bench admitted the appeal and impleaded the State of Chhattisgarh as a party. Thereafter, the appeal was finally decided on 28th May, 2009 holding that this Court has the territorial jurisdiction. The Division Bench also held that the writ petition was maintainable inasmuch as even in contractual matters, if the action of the State and its instrumentality is arbitrary, unreasonable and illegal, the Court can exercise its extra ordinary jurisdiction under Article 226 of the Constitution. Support from the ratio laid down by the Apex Court in A.B. International Ltd. (supra) was taken. Applying this ratio, the Division Bench made the following observation:-

On a given set of facts if "the State" acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the court by way of writ under Article 226 of the Constitution and the Court depending on facts of the said case is empowered to grant the relief. In the present case there has been an amendment to the rates on the basis of which the appellant has raised its demand. No decision has been taken on the bills raised by the appellant as per the revised rates. This indecision and inaction clearly is unacceptable and unreasonable. We have, accordingly directed respondent No.1 which had floated the tender enquiry on behalf of the State of Chhattisgarh to take a decision within a period of two weeks. It will be open to the appellant to take appropriate remedies in accordance with law in case it is aggrieved by the decision of the respondent no.1 With these observations, the present appeal as also the writ

petition stand disposed of as nothing further survives in the same.

10. It is clear from the above that what was perceived as arbitrary and on the basis of which the writ petition was held to be maintainable was that even the decision on the request of the appellant for payment at the rate of Rs. 50 per kg. instead of Rs. 24 per kg qua the quantity of steel had not been taken. This is clear from the reading of para 5 of the said order wherein the contention of the counsel for the appellant were noted as per which vide letter dated 18th September, 2008, the Public Works Department, Chhattisgarh, Raipur had directed the HPL to take a decision at its level in respect of bills as per the contract but no decision had been taken. In para-6 on this point the Bench observed that in view of the categorical stand of the HPL that they were directed by the PWD to take a decision, the said decision had not been taken and this direction was given to the HPL to take decision within two weeks.

11. In view of the above, it would be difficult for the appellant to take shelter made the aforesaid order of the Division Bench. The order did not go to the extent of holding that if the decision taken by the HPL goes against the appellant even then the appellant shall be entitled to file a writ petition.

12. Still, one could argue (which is the submission of the appellant as well) that if there are no disputed question and the matter pertains only to interpretation of the Clause, the matter is in the realm of interpretation on the basis of the rates which are admissible to the appellant, writ petition could be maintainable as denial of "admitted" rates may amount to arbitrariness on the part of the State or instrumentality/agency of the State. However, the matter does not rest here. This argument ignores certain vital facts which take away the case from the realm of "admitted facts" and bring the issue in the arena of "disputed facts". As per the appellant himself, when the respondents reiterated and asserted that the appellant shall be entitled to claim on Rs. 24 per kg for the qualities of steel, he accepted the same vide his letter dated 26th September, 2009. This letter is in Hindi and English translation whereof reads as under:-

For the afore subject work, I am agreeable to work at the sanctioned rate of Steel at the rate of Rs. 24 per kg. plus 59 percent agreed as per the contract agreement for the rate of steel and I will not go to court in respect of rate of steel.

13. There is also, on record, letter dated 30th June, 2009 addressed by HPL to the appellant narrating the events of the contract in question and ascertaining that the appellant had entered into agreement/contract which is subject to the general/special terms and condition as per the bid documents and the offered rates selected to the bid process. As per the respondent, there was no terms and condition for price escalation to the agreement/contract for the subject project. The decision as per this letter thus was that amended notification dated 1.4.2008 issued by the Chief Engineer, PWD was not applicable. It is also highlighted that the appellant willingly signed the agreement much later than the date of issue of

the amendment to SOR 1999 rates and at the time of signing and acceptance of work, the appellant had not raised any objection about the amended rate and its implication in future and therefore the claim for Rs. 50 per kg was not justified. It is important to note that the appellant has not denied his letter dated 29th June, 2009 vide which he accepted the rates of Rs. 24 per kg. His submission is that the respondents were not releasing the payments even in respect of work already completed and because he was facing financial crunch and therefore, issuance of this letter was involuntary and under coercive circumstances. Naturally, these are the aspects which cannot be dealt with or gone into in writ proceedings under Article 226 of the Constitution which is an extra ordinary jurisdiction. In these circumstances, if the discretion is exercised by the learned Single judge relegating the parties to arbitration/civil remedies, we do not find any error therein as the aforesaid dispute highlighted by us requires evidence which process can be under taken only in arbitral/civil proceedings.

14. We thus confirm the orders dated 17th December, 2009 passed by the learned Single Judge refusing to issue notice on prayer (i), (ii) and (iii) of the writ petition and dismiss this appeal.

LPA 176 OF 2010:

15. As pointed out above, the subject matter of this appeal is letter dated 16th September, 2009 vide which the HPL cancelled 6 packages out of total 11 packages awarded to the appellant. The reason which led to this cancellation, as stated in the said letter is that the appellant had failed to fulfill the contractual obligation to furnish performance guarantees as mentioned in Letter of Intent (LOI) dated 24th July, 2008 and agreement dated 23rd August, 2008. It is stated that according to condition No.7 of NIT dated 20th March, 2008 and also condition No. 9.1 of the General Conditions of Contract, it was obligatory on the part of the appellant to furnish the performance guarantees and since these guarantees have not been furnished, the LOI issued thus stands withdrawn and contract cancelled.

16. It is not in dispute that the bank guarantees as required under the said LOI had not been furnished by the appellant. However, the main plank of attack of the appellant quashing the termination was that the aforesaid communication dated 19th September, 2009 was an act of arbitrariness and malice in law. Malice was sought to be projected by submitting that after the judgment of the Division Bench in the first round of litigation, the respondent had become vindictive. Though, the appellant had completed the substantial work in respect of contract, payments were due and not released to the appellant even when calculated under unamended rates. It was argued that these payments could easily be adjusted towards the amount for which bank guarantees for the remaining 6 packages were to be furnished and non furnishing of the said bank guarantee was only an excuse. It was also argued that the HPL had received a sum of Rs. 41.22 crores from the respondent no.3 who had retained Rs. 18.3 crores. In the counter affidavit filed by the HPL, the HPL had joined the issue on each other

aspect. It contended that there were no outstanding bills of the appellant that remained to be paid. It was also denied that HPL or its CMD had acted out of malice either in law or in fact. The HPL went to the extent of arguing that there was serious issues of non-fulfillment of the conditions of the contract by the appellant concerning even the other 5 packages but at present the said contract of 5 packages have not been cancelled which showed that no malice was shown by the HPL.

17. The learned Single Judge after considering the aforesaid respective pleas, dismissed the writ petition vide impugned order dated 27th September, 2007 taking a view that the matter was purely contractual in nature and there was no serious dispute on the essential facts.

18. The respective pleadings of both the parties in fact reflect that the issue raises the disputed question of facts. Coupled with this, we notice that furnishing of performance guarantee was a mandatory condition and has not been admittedly fulfilled by the appellant. Termination of the contract on this ground would be in accordance with the contractual terms prima facie cannot be termed the issue as to whether substantial amount were due to the appellant from other contracts and against those payments, the guaranteed amount could be adjusted or not is an issue which can be gone into only in arbitral/civil proceedings and cannot be the subject matter of the Article 226 of the Constitution.

19. This leaves us to the question as to whether there was any malice in law as malice in fact cannot be determined unless the facts are first ascertained.

20. In an attempt to establish malice in law, the appellant relied upon and referred to the letter dated 19th September, 2009 which was written by HPL to the Principal Secretary of respondent no.3/State. In that letter, reference was made to meeting held on 28th August, 2009 between the Principal Secretary of the Government and the officials of the HPL when the withdrawal of the contract awarded to the appellant was decided, for which the land was yet to be made available by the State Government for execution. In this letter, it is stated that the contract with the appellant has been cancelled by issuing letter dated 16th September, 2009 which further mentions that:-

We have cancelled the contract putting blame of non-fulfillment of contractual obligations by the contractor, although we were unable to hand over the land for the project, being not made available to us by the Government of Chhattisgarh and also the constraints in release of funds, even against the ongoing contract.

The HPL has further stated that because of non allotment of the land by the State to the HPL, the HPL is not to be made responsible for any financial implications or legal issues arising, if any, due to cancellation of contract. This letter, in first blush, may give an impression that the contract is terminated for oblique reasons, inasmuch as it was non-fulfillment of land. However, when the said letter is read in its entirety, there cannot be an authoritative determination of malice in law. It is to be borne in mind that the HPL is assigned the work by

the State and obviously HPL wanted to save its skin and did not want any liability to come upon it, not only from the State insofar as non performance of the 6 packages for want of land is concerned, it did not want any liability to come upon it as a result of impugned termination as well. The letter is to be read in that hue which may be a subject matter of controversy between HPL and the State/R-3.

21. What is more important is that the contents of this letter of HPL are strongly refuted by the respondent no.3 vide communication dated 25th September, 2009. This aspect is dealt with by the learned Single Judge in the following words:-

20. The appellant wants this Court to infer from the above letter that HPL had been acting under dictation of Respondent No.3 and therefore proceeded to cancel the six packages although there was no justification for it. If what is stated in the above letter had not been refuted by Respondent No.3 then it would have been possible to draw such an interference. However, by a letter dated 25th September, 2009 addressed to respondent No.2, the Principal Secretary took strong exception to the suggestion and pointed out that the meeting held on 28th August, 2009 chaired by the Secretary MoHUPA related to "serious issues of delay and poor quality arising entirely due to bad execution and supervision. The meeting was not meant to conspire on how to falsely implicate anybody." He added: "your letter seeks to give an impression that the Secretary MoHUPA-GOI or the undersigned had directed you to unfairly act against the contractor to cancel his LOI. Such suggestion is simply atrocious and confirms our suspicions that HPL's sympathies are more towards the non-performing contractor than towards the Government of Chhattisgarh which has engaged your services and whose trustee you are expected to be". While asserting that "neither land nor money is an issue at all", the Principal Secretary signed off the letter stating "please note that we shall act to ensure that all culprits are brought to justice.

21. The above exchange of correspondence hardly enables this Court to come to a conclusion that Respondent No.3, with whom the Appellant admittedly has no privity of contract, and HPL, with whom alone the Appellant had a contract, were conspiring to unfairly terminate the Appellant's contract for six packages. The entire case of the Appellant hinges on the letter written by Respondent No.2 to Respondent No.3 which is at best hearsay evidence which in any event is disputed by Respondent No.3. The latter in fact seems to suggest that Respondent No.2 is trying to shield the Appellant. In fact, learned Senior Counsel for the Appellant was hard pressed to show how the above exchange of correspondence substantiated the case of the appellant that either or both Respondents 1 and 3 were acting against him out of malice in law or fact.

22. We are quite in agreement with the aforesaid analysis, malice in law is not established. Whether there was malice in fact or not can be gone into only on the basis of evidence and the learned Single Judge has rightly relegated the parties to alternate remedies.

23. Accordingly, this appeal is also dismissed. However, there shall be no order as to costs.