*IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 21st November, 2011

+ **LPA 918/2011**

RAYALSEEMA CONCRETE SLEEPERS PVT. LTD. ..... Appellant

Through: Mr. Neeraj Kishan Kaul, Sr. Adv. with Mr. R.K. Sanghi & Ms. S. Dutta, Adv.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Ms. Geetanjali Mohan & Mr. Ketan Madan, Adv. for UOI.

AND

LPA 964/2011

RAYALSEEMA CONCRETE SLEEPERS PVT. LTD. ..... Appellant

Through: Mr. Neeraj Kishan Kaul, Sr. Adv. with Mr. R.K. Sanghi & Ms. S. Dutta, Adv.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Ms. Geetanjali Mohan & Mr. Ketan Madan, Adv. for UOI.

CORAM :-
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

Signature Not Verified
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Certify that the digital file and physical file have been compared and the digital data is as per the physical file and no page is missing.

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JUDGMENT

RAJIV SAHAI ENDLAW, J.

1. The appeals impugn identical orders dated 4th November, 2011 and 16th November, 2011 in W.P.(C) No.7859/2011 and W.P.(C) No.7230/2010 respectively.

2. W.P.(C) No.7230/2010 was filed contending, that the petitioner is engaged *inter alia* in the business of manufacturing of concrete sleepers for respondent Railways; that the respondent Railways placed a purchase order dated 1st June, 2007 on M/s RCS-GSRK Wooden Ties Pvt. Ltd. for supply of Railway Tracks Special Wooden Sleepers made out of imported logs of Malaysian Balau Group of Species; that the petitioner is a shareholder of the said M/s RCS-GSRK Wooden Ties Pvt. Ltd.; that the said M/s RCS-GSRK Wooden Ties Pvt. Ltd. was unable to supply the wooden sleepers owing to non-availability in Malaysia of Malaysian Wood and owing whereto the respondent Railways encashed the Bank Guarantee furnished by the said M/s RCS-GSRK Wooden Ties Pvt. Ltd.; that according to the said M/s RCS-GSRK Wooden Ties Pvt. Ltd. the contract has become void and frustrated; however the respondent Railways have levied liquidated damages on the said M/s RCS-GSRK Wooden Ties Pvt. Ltd. who had invoked the arbitration clause. The writ petition was filed owing to the communication sent by the Western Railways to all Zones to realize the liquidated damages levied on M/s RCS-GSRK Wooden Ties Pvt. Ltd. from the pending dues of the petitioner. It was the contention of the petitioner

that no copy of the said internal communication had been sent to it and without notice to it the dues allegedly of M/s RCS-GSRK Wooden Ties Pvt. Ltd. were being sought to be recovered from the petitioner. The petitioner contended that the contract under which liquidated damages had been levied was between the respondent Railways and M/s RCS-GSRK Wooden Ties Pvt. Ltd. and petitioner cannot be held liable therefor.

3. Notice of W.P.(C) No.7230/2010 was issued and vide order dated 29th October, 2010 the respondent Railways was restrained from, in pursuance to communication dated 22nd October, 2010, withholding any payments to the petitioner.

4. On 25th August, 2011 when the aforesaid W.P.(C) No.7230/2010 was listed before the learned Single Judge, attention of the counsels was invited to ***New Horizon Ltd. v. UOI*** (1995) 1 SCC 478 and to ***M/s Gammon India Ltd. v. Commission of Customs, Mumbai*** 2011 (7) SCALE 297.

5. W.P.(C) No.7859/2011 was filed by the petitioner impugning the communication dated 2nd November, 2011 issued by the East Coast Railways, also directing the Southern Railway to withhold payments due to the petitioner for the reason of the liquidated damages levied on M/s RCS-GSRK Wooden Ties Pvt. Ltd. The said writ petition came up before the learned Single Judge on 4th November, 2011. The learned Single Judge was of the view that the writ petition was premature as the East Coast Railways, before issuing notice to the Southern Railways to withhold

payments to the petitioner, had not given any notice to the petitioner. It was held that the principles of natural justice demanded that before any action was taken against the petitioner on the basis of the impugned communication dated 2nd November, 2011, the petitioner would be put to notice by the respondent Railways. With the said observation the writ petition was dismissed as premature.

6. Thereafter when W.P.(C) No.7230/2010 came up before the same learned Single Judge on 16th November, 2011, the same was also dismissed as premature.

7. The senior counsel for the appellant has at the outset contended that the learned Single Judge erred in dismissing W.P.(C) No.7859/2011 in *limine* when earlier writ petition being W.P.(C) No.7230/2010 entailing similar controversy was pending and interim protection granted therein. Though in view of W.P.(C) No.7230/2010 having also since stood dismissed, the said argument is now infructuous but we may mention that W.P.(C) No.7230/2010 was also at the show cause stage only and thus the learned Single Judge cannot be said to have committed any error in dismissing W.P.(C) No.7859/2011 though entailing similar controversy.

8. The senior counsel for the appellant has next contended that the writ petitions could not be said to be premature in as much as in pursuance to the communications impugned therein the monies due to the petitioner were being withheld. It is thus contended that the appellant was justified in invoking the remedy thereagainst.

9. The counsel for the respondent Railways appearing on advance notice has contended that the communications impugned in the two writ petitions were addressed not only to all the zones but also to the petitioner; that the petitioner concealed this fact in the writ petitions; that the petitioner had in fact also responded to the said communication and to which rejoinder had been given by the respondent Railways. She thus contends that it is not as if the petitioner had not been heard in the matter of withholding of the dues. It is also contended that the petitioner is a joint venture partner in and holding 95% share in M/s RCS-GSRK Wooden Ties Pvt. Ltd. and is liable for the liquidated damages recoverable by the respondent Railways from the said M/s RCS-GSRK Wooden Ties Pvt. Ltd.

10. The senior counsel for the petitioner has rejoined by contending that the learned Single Judge has not even adjudicated the controversy on merits and the matters are liable to be remanded to the learned Single Judge for decision. It is contended that no case for piercing the corporate veil even was made out in as much as no case of fraud has been set up.

11. We may notice that Clause 6.3 of the letter dated 1st June, 2007 of the respondent Railways to M/s RCS-GSRK Wooden Ties Pvt. Ltd. empowered the respondent Railways to recover the liquidated damages in terms of Clause 0702 of IRS Conditions of Contract. The same is not before us. It will fall for adjudication whether the respondent Railways is entitled to recover the liquidated damages claimed by it under the contract with M/s RCS-GSRK Wooden Ties Pvt. Ltd. from the petitioner who is

but a joint venture partner and/or shareholder of M/s. RCS-GSRK Wooden Ties Pvt. Ltd. In so far as the argument of the petitioner of piercing the corporate veil is concerned, we may notice that this Court in ***Saurabh Exports v. Blaze Finlease and Credit*** 129 (2006) DLT 429 pierced the corporate veil where the same was being used to evade obligations in law. We also are concerned that M/s RCS-GSRK Wooden Ties Pvt. Ltd. appears to have been incorporated only for the purpose of entering into the contract aforesaid for supply of wooden sleepers to the Railways and is unlikely to have any assets from which the dues and claims if any of the respondent Railways can be recovered. All these questions undoubtedly require consideration.

12. However we are of the opinion that the learned Single Judge having held that said recoveries cannot be made from the petitioner without affording opportunity of hearing to the petitioner, there is no need to remand the matters to the learned Single Judge. The respondent Railways is bound by the observations therein which require it to comply with the principles of natural justice before effecting any recovery from the petitioner of the dues of M/s RCS-GSRK Wooden Ties Pvt. Ltd. As of now, we do not have the stand/basis of such claim of the respondent Railways before us and it is deemed expedient that the opportunity of hearing afforded by the learned Single Judge is allowed its course.

13. We had also enquired whether the petitioner is a party in the arbitration stated to be underway. We are informed that the same is

between M/s RCS-GSRK Wooden Ties Pvt. Ltd. and the respondent Railways only and the petitioner is not a party thereto.

14. The senior counsel for the petitioner has also expressed urgency by contending that dues of the petitioner are held up by the respondent Railways. The said grievance can be taken care of by directing the respondent Railways to act in a time bound manner.

15. Thus while dismissing these appeals, we further direct/clarify as under:-

A. The respondent Railways to treat the present petitions as the representations of the petitioner against the communications aforesaid directing withholding of payments due to the petitioner. The petitioner shall be entitled to make a further representation if any required in this regard within two weeks hereof.

B. The respondent Railways are directed to grant a personal hearing to the petitioner on the aforesaid aspect within six weeks hereof.

C. The respondent Railways, if after such hearing sustain recovery of liquidated damages from the dues of the petitioner, to pass a reasoned order and to deliver a copy thereof to the petitioner within twelve weeks hereof.

D. The petitioner if remains aggrieved therefrom shall have remedies in law.

No order as to costs.

RAJIV SAHAI ENDLAW,J

ACTING CHIEF JUSTICE

NOVEMBER 21 , 2011
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