

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 13836/2009 & CMs 15675-78/09, 9603-04 /2010

Reserved on: 20th September 2010

Decision on: 27th September 2010

BASANT BAGDE

..... Petitioner

Through: Dr. A.M. Singhvi, Senior Advocate with
Mr. Amit Anand Tiwari and
Mr. Amit Bhandari, Advocates.

versus

HINDUSTAN PREFAB LIMITED & ORS

..... Respondents

Through : Mr. Manoj Sharma with
Mr. Sarad Jha and
Mr. Sumit Bhardwaj, Advocates for R-1 and R-2.
Mr. A.P. Mayee and
Ms. Praveena Gautam, Advocates for R-3 with
Mr. V.P. Sharma, Deputy CEO, SUDA.

CORAM: JUSTICE S. MURALIDHAR

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| 1. Whether Reporters of local papers may be
allowed to see the judgment? | No |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in Digest? | Yes |

JUDGMENT

27.09.2010

1. This is the second round of litigation involving the parties stemming from the award to the Petitioner, by the Respondent No.1 Hindustan Prefab Limited ('HPL'), the contract of construction of low cost houses in eleven packages, in two lots of five and six packages each, at Raipur in Chhattisgarh. This time around, the petitioner seeks a writ of certiorari to quash the decision of the HPL conveyed by its letter dated 16th September 2009 cancelling six of the eleven packages awarded to the Petitioner. This petition also seeks a writ of mandamus directing the Respondents "not to cancel the contract of the Petitioner in respect of the remaining five

packages.”

2. The background to the present petition under Article 226 of the Constitution is that on 20th March 2008 HPL issued a notice inviting sealed percentage rate tender (‘NIT’) for construction of houses under the Basic Services for Urban Poor (‘BSUP’) Scheme of Jawaharlal Nehru National Urban Renewal Mission (‘JNNURM’) in Raipur City. Clause 5 of the Special Conditions of Contracts (‘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 further stated that “under no circumstances, such a tenderer is allowed to quote separate percentages for individual items, trades or group of items.”

2a. The Petitioner states that prior to the above NIT dated 20th March 2008, HPL had already invited four tenders with respect to the same project. However, no contract could be awarded since the bids received were non-competitive. 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 in PWD by enhancing the rate of Item No. 8 of Chapter No. IV (Steel) from ₹ 24 per kg to ₹ 50 per kg.

3. It is stated that on 3rd April 2008 the Petitioner submitted six tenders on

percentage rate basis. The quoted rates were 109% above the SOR, after taking into account the amended rates. The tenders were opened on that very day. The lowest (L-1) bidder was awarded seven packages out of total 18 packages at the rate of 59% of SOR. It is stated that on 9th May 2008, the HPL negotiated with the Petitioner in terms of Clause 7 of NIT. The Petitioner was asked to submit his acceptance for executing the contract at the L-1 rate. In response thereto, by a letter dated 9th May 2008 the Petitioner agreed to quote its rates at the L-1 price which was 59% above SOR, subject to grant of a minimum of five packages.

4. It is stated that the HPL entered into an Agreement dated 7th June 2008 with the Petitioner at Delhi whereby five packages were awarded to the Petitioner. This entailed the Petitioner having to construct in each package 1536 dwelling units (DUs). The total time period was 18 months. A supplementary agreement was entered into on 23rd August 2008 for the remaining six packages of the NIT.

5. The Petitioner states that he commenced the work and submitted his first running account bill to the HPL. In the said bill, the Petitioner 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.

6. Aggrieved by the above decision dated 18th September 2008, the Petitioner filed a Writ Petition (Civil) No. 7044 of 2008 before this Court. On 19th

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March 2009 a learned Single Judge of this Court dismissed the writ petition on the ground that the Petitioner 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 petition.

7. Aggrieved by the above order dismissing his writ petition, the Petitioner filed a LPA No. 182 of 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 Petitioner for grant of increased rate of steel @ ₹ 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. v. Export Credit Guarantee Corporation of India (2004) 3 SCC 553*.

8. The Petitioner states that consequent upon the above order of the Division Bench of this Court, he was subjected to a “tyrannical attack” by the Respondents including the Respondent No. 2 i.e. CMD of HPL and the Chief Secretary and the Principal Secretary of Respondent No.3 i.e. State of Chhattisgarh. The Petitioner claims that Respondent No. 2, informed the Petitioner that in light of the order of the Division Bench of this Court, the case of the Petitioner for grant of amended rate of steel had been recommended to the State of Chhattisgarh. However, the Respondent No. 3 reiterated that the Petitioner should accept ₹ 24/- per kg (i.e. the unamended

rate of steel). The Petitioner states 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 had, under unrelenting coercion, accepted ₹ 24/- per kg. as the rate of steel and also gave an undertaking on 29th June 2009 that he would not be approaching this court for adjudication of his grievances. Thereafter HPL issued an order dated 30th June 2009 to the effect that the Petitioner was not entitled to the amended rate of steel @ ₹50/- per kg.

9. The Petitioner has enclosed a copy of a letter dated 31st July 2009 from Respondent No. 2, the CMD of HPL, to the Chief Secretary of Respondent No. 3 wherein it was inter alia stated:

“Though the above matter has been resolved/settled as per the direction given to us, even after that neither further balance land was handed over nor our due payments were released. Rather, HPL has been further asked to ensure that the rates will not go on higher than the approved rates by the State Government. The same exercise has also been completed and informed to the CEO, SUDA vide our letter No. HPL/CG/09/250 dated 28th July 2009. However things are still at stand still.

We would be grateful if you can kindly use your good office to intervene in the matter so that project may be restarted, further it is also requested that the land for the balance houses may be allotted and payments are released as per the agreement.”

10. Aggrieved by the above decisions, the Petitioner filed CM Nos. 13048-49 of 2009 in the disposed of LPA. In these applications, it was alleged that the Respondents were neither making payments for the work already done on the

basis of the admitted rate of steel and had also stopped making land available for the construction of the houses. In the circumstances, the petitioner prayed for grant of the amended rate of steel at ₹ 50/- per kg. The Division Bench directed notice to issue in the said applications on 15th September 2009. On 16th September 2009, HPL cancelled the six packages out of total 11 packages awarded to the Petitioner on the ground that the Petitioner had failed to comply with one of the terms of contract which required him to furnish a performance guarantee. On 12th October 2009 while directing notice to issue in the applications, the Division Bench of this Court directed status quo to be maintained. Meanwhile challenging the order dated 16th September 2009 a further application CM 14295 of 2009 was filed. However, when the applications were heard subsequently on 10th November 2009, the petitioner sought leave to withdraw the applications with liberty to file a substantive writ petition. The applications were dismissed as withdrawn with liberty as prayed for. Thereafter the present writ petition was filed on 7th December 2009.

11. In the present petition as originally filed, prayers made were as under:

- “i) Issue a writ of certiorari quashing the order dated 30.6.09 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 Petitioner for 11 packages;
- iii) Issue a writ of mandamus directing the respondents to make the payment to the Petitioner 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 cancelling six packages out of total 11 packages awarded to the petitioner;
- v) Issue a writ of mandamus directing the respondents not to cancel the contract of the Petitioner 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.”

12. However, on 17th December 2009 this Court issued notice in the writ petition limited to prayers (iv) and (v) above. In other words, the challenge to the order dated 30th June 2009 passed by the HPL disallowing the claim of the petitioner for the rate of steel to be fixed at ₹ 50 per kg. and other consequential reliefs were not entertained. Although the said order dated 17th December 2009 is stated to be under challenge before the Division Bench by way of an LPA, no interim order has been passed therein. Consequently, the scope of the present writ petition is confined to prayers (iv) and (v) above.

13. Dr. Singhvi, learned Senior counsel for the Petitioner urged that the actions of the Respondents were vitiated both by malice in fact and malice in law. It was in retaliation for the Petitioner having approached this court that the HPL cancelled the six remaining packages by the order dated 16th September 2009. HPL's letter dated 19th September 2009 to the Principal Secretary of the Respondent No. 3 itself clearly indicated that the decision to terminate the six packages was arbitrary and vitiated by malice in law. Relying on the judgments in *Smt. S. R. Venkataraman v. Union of India*

(1979) 2 SCC 491 and *Express Newspapers Pvt. Ltd. v. Union of India (1986) 1 SCC 133*, it is submitted that since a specific plea of legal malice has been raised by the Petitioner against HPL and the State of Chhattisgarh (Respondent No. 3), the writ was maintainable. In particular, it was urged that when there is a malice-induced breach of contract then this Court can interfere under Article 226 of the Constitution. The Petitioner claims that for the work already completed by him several payments were due even when calculated under the unamended rates. This could have been easily adjusted towards the amount for which a bank guarantee had to be furnished by the Petitioner for the remaining six packages. It is submitted that the non-furnishing of the bank guarantee was only an excuse to terminate the Petitioner's contract for the remaining six packages. The petitioner also contends that after receiving ₹ 41.22 crores from Respondent No. 3, HPL retained ₹ 18.3 crores of the Petitioner's money.

14. In reply to the above submissions, Mr. Manoj Sharma, the learned counsel appearing for the Respondents 1 and 2 stated that the HPL was only an 'executing agency' for the Respondent No. 3. There were two packages of construction of low cost houses. They were to be constructed at a fixed price. The first package consisted of 27,976 DUs and the second 16,896 DUs. The latter was further divided into 11 packages of 1536 DUs each. This was further sub-divided as 5 packages (7,680 DUs) and 6 packages (9,216 DUs). The Petitioner not only agreed to the terms of the contract but also to the L-1 rates. Clause 3.6 of the Agreement dated 7th June 2008 made it clear the contract was awarded at a pre-fixed price. According to HPL, the progress of construction of DUs in the first five packages was tardy. Nevertheless, it is

submitted that all the bills of the Petitioner were settled on the basis of the unrevised rates. According to HPL there are no outstanding bills of the Petitioner that remain to be paid by it. He denied that HPL or its CMD had acted out of either malice in law or malice in fact. The letter dated 19th September 2009 written by Respondent No.2 to Respondent No.3 did not show any malice on the part of Respondent No.2. The furnishing of a bank guarantee was one of the essential conditions for award of the contract of six packages and this was not fulfilled by the Petitioner. Therefore the cancellation of the award of those six packages was inevitable. There was no question of adjustment of the amount for which the guarantee had to be furnished against outstanding payments owing by HPL to the Petitioner particularly since according to HPL there were no payments due to the Petitioner. There was a serious issue of the non-fulfilment by the Petitioner of the conditions of contract concerning the five packages but as at present the said contract of five packages was not cancelled. It is submitted that in any event this court could not, in exercise of its powers under Article 226 of the Constitution, issue a writ to HPL not to cancel the five packages as that was a relief that could be granted even in a suit for specific performance.

15. Mr. A.P. Mayee, learned counsel appearing for the Respondent No.3 State of Chhattisgarh, pointed out that there was no privity of contract between the Petitioner and the Respondent No. 3. Under the BSUP Scheme, 80% of the funds were provided by the Central Government, 10% by the State Government and 10% by the local authority. A sum of ₹ 8.69 crores was released to the HPL even prior to issuance of the NIT dated 20th March 2008 and 26.056 hectares of land had been released to the HPL for

construction of 7816 DUs. It is pointed out that by a letter dated 25th September 2009, Respondent No. 3 replied to the letter dated 19th September 2009 received from Respondent No. 2 refuting the allegations made therein as baseless and denying the fact that land or money was an issue. Respondent No. 3 further stated that the issue of land was not connected with the cancellation of the six packages. It was for the HPL to justify the said cancellation. The concerns about the quality of construction regarding the five packages had already been expressed to HPL. Respondent No.3 was of the view that the progress and quality of work in the five packages entrusted to the Petitioner was unsatisfactory.

Scope of the present petition

16. The above submissions have been considered. The scope of the present writ petition is limited to prayers (iv) and (v). It may be noticed at this stage that against the refusal by this Court by its order dated 17th December 2009 to issue notice on prayers (i) to (iii), the Petitioner has filed a Letters Patent Appeal, which is stated to be pending before the Division Bench of this Court. Prayer (iv) invites this court to declare the cancellation or termination of the six packages of the contract awarded by HPL to the Petitioner to be unlawful and obviously seeks the consequential relief of restoration of those six packages. Prayer (v) seeks the relief of restraining HPL from cancelling the contract in relation to the five packages. There is, therefore, no matter of doubt that both prayers arise out of a purely contractual dispute. However, in the first round of litigation in this very case the Division Bench of this Court reversed the judgment of the learned Single Judge by relying on the decision of the Supreme Court in ***ABL International Ltd.*** The Division Bench held

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that even if the dispute was purely contractual, a writ petition could nevertheless be entertained.

17. One of the main reasons why the Supreme Court in *ABL International Ltd.* held that even in matters arising out of a contract involving a Central Government entity or a State entity, a petition under Article 226 of the Constitution would be maintainable, was that in that case there was no dispute on the essential facts. As will be presently seen, the position in the instant case is different. On almost every assertion by the Petitioner, the Respondents have joined issue. However, to be fair to learned Senior counsel to the Petitioner, he proceeded to argue the case on merits by urging that since the decision dated 16th September 2009 of HPL to terminate the six packages was being assailed on the grounds of arbitrariness, malice in law and malice in fact, this Court had the jurisdiction under Article 226, to examine and adjudicate these issues notwithstanding that they may give rise to disputed questions of fact. Indeed, at no stage did the learned Senior counsel seek to reserve the right of the Petitioner to agitate these issues in other appropriate proceedings. Consequently, this Court proceeds to deal with the contentions of the parties on merits.

Malice in law and malice in fact

18. In para 32 of the writ petition the Petitioner has assailed the order dated 16th September 2009 passed by the HPL cancelling the six packages on the ground of malice in law. Para 32 of the writ petition reads as under:

“32. On 19.9.2009, Respondent No.2 wrote a letter to Principal Secretary of Respondent No.3 State saying that the decision was

already taken on 28.8.2009 to cancel the six packages of the petitioner, however, they have cancelled the same by putting blame on the petitioner although they were unable to hand over the land for the project and also they were having constrained of releasing funds even against the ongoing contract. The above two letters clearly display the legal malice of the Respondent authorities, their high handedness, arbitrary and malafide intention to destroy the business of the petitioner and it also discloses the utter disregard for rule of law by the respondent authorities in their word and action.”

19. The letter dated 19th September 2009 was written by Respondent No.2, the CMD of HPL, to the Chief Secretary of Respondent No.3 referring to a meeting held on 28th August 2009 wherein it had been decided to withdraw the six packages awarded to the Petitioner. The letter proceeds to state: “We have cancelled the contract by putting blame of non-fulfilment 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 the release of funds even against the ongoing contract.” As regards the five packages it was pointed out by Respondent No.2 that land for only 6048 DUs as against 7680 DUs was made available and that either additional land should be made available or the contract should be foreclosed for the balance work. The main purpose of the letter was clear from the last line where Respondent No.2 states “HPL is not to be made responsible for any financial implications or legal issues arising, if any, due to cancellation of contract.”

20. The Petitioner 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 inference. 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 Petitioner admittedly has no privity of contract, and HPL, with whom alone the Petitioner had a contract, were conspiring to unfairly terminate the Petitioner’s contract for six packages. The entire case of the Petitioner 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 Petitioner. In fact, learned Senior counsel for the Petitioner was hard pressed to show how the above exchange of correspondence substantiated the case of the Petitioner that either or both Respondents 1 and 3 were acting against him out of malice in law or fact.

22. The initial burden on a Petitioner seeking to bring forth a case of malice in law or in fact is indeed substantial. It cannot be based on hearsay, conjectures and surmises. Unless some factual foundation is laid to support a plea of malice, it will be unsafe for a writ court to examine the matter any further. In the present case, the entire case of the Petitioner is based on the letter dated 19th September 2009 by Respondent No. 2 to Respondent No. 3 which suggests that the contract of the Petitioner may not have been terminated for valid reasons and puts the blame on Respondent No.3. This has been rejected outright by Respondent No.3 in its reply dated 25th September 2009. It is not feasible for a writ Court to examine the authors of the respective letters to determine which of these two highly contested versions is right. Consequently, on the basis of the case put forward by the Petitioner, it is not possible for this Court to conclude that the decision dated 16th September 2009 to terminate the contract of six packages awarded to the Petitioner is vitiated either by malice in law or malice in fact.

The cancellation of contract cannot be held to be arbitrary

23. It was pointed out by learned counsel for the HPL that the requirement of furnishing performance guarantee as regards the contract concerning the six

packages formed an essential component of the contract. It could not be waived by the Respondent No. 3. That was one of the primary reasons why the contract for the remaining six packages was cancelled. The response of the Petitioner was that the amount for which the bank guarantee had to be furnished could be adjusted against the payments owing to the Petitioner. In other words, there is no denial that the Petitioner failed to furnish the performance guarantee as required by the contract covering the six packages.

24. This Court is unable to appreciate the above submission of the Petitioner. In the first place whether any amount is owing to the Petitioner by the HPL is itself a disputed question of fact which cannot be determined in these proceedings. Moreover, the obligation to furnish a performance guarantee in a construction contract cannot possibly be linked to outstanding payments against completed works of other contracts between the parties. The very submission that the amount for which the guarantee had to be furnished could be adjusted against outstanding payments, which in any event is disputed, appears to this Court to be misconceived. In the circumstances, the decision of HPL by its letter dated 16th September 2009 to terminate the six packages awarded to the Petitioner on the ground of non-furnishing of the performance guarantee cannot be held to be arbitrary.

Prayers (iv) and (v) even otherwise not capable of being granted

25. The Petitioner referred to the report of a Professor from the Indian Institute of Technology, Delhi who was appointed as a Consultant by the HPL to carry out a check on the quality of the construction. The Petitioner claimed that the said expert, by his report dated 22nd October 2009, found that

the structures raised by the Petitioner were of excellent quality. It was accordingly submitted that there was no justification in not clearing the outstanding payments owing to the Petitioner as regards the five packages awarded and for which work was in progress. It was also on this basis that the Petitioner in prayer (v) sought a mandatory injunction to the Respondents “not to cancel the contract of the Petitioner in respect of the remaining five packages.”

26. Prayer (v) as framed is not capable of being granted even by a civil court since it seeks to restrain one of the parties to a contract from terminating the contract. In effect, it seeks continuation of a contract which is yet to be terminated. No court can possibly grant such a pre-emptive permanent injunction that a contract cannot be terminated. It can at best adjudicate on whether the termination, after it takes place, was lawful. Then again it cannot direct specific performance of a contract of the kind with which the present case is concerned. As of now, there is no termination of the five packages awarded to the Petitioner. It is not possible for this court to render a finding on the quality of construction and to simply accept the report of the expert cited by the Petitioner. These would be technical matters for which evidence would have to be led. A writ court is ill suited for that exercise.

27. Prayer (iv) seeks the quashing of “the letter dated 16.09.2009 of Respondent No. 1 cancelling six packages out of the total 11 packages.” In other words, this Court in exercise of its powers under Article 226 is asked to declare the termination of the contract of six packages to be illegal. The expectation obviously is that if such prayer is granted it would amount to

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continuation of the contract concerning the six packages. Such a relief cannot possibly be granted to the Petitioner even in a suit. For the illegal termination of a construction contract the only relief that can be granted is of damages if at all. In any event as has already been held the Petitioner has failed to show that the termination of the six packages is arbitrary or vitiated by malice either in law or in fact.

Conclusion

28. For the aforementioned reasons, this Court finds no merit in the petition as regards prayers (iv), (v) and (vi) on which prayers alone notice was issued in the writ petition. The writ petition is dismissed with costs of ₹ 10,000/- of which ₹ 5,000/- will be paid by the Petitioner to Respondents 1 and 2 and the remaining ₹ 5,000/- will be paid to Respondent No. 3 within two weeks. All pending applications stand dismissed.

S. MURALIDHAR, J.

SEPTEMBER 27, 2010
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