IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.1978 of 2016

IN

Civil Writ Jurisdiction Case No. 10122 of 2015

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Essar Power (Jharkhand) Limited, a Company incorporated under the Companies Act, 1956, having its registered officer address at Prakash Deep Building, 10th Floor, 7 Tolstory Marg, New Delhi 110 001

.... Appellant/s

Versus

1. Bihar State Power Holding Company Limited through G.M. Commerce, B.S.P.H.Co. Ltd. having its registered address at 1st Floor, vidyut Bhawan, Bailey Road, Patna- 800 001, Bihar,
2. The Union of India, though Secretary, Ministry of Coal, having its address at Shastri Bhawan, P.O. & P.S.-Parliament Street, Town & District- New Delhi (NCT of Delhi)
3. ICICI Bank Limited through its Manager, having its office at ICICI Centre, 163, H. T. Parekh Marg, Backbay Reclamation, Churchgate, Mumbai- 400 020

.... Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Karan Bhariok, Advocate
		Mr. Prabhat Ranjan Singh, Advocate
For the Respondent/s	:	Mr. Navin Prakash, Advocate
		Mr. Anand Kumar Ojha, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE

&

HONOURABLE DR. JUSTICE RAVI RANJAN

JUDGMENT AND ORDER

CAV

(Per: HONOURABLE THE CHIEF JUSTICE)

Date: 28-10-2016

The Essar Power (Jharkhand) Limited, a company incorporated under the Companies Act, 1956, the appellant herein, runs a Thermal Power Project in the State of Jharkhand, which was linked to the Chakla Coal Block, allocated to the appellant on 20.02.2007.

2. On the basis of the said allocation, the appellant, pursuant to the notice inviting tender, participated for supply of long terms power issued by the respondent-company. The appellant having been declared the lowest bidder, the power purchase agreement (in short, 'PPA') was entered into, on 09.07.2010, between the appellant and the respondent power company for long term procurement of electricity as required under the PPA. The appellant submitted a contract performance guarantee (PPA) issued by the respondent ICICI Bank for a sum of 135 crores. As per the PPA, the appellant was required to supply power for a period of twenty five years at the agreed tariff and the scheduled delivery date was 09.07.2014. By its letter, dated 28.04.2014, the appellant informed the respondent- Power Company of the existing circumstances, which, according to the appellant, constituted force *majeure* and requested, accordingly, extension of the scheduled delivery date by a period of three years. By its letter, dated 16.07.2014, the respondent-Power Company, issued a show cause notice to the appellant seeking to terminate the PPA. On 25.08.2014, by its judgment, in WP (Cr.) 120 of 2012, the Supreme Court cancelled the allocation of all coal blocks including the Chakla Block, allocated to the appellant. Consequently, the appellant sent a termination notice, on 09.07.2015, citing force *majeure* as a reason of its inability to perform the contract. However, the same was not accepted by the respondent- Power Company.

3. Thereafter, in a writ petition made under Article 226 of the Constitution of India, which gave rise to CWJC

No.10122 of 2015, filed by the appellant, a learned single Judge disposed of the writ petition by order, dated 23.07.2015, on the ground, *inter alia*, that an alternative remedy was available to the writ petitioner/appellant. However, while doing so, it was also observed to the effect that some of the contentions of the appellant were not well founded.

4. The appellant, thereafter, sent a representation, dated 24.08.2015, whereby it proposed to supply power from alternate source provided that the scheduled delivery date was extended and cost associated therewith was included in the cost/price of the supply of power with the contention that this alternative arrangement would still be lesser than the market price at which the respondent-Power Company procures power. On disposal of the writ petition, namely, CWJC No.10122 of 2015, the appellant also approached the Bihar Electricity Regulatory Commission, which was, however, of the opinion that the appellant's petition was premature inasmuch as its proposal/representation dated 28.04.2015, aforementioned was still under consideration by the respondent- Power Corporation and, therefore, the matter was disposed of as premature.

5. In the above factual background, we, now, proceed to deal with the present Letters Patent Appeal, which has been preferred by the appellant, being aggrieved by the order, dated 23.07.2015, passed, in CWJC No.10122 of 2015, whereby the appellant's writ petition has been dismissed as being not maintainable on the ground of existence of *alternate remedy* for resolution of dispute. The impugned order, dated 23.07.2015, contains, *inter alia*¸ following observations:

> *"….the contention of the petitioner Company that in not accepting the notice given to the respondent Company and treating the agreement terminated entitling the petitioner Company to get the Contract Performance Guarantee returned, in my view, is not well founded."*

6. By the order, under appeal, dated 23.07.2015, the learned single Judge has, thus, observed, while dismissing the writ petition on the ground of existence of alternative remedy, that the contention of the petitioner Company that in not accepting the notice given to the respondent Company and treating the agreement terminated entitling the petitioner Company to get the Contract Performance Guarantee returned, is, in the view of the learned single Judge, not well founded.

7. We have heard Mr. Karan Bhariok, learned counsel appearing, for the appellant and Mr. Navin Prakash, learned counsel appearing for the respondent No.1-Bihar State Power Holding Company Limited.

8. It is the contention of the appellant that the above observations of the learned single Judge made in the order, under appeal, has made the alternative remedy o*tiose* inasmuch as these observations have pre-determined the issue, which was to be decided, should the appellant Company opted to take recourse to the alternative course of remedy, which became the ground for dismissing the appellant's writ petition.

9. In support of its above contention, the appellant has pointed out the order, dated, 18.06.2016, passed by the respondent No.1-Power Company, whereby the respondent No.1-Power Company, relying, on the impugned observations made in the order, under appeal, has terminated the Power Purchase Agreement (in short 'PPA'). This is amply clear from the following observations:

> "***Therefore under the present prevailing uncertainty liked with the project for supply of 450 MW Power coupled with the direction of the Hon'ble Patna High Court passed vide order dated 23rd July 2015 in CWJC No.10122 of 2015 & BERC order dated 10th February, 2016***, *incase No.42 of 2015, and in accordance with the provisions of Sub Article 3.4.2, 3.5.3., 2nd & 3rd proviso of 4.8.1 of the PPA dated 09.07.2010,* ***BSP(H)CL, is compelled to terminate the Power Purchase***

> ***<u>Agreement (PPA)</u>*** *executed on 9th July, 2010, with M/s Essar Power Jharkhand Limited for supply of 450 MW power and encash the CPG for Rs. 135 Crores (Rupees One hundred and thirty five crores) submitted by M/S EPJL and also request to pay balance amount of liquidated damages i.e. Rs.45 Crorers (for 450 MW) in accordance with 3rd proviso of Sub Article 3.4.2 of the PPAs within 15 (fifteen) days from the date of issue of the notice for termination of PPA dated 9th July, 2010.*
>
> (Emphasis is added)

10. It is, therefore, the submission of the appellant that unless the observations made by the learned single Judge in the order, under appeal, to the effect that *the contention of the appellant in not accepting the notice given to the respondent Company and treating the agreement terminated entitling the petitioner Company to get the Contract Performance Guarantee returned, 'in my view', is not well founded,* is not set aside, there is no possibility of any decision on merit in the alternative remedy, for, even if the respondent-Power Company wants to decide, otherwise, it cannot take a decision contrary to what the learned single Judge so observed.

11. However, an attempt has been made to resist the appeal on the ground that it is barred by limitation. We must point out that the delay, upon hearing the parties, has already been condoned by order, dated 19.10.2016, and as against the order aforementioned there has been no remedial measure taken by the respondents. This apart, the ground for condonation of delay are, broadly speaking, that the appellant *bona fide* pursued the alternative remedy available in law expecting a decision on merit of their case. In the light of the impugned observations made in the order, under appeal, dated 23.07.2015, expectation of a decision, according to the appellant, on merit of their case, by the authority concerned, eventually, proved impossible inasmuch as an order was passed against the appellant, on 18.06.2016, relying on the very above adverse observations contained in the order, under appeal, and the appellant is, therefore, left with no other alternative, but to prefer this appeal so as to get the observations made to the effect, that *the contention of the petitioner Company that in not accepting the notice given to the respondent Company and treating the agreement terminated entitling the petitioner Company to get the Contract Performance Guarantee returned, 'in my view', is not well founded,* is set aside and thereby make the respondents free to take a decision in accordance with law.

12. The appellant, in the meanwhile, has filed a petition before the Central Electricity Regulatory Commission (CERC), which is pending for consideration. However, as the appellant has been compelled by the circumstances, indicated hereinabove, to file this appeal, the delay can neither be described deliberate nor can be attributed to any negligence or latches. Moreover, the project, in question, admittedly, involves public interest. Hence, the appeal could not have, therefore, been resisted on the ground of delay. **(See: Collector, Land Acquisition, Anantnag Vs. Mrs. Katiji, (1987) 2 SCC 107)**

13. Although, in the meanwhile, as already indicated above, the order, dated 18.06.2016, passed by the respondent No.1, has been challenged before the CERC, which has stayed the invocation of the Bank Guarantee till 10.11.2016 by an order passed, in this regard, on 26.07.2016, it is contended, on behalf of the appellant, that the impugned observations made in the order, under appeal, dated, 23.07.2015, have prejudicially influenced the consideration of the appellant's proposal and the appellant has reasonable apprehension that the same would continue to affect their right to be heard on merit even before the CERC. It is, therefore, submitted, on behalf of the appellant, that they are willing to withdraw their petition, which has been made before the CERC and, in the meanwhile, impugned observations made in the order, under appeal, be set aside.

14. Various other reliefs have also been sought for in the present appeal claiming that in the peculiar facts of the present case, the private and public interests are so inextricably mixed up with public interest that upholding of the alternative arrangement, which had been offered by the appellant to the respondent No.1 Power Company, is quite reasonable.

15. The respondents have opposed this appeal on the ground that as the appellant has already availed of the remedy in terms of the order, under appeal, dated 23.07.2015, the appeal is not maintainable.

16. We are not impressed with this argument inasmuch as the order, dated 18.06.2016, passed by the respondent- Power Company on the representation of the appellant, clearly shows that they have been influenced by the impugned observations, which have been made by the learned single Judge in the order, under appeal, in the sense that no case of force *majeure* was made out.

17. It is of immense importance to point out that whenever a writ Court finds that there is alternative remedy available for decision of a *lis* and that party are required to take recourse to such alternative remedy, the Court must not make any observations, even *prima facie*, which may have an adverse bearing on, or consequence detrimental to, the interest of any of the parties to such a writ petition. Considered in this light, the learned single Judge's impugned observations made in the order to the effect '*that the contention of the petitioner Company that in not accepting the notice given to the respondent Company and* *treating the agreement terminated entitling the petitioner Company to get the Contract Performance Guarantee returned, 'in my view', is not well founded"* makes the alternative remedy a futile exercise.

18. The impugned observations, therefore, though may not be final, ought not to have been, in our considered view, made. Our view is fortified by the *ratio* of the Supreme Court, in a case arising out of a judgment from this High Court, in ***Tin Plate Co. of India Ltd. Vs State of Bihar & others*** (**AIR 1999 SC 74**), wherein the relevant observations, made in paragraphs 4 and 5, read as under:

> *4. Learned counsel appearing for the appellant urged that the High Court has committed grave error in making various observations touching upon the merits of the case while dismissing the writ petition on the ground of alternative remedy and thereby prejudicing the case of the appellant to be taken up before the Appellate Authority who was bound to decide the case in terms of the observations made by the High Court. The argument is well substantiated. It is no doubt true that when an alternative and equally efficacious remedy is open to a person, he should be required to pursue that remedy and not to invoke extraordinary jurisdiction of the High Court under Article 226 of the Constitution and where such a remedy is available, it would be a sound exercise of*

discretion to refuse to entertain the writ petition under Article 226 of the Constitution. In the present case, admittedly the appellant had an alternative and equally efficacious remedy by filing an appeal before the Appellate Authority against the order of assessment and in view of such a remedy being available to the appellant, the High Court was right in dismissing the writ petition on the ground that the appellant has an alternative remedy available under the Bihar Sales Tax Act. <u>However, we do not subscribe to the view of the High Court when it made a number of observations touching upon the merits of the case while dismissing the writ petition on the ground of alternative remedy. If the writ petition under Article 226 is to be dismissed on the ground of alternative remedy, the High Court is not required to express any opinion on merits of the case which is to be pursued before an alternative forum.</u> It is true that in the present case the appellant's counsel in his effort to get over the objection of existence of an alternative remedy, addressed the Court on merits of the case and thereby invited the observations on merits of the case by the High Court. But in such a situation <u>if the High Court is to dismiss the writ petition on the ground of alternative remedy, it would be a sound exercise of jurisdiction to refrain itself from expressing any opinion on the merits of the case which ultimately is to be taken up by a person before an alternative forum.</u>

> *5. In the present case, <u>in view of the observations made by the High Court, the Appellate Authority has rejected the appellant's appeal at the threshold and the appellant has been left without any remedy under the law. In such circumstances, we are of the view that the observations made by the High Court in its judgment on merits of the case was totally un-called for and deserves to be set aside.</u> Consequently, we set aside the observations made by the High Court in the judgment under appeal to the extent they relate to the merit of the case which was the subject matter of appeal before the Sales Tax Appellate Authority. Since the Appellate Authority under the Act observed that delay could have been condoned and also the fact that the appellant has deposited 20% of the tax, we set aside the order of the Appellate Authority dated 22.6.96 and restore the appeal to the file of Joint Commissioner of Commercial Taxes (Appeals), who shall decide the appeal expeditiously on its own merit without being influenced by any of the observations made by the High Court in the writ petition.*
>
> (Emphasis is supplied)

19. The Supreme Court, in ***Tin Plate Co.*** (supra), cautioned the High Court not to make observations touching the merit of the case if the Court was, otherwise, dismissing the writ on the ground of availability of alternative remedy. In that case also, the alternative forum, i.e., the appellate authority in the tax department, had relied on the observations of the High Court, while dismissing the appeal. The Supreme Court did not only order for removal of all observations of the High Court touching the merit of the case, but also set aside the order of the appellate authority.

20. This appeal also deserves to be allowed relying on the *ratio* of the Supreme Court, in ***Tin Plate Co.*** (supra). Hence, this appeal is partly allowed. We set aside the impugned observations, made in the order, under appeal, dated 23.07.2015. Consequently, the observations, made in the order, dated 23.07.2015, passed in CWJC No. 10122 of 2015, shall stand expunged.

21. It is, however, made clear that since the order, dated 18.06.2016, passed by the respondent No.1, Power Company, is based on the impugned observations made in CWJC No.10122 of 2015, the order, dated 18.06.2016, aforementioned is also bad in law and, therefore, needs to be set aside, which we hereby do and it is hereby accordingly directed that the appellant's representation, dated 28.04.2014, made to the respondent No.1, Power Company, be considered afresh on its own merit uninfluenced by any of the observations made on the merit of the appellant's case by the learned single Judge in the order, under appeal.

22. The appellant shall, however, withdraw its petition, which has been filed before CERC and we leave it open to the Bihar Electricity Regulatory Commission (BERC) to take a decision afresh on the dispute between the parties, if and when the dispute reaches the BERC.

23. In view of the above and for the foregoing reasons discussed above, this appeal stands allowed.

(I. A. Ansari, CJ)

Dr. Ravi Ranjan, J: I agree.

(Dr. Ravi Ranjan, J)

J.Alam/-

AFR/NAFR	AFR
CAV DATE	24.10.2016
Uploading Date	28.10.2016
Transmission Date	N/A