
(2006) 05 OHC CK 0038
In the Orissa High Court
Case No : Writ Petition (C) No. 4442 of 2006

Varsha Fabrics Pvt. Ltd.

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 19-05-2006

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 298

Citation : (2006) 102 CLT 137 : (2006) 1 OLR 849 Supp

Hon'ble Judges : Sujit Barman Roy, C.J;I. Mahanty, J

Bench : Division Bench

Advocate : G. Mukherji, P. Mukherji, Aswini Kr. Mishra, J. Sengupta, Biswanath Rath, J. Rath, S.K. Jethy, K.R. Sahoo and S.B. Mohanty, S.P. Mishra, S.S. Das, P.K. Nayak, K.C. Khuntia and R.K. Sahoo, for the Appellant; R.K. Rath and N. Rout, for O.P. Nos. 2 and 3 and Additional Government Advocate for O.P. No. 1, for the Respondent

Final Decision : Allowed

Judgement

I. Mahanty, J.—The petitioner-M/s. Varsha Fabrics Private Limited (registered under the Companies Act, 1956) has filed the present writ petition seeking to challenge contemplated "fresh bid" for dis-investments of Hirakud Industrial Works Limited (in short "HIWL"), a subsidiary Industrial Development Corporation of Orissa Limited (hereinafter referred to as "IDCOL") as arbitrary and whimsical action of the opposite parties in view of the petitioner-company's willingness to abide by the terms and conditions of negotiation with IDCOL. The petitioner-company essentially is aggrieved by a limited period of "seven days" given to it for compliance with the terms and conditions contained in letter dated 27.2.2006 (Anenxure-8). The said communication contained a further threat to reject the petitioner's offer, in the event of petitioner not complying with the terms, within the period stipulated and in such an event IDCOL may invite a fresh tender.

Certain important facts and events, which are not in dispute and have been

raised in the present writ petition are noted hereunder:

7.2.2003 : An advertisement was floated inviting "Expression of interest" for HIWL. 28.2.2003 : Petitioner-company submitted its bid documents in the shape of "Expression of interest". 17.12.2003 : Petitioner-company submitted its bid documents as the lead bidder for a price of Rs. 2,61 crores along with earnest money deposited to the tune of Rs. 25 lakhs by way bank guarantee. 9.1.2004 : Petitioner was invited to attend in Inter Departmental Core Group Meeting. 24.1.2004 : (A joint meeting was held) Postponed to 4.2.2004. 4.2.2004 : Inter Departmental Core Group Meeting was held for negotiation of final bid for HIWL. In the said meeting, the petitioner agreed in principle to the terms and conditions that were proposed and put forth its grievance subject to approval of the same by the Cabinet Committee for disinvestments. The petitioner revised the original bid from Rs. 2.61 crores Rs. 5,25 crores (Annexure-4): 16.2.2005 : IDCOL intimated the petitioner- company that finalization of disinvestments can only be made after final adjudication of W.P. (C) No. 11178 of 2004 pending before this Court (Annexure-5). 26.2.2005 : Cabinet Committee on disinvestments (CCD) "Accepted offer" of the petitioner-company and while confirming such approval CCE insisted for remittance of upfront loan payment. 22.8.2005 : Petitioner-company agreed to pay the upfront IDCOL loan amounting to Rs. 206,97 lakhs on 24.2.2005. 22.9.2005 : W.P.(C) No. 11178 of 2004 was dismissed. 7.10.2005 : IDCOL sent a copy of share purchase agreement and judgment of Orissa High Court (supra) and demanded payment of Rs. 5,25,00,000/- as purchase consideration and Rs. 3,98,23,288.15 towards unsecured loan of IDCOL to HIWL on 30.9.2005 (Annexure-B) 29.10.2005 : Petitioner seeks reconciliation of account and clarification (Anenxure-6). 2.12.2005 : Hon"ble Supreme Court dismisses S.L.A. (Civil) No. 23818 of 2005 where challenge had been made to judgment dated 22.9.2005 of the Hon"ble Orissa High Court in W.P.(C) No. 1 1178 of 2004. 29.1.2006 : Cabinet Committee on Disinvestment (in short) meets and approves/modifies terms settled earlier on 3.2.2005 to the following effect. 27.2.2006 : IDCOL's letter containing the terms and conditions approved by CCD and requiring compliance within a period of seven days (Impugned order).

2. In the light of the aforesaid undisputed fact and sequence of events the following facts emerge for consideration:

(a) M/s. Varsha Fabrics Private Limited had expressed its interest for participating in a bid for disinvestments of HIWL on 28.2.2003 and pursuant to it made an offer for Rs. 2,62 crores. Negotiation took place thereafter and offer was enhanced to Rs. 5.25 crores by 4th February, 2004. The Cabinet Committee on disinvestments met on 3.2.2005 and duly approved the offer of Varsha on certain specific terms and conditions and the same was accepted by M/s. Varsha Fabrics Private Limited vide its letter dated 28.2.2005.

(b) This decision of the CCD could not be implemented because of the interim order dated 14.10.2004 passed by this Court in W.P.(C) No. 11134 of 2004 and

the objection filed by the project institution/organization (IDCOL) of HIWL, opposing the decision of the Government for disinvestments of HIWL.

(c) This Court by its judgment dated 22.9.2005 dismissed the aforesaid writ petition thereby upholding both the decisions of the State of Orissa for disinvestments of its share holding in HIWL as well as in its decision to accept the offer for purchase given by M/s. Varsha Fabrics Pvt. Ltd., the petitioner-company.

It is relevant to mention here that the Judgment passed by this Court dated 22.9.2005 had been challenged before the Supreme Court of India in Special Leave to Appeal (Civil) No. 23818/2005 and the same was dismissed on 2.12.2005 in limine having no merit.

3. That a meeting of the Cabinet Committee on Disinvestments was held on 29.1.2006 under the Chairmanship of the Chief Minister and the following decisions were taken:

The following payment should be made upfront. by M/s. Varsha Fabrics Private Limited within seven days of receipt of the letter in this regard from IDCOL.

(a) The consideration amount of Rs. 5,25 crores towards acquired 100% shareholding of IDCOL in HIWL.

(b) Unsecured loan of IDCOL to HIWL as on the closing date.

(c) Rs. 2.80 crores payable to United Bank of India towards One Time Settlement dues along with the dues of Union Bank of India.

(d) The amount payable to bond holders, which is secured by Corporate Guarantee of IDCOL.

If M/s. Varsha Fabrics Pvt. Ltd. fails to comply with the aforesaid conditions, action should be initiated to issue fresh tender for disinvestments of IDCOL's shareholding in HIWL.

The minutes dated 29.1.2006 was forwarded to IDCOL under cover letter dated 23.2.2006 and the IDCOL, in turn, has issued the letter dated 27.2.2006 to the petitioner.

4. The main issue that arises for consideration in the present writ application is whether the period of "seven days" stipulated in the impugned letter under Annexure-8 for complying with the terms and conditions stipulated therein was just and reasonable in terms of the tender condition, post bid negotiation and earlier CCD decision dated 3.2.2005.

It would be clear from the facts noted above that the petitioner has been seriously pursuing for acceptance of its offer since 2002. Further the petitioner has also agreed to enhance its bid price as well as to accept certain terms and conditions, which were not originally in the expression inviting tender. Accordingly the petitioner has also provided the earnest money deposit by way of

bank guarantee and since then it has been continuously extending the validity thereof. Most importantly, the "offer of the petitioned has been categorically "accepted by the State" in the Cabinet Committee for disinvestments on 3.2.2005 and the terms and conditions approved by the State have been categorically "accepted by the petitioner" vide letter dated 16.2.2005 (Annexure-A). The embargo in carrying out such decision was on account of challenge to the decision for disinvestment made by the State Government and interim order remained in force from 14.10.2004 till the judgment dismissing the writ application was passed on 22.9.2005 and subsequent challenge thereto before the Hon''ble Supreme Court. Thereafter, the matter went up once again before the Cabinet Committee for its approval and the said approval to certain modifications on being obtained was intimated to the petitioner vide letter dated 27.2.2006.

5. It is important to note here that although this Hon''ble Court dismissed W.P.(C) No. 11178 of 2004 vide judgment dated 22.9.2005 this Hon''ble Court took a detailed note of the minutes of the meeting held on 25.4.2005 in presence of M/s. IDCOL, M/s. Varsha Fabrics Private Limited, HIW Workers Union and Hira Cable Employees Union (in short "HCEU"), which reads as follows:

I. Regarding the demand for protecting the service conditions of the regular, casual and contract employees, it was agreed that their service conditions will be protected as per the provisions of I.D. Act, 1947.

II. Regarding payment of pending salary, it was agreed that all the workmen will be paid one month's current salary and one month's unpaid salary by M/s. VFPL immediately after taking over the Company by them. In the second month the M/s. VFPL will pay one-month current salary and another one-month arrear salary. In the subsequent months 25% of one month's pending salary (unpaid salary) will be paid along with the current salary. In case of retired and VR employees their arrear salary, unpaid salary and other dues will be paid by M/s. VFPL immediately on submission of clearance.

III. Regarding clearing of pending PF dues, it was agreed by M/s. VFPL that the matter will be taken up with the RPF Commissioner and as per the directive of the RPF Commissioner the PF dues will be cleared.

IV. Regarding the request of the Union for running of the Company by the Govt./ IDCOL in the event of failure of M/s. VFPL to run the same, it was agreed that the buyer will give a Action Plan showing their plan to run the Company (Action Plan copy enclosed). In the event of abandonment of the company by M/s. VFPL, IDCOL will take up the matter with the Govt. and as per order and directive of the govt., IDCOL will take suitable steps to protect the interest of the workman.

V. Regarding clearing of Bank loan, leave encashment, medical reimbursement etc., it was agreed by M/s. VFPL that the same will be cleared as soon as possible after the take over of the management of the company. It was agreed that IDCOL will monitor the same. Regarding clearing of pending LIC dues, it was

agreed by M/s. VFPL that the unpaid LIC premiums will be deposited in time so as to ensure that the policies are not made defunct.

VI. Regarding applicability of D.A., it was stated by M/s. VFPL that there should not be any linkage of D.A. of the employees of IDCOL with that of HIWL. However, it was agreed that the package that will be offered by M/s. VFPL to the workman of HIWL will be compatible.

VII. Regarding PF dues of retired and VR employees, it was agreed that the PF dues of retired and VR employees will be cleared immediately after taking over the management by M/s. VFPL.

VIII. Regarding payment of 20% VR dues along with other dues on submission of clearance by the employees who will opt for VR. It was agreed that the same will be cleared immediately by M/s. VFPL.

IX. The 80% VR dues, which is to be paid by DFID, the same will be paid within 4 (four) months and IDCOL will monitor the same.

X. Regarding preference in employment to the employee's son/V.R./Ex-employee's dependant/legal heir of deceased employees/casual/contract labours, it was agreed by M/s. VFPL that while recruiting persons preference will be given to the V.R./retired employees of HIWL subject to their merit and suitability.

XI. It was agreed that since the Company will be separated from the IDCOL M/s. VFPL shall form a separate scheme in consultation with LIC as a substitute to the existing family aid scheme for the employees of the Company.

XII. Regarding payment of pending gratuity premium, it was agreed by M/s. VFPL that the same be deposited with LIC in consultation with them and the payment will be made within 2 (two) months. The existing gratuity scheme will continue.

XIII. Regarding payment of pending ESI contributions, it was agreed by M/s. VFPL to clear the same immediately after the take over of the management of HIWL.

XIV. Regarding payment of pay revision arrear, it was agreed by M/s. VFPL that all the workmen will be paid 75% of one months arrear salary accrued due to revision of pay along with the current month salary from the 3rd month of take over of the Company.

XV. It was agreed that a tripartite settlement will be signed as per the above within a week of clearance of the Hon"ble High Court for take over of the Company.

6. It would be equally important to note here that vide the impugned communication dated 27.2.2006 the petitioner, apart from being directed to make various payments, was also required to enter into the "Tripartite

agreement" with the HIWL Union in terms of the minutes of the meeting dated 25.4.2005 to be done within a period of seven days as stipulated therein.

7. It is further contended by the petitioner that the non-signing of the Tripartite Agreement was due to non-cooperation of both IDCOL as well as the Workers Union. It is also important to note herein the following averments made by IDCOL in their counter affidavit, which reads as follows:

That M/s. Varsha Fabrics Private Limited vide their letter dt. 6.3.2006 again intimated IDCOL that a meeting of the HIWL Worker's Union be held for executing a tripartite agreement on 7th March, 2006 evening or 8th March, 2006 morning. Accordingly all the Unions of HIWL were informed to attend the meeting on 8.3.2006 at 10.00 A.M. But they requested for further time upto 7-15 days to hold the meeting.

That all the Workers Unions of HIWL were intimated that if they do not come for attending the meeting for signing the tripartite agreement on 8th March, 2006 at 10.00 A.M. then IDCOL will go ahead with the signing of SPA with M/s. Varsha Fabrics Private Limited, Kolkata incorporating a clause for protection of Workers' interest in line with the minutes of discussion dt. 25.4.2005 and a meeting would be organized with the Unions within fifteen days of signing of the SPA for signing the tripartite agreement which will be reflected in the SPA.

From the averments made herein above, it would be clear that the petitioner cannot be held responsible in any manner for non execution of the said tripartite agreement. It is also important to state that the further intimation by the IDCOL to the Workers Union informing that if they do not come forward to attend the meeting for signing the tripartite agreement on 8th March 2006 at 10.00 A.M. then IDCOL will go ahead with the signing of SPA with the petitioner-company and that meeting would be organized with the Unions thereafter, within fifteen days of signing of the tripartite agreement.

Though as to when the aforesaid fact was intimated to the petitioner-company has not been spelt out in the affidavit, yet it would be clear that in terms of the impugned letter under Annexure-8 dated 27.2.2006 the signing of the tripartite agreement was a condition precedent to the signing of the S. P. Agreement. This Hon'ble Court disposed of W.P.(C) No. 11178/2004 by its judgment dated 22.9.2004 in terms of the observation made in paragraph-21, which reads as follows:

From the above, it transpires that the Workmen shall sign a tripartite settlement within a week from the clearance of this Court which solves the grievance of the workers in regard to their interest.

8. It would be extremely important herein to take note of the fact that although a period of seven days was stipulated in the communication dated 27.2.2006 for compliance of terms and conditions set out therein, yet, in the counter affidavit in paragraph-19 IDCOL themselves stated that their further communication

dated 7.3.2006, purportedly handed over to the authorized representative of the petitioner, contained a further request to comply with the terms and conditions stipulated by the CCD.

It is a matter of concern to take note that although CCD held a meeting on 29.1.2006 a period of nearly one month lapsed before the terms and conditions were approved by the CCD and intimated to the petitioner i.e., in the letter dated 27.2.2006. Further although the said letter contained "seven days" period for compliance, yet, the IDCOL on their own have themselves indicated on 7.3.2006, that the stipulation of time was not absolutely of prime importance and, therefore, same could be extended, since the said letter itself was issued more than seven days after 27.2.2006.

9. It is equally important to take note of the fact that, although the impugned letter (Annexure-8) dated 27.2.2006 contained a note that in the event of inaction on the part of the petitioner, IDCOL would have rejected their bid. The said communication seems to have omitted to take note of the fact that by the said time the "bid was no longer available to be rejected" since by then the bid (offer) of the petitioner had come to be accepted by IDCOL and duly approved by the State of Orissa by the decision of the CCD, even the variation of the terms suggested by CCD has also been accepted by the petitioner-company. In other words we are of the view that a "completed contract had come into existence and it was no longer available to either party to walk out of the said contract without abiding by the terms of the same. We are of the view that a contract had come into existence in the matter as set out herein above. Although Share Purchase Agreement (in short "S. P. Agreement") had not been signed by the parties yet, signing of the same was a mere formality, since the terms and conditions had already been negotiated and agreed to by the parties.

10. In this regard, it would be important to take note of the averments contained in a caveat petition filed by M/s. IDCOL registered as Caveat Petition No. 183/2006 which forms a part of the record of the present writ application. This caveat petition bears an affidavit dated 19.3.2006 by the Company Secretary of M/s. IDCOL I.e., Opposite party No. 3 to the following effect:

That the said subsidiary company with its assets and liabilities including the share capital are being disinvested and the opposite party in the said process is to take over.

That the time period given to the said opposite party for signing the share purchase agreement has already expired and the said opposite party is unnecessarily delaying the matter. It is also apprehended that the said opposite party may file case against the subsidiary company including the caveator No. 1 to delay the matters. Hence this caveat.

The said company and its assets and liabilities including share capital are being disinvested and the O.P. in the said process is to take over.

In view of the aforesaid averments, it can be safely assumed therefrom that it was the averment of M/s. IDCOL that VFPL was in the process of taking over and that VFPL had been unnecessarily delaying the matter by not acting within the time period given for signing the share purchase agreement, i.e., complaint was only of alleged delay and no mention exists therein either of rejection of the bids or termination of contract.

It is pertinent to mention here that while present writ petition was filed on 24.3.2006 after serving a copy of the petitioner on the counsel for the Caveator, M/s. IDCOL issued a fresh advertisement thereafter by publishing an invitation for bid for disinvestments in HIWL in the Samaj dated 29.3.2006 (Annexure-D) inviting the parties to express their interest and the last date of submission of the bid was 17.4.2006. On the said date after hearing the parties, this Hon''ble Court vide order dated 17.4.2006 directed the IDCOL not to open the bid received pursuant to its advertisement vide Annexure-D and the said interim order was directed to continue. Therefore, the advertisement and subsequent events have to be termed as *Us pendens* events and therefore, bound by the judgment in the present writ application.

It has been contended by the learned Counsel for M/s. IDCOL that IDCOL be permitted to open the bid. But in view of the judgment being pronounced in this case, no further action need be taken in the matter since the advertisement was made during the pendency of the present application before this Hon''ble Court.

11. The State of Orissa-O.P. No. 1 though has not filed any counter affidavit to the present writ application, it appeared through Learned Addl. Counsel, who on the date of hearing i.e., on 9.5.2006 produced a copy of the written instruction received by him from the Government of Orissa in the Public Enterprise Department vide letter dated 4.5.2006 inter alia rejecting the proposal of the petitioner given during the pendency of the present writ application and further stating that since the advertisement inviting fresh bids for disinvestments of IDCOL share holding in HIWL has already been initiated and bids have been received, the bid of the petitioner thereby stood cancelled and cannot be considered at this stage.

12. An intervention application has been filed by M/s. AFCONS purportedly on account of certain claim, they have made against HIWL. Since the present writ application relates to the disinvestments process and has no connection with settlement of such claims or dispute, if any, we do not entertain such application in the present application and leave it to the parties concerned to seek remedy as available to it in law.

13. We are of the view that the judgment of the Hon''ble Supreme Court in the case of Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, is of extreme relevancy. Justice Sabyasachi Mukherji, the then Chief Justice of India speaking for the Bench has observed as follows:

The State acts in its executive power under Article 298 of the Constitution in

entering or not entering in contracts with individual parties. Article 14 of the

Constitution would be applicable to those exercise of power. Therefore, the action of State organ can be checked under Article 14. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, it should meet the test of Article 14 of the Constitution. If a Governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. Rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State Instrumentality in dealing with citizens. 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 touch stone relevance and reasonableness, fair play, natural justice, equality and non-discrimination. It is well settled that there can be "malice in law". Existence of such "malice in law" is part of the critical apparatus of a particular action in administrative law. Indeed "malice in law" is part of the dimension of the rule of relevance and reason as well as the rule of fair play in action.

As has been held by the Supreme Court in the aforesaid judgment it is settled law that if a Governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. It has further been held that even though the rights of the citizens are 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 touch stone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination.

We are of the view that imposition of an unreasonable short period of seven days for compliance of the terms and conditions stipulated being unreasonable and arbitrary amounts to malice in law thereby necessitating interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

14. In consideration of equitable realities of the situation we have arrived at a conclusion that the period of seven days stipulated in the impugned communication dated 27.2.2006 vide Annexure-8 while being unreasonable is also arbitrary thereby causing injustice to the petitioner. Therefore, keeping the object underlying the disinvestments of HIWL and keeping the interest of workmen and the employees of HIWL in mind, we dispose of this writ application with the following directions:

(A) In the facts and circumstances as enumerated herein above it would be clear that the "closing date" for signing of the S.P.A, fixed by IDCOL under impugned order (Annexure-8) i.e., seven days from the date of receipt of the said letter, was unilateral, impractical and an impossibility, in view of the failure on the part of the Workers Union signing in the tripartite agreement. In any event of the

matter, we are of the view that the petitioner company acting through its legal counsel, having made statement before this Hon"ble Court, to the effect that it was ready and willing to abide by all the terms set out by the CCD in its meeting dated 29.1.2006, and its offer having been accepted (Annexure-8) we deem it fit and proper to direct extension of the period for compliance of the terms and stipulating in Annexure-8 by further period of two months from the date of pronouncement of this judgment.

(B) We make it clear that in the event the petitioner company does not comply with each and every term approved by the CCD and communicated to the petitioner through IDCOL's letter dated 27.2.2006 (Annexure-8) within the time stipulated above, it would be open to the opposite parties to take steps for inviting fresh bids for disinvestments of its share holding, as well as other steps in accordance with law.

Learned Counsel for the petitioner had brought to the notice of this Court that it had already prepared a draft for Rs. 5,25,00,000/-towards the consideration amount for acquiring 100% share holding on IDCOL and HIWL in order to prove its bona fides to this Court as well as to show its readiness to comply with the terms of the transaction. We direct that the said draft be deposited with the IDCOL within one week from today. The said amount may be accepted by the IDCOL as part compliance of its terms contained in Annexure-8.

(C) Intervention applications in the present writ application have been filed by the Workers Unions and they have been made parties to the present proceeding. It is in their interest to ensure that the tripartite agreement as contemplated under the minutes of the meeting dated 25.4.2005 are signed within a period of fifteen days from today in order to protect their interest. We make it clear that if the Union does not come forward to sign in the tripartite agreement it shall be open to M/s. IDCOL-opposite party to sign the S.P.A. with the petitioner on the petitioner complying with all terms and conditions as agreed to by the parties. This direction is being passed keeping in mind the interest of the State and the protection of the workers interest as well as to balance out the said interest with the rights of the petitioner as well as that of the employees.

The writ application is allowed.

Sujit Barman Roy, C.J.

15. I agree.