

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.14995 of 2009

M/s Sri Ram Enterprises a Partnership Firm, having its registered Office-5th Floor, Sadbhawna, A.C. Road, Bhagalpur-2 through its partner Roshan Kumar Agrawal son of Shiv Kumar Agarwal, resident of Barharwa, District – Sahebganj.

..... Petitioner

Versus

1. The General Manager, Eastern Railway, 14 Strand Road, 4th Floor, Kolkata-70000.
2. The Chief Administrative Officer (Construction), Eastern Railway, 14 Strand Road, 4th Floor, Kolkata- 700001.
3. The Deputy Chief Engineer, Eastern Railway, Bhagalpur

..... Respondents

Appearance:

For the Petitioner : Mr. Gautam Kejriwal
Mr. Vinay Mistry, Advocates
For the Respondents : Mr. Anil Kumar Sinha, Advocate

CORAM: HONOURABLE MR. JUSTICE VIKASH JAIN
ORAL JUDGMENT
Date: 29-08-2016

Heard learned counsel for the petitioner and learned counsel
for the respondents.

2. The present writ petition has been filed for the following
reliefs:

- i) For issuance of an order, direction or writ in the nature of Certiorari quashing the letter dated 26.08.2009 issued vide Memo No. WT/477/1326 whereby the respondent no. 3 has deducted an amount of Rs. 22,73,332/- equivalent to 10% of performance guarantee and security deposit from the running bills of the petitioner which is contrary to the terms of the agreement between the parties.
- ii) For issuance of writ in the nature of mandamus directing the respondent railway authorities that the termination of the contract after 111 days of period of completion of the work was bad and that the same ought to have been in terms of the Letter of Acceptance dated 09.01.2008 and in terms of Clause-3 of Special Conditions of Contract.

iii) For issuance of writ in the nature of mandamus directing the respondent railway authorities to confine their forfeiture to the extent of value of earnest money being Rs. 3,88,000/- only.

iv) For issuance of writ in the nature of mandamus declaring that their action of forfeiting, by deductions from running bills and security deposit of other contracts, is unjust and illegal.

v) Any other relief or reliefs to which the petitioner is found entitled to in the facts and circumstances of the case.”

3. I.A. No. 6781 of 2016 has been filed for amendment in the relief portion of the main writ application by insertion of the following prayers in paragraph 1 of the writ application.

“(vi) For issuance of a writ in the nature of certiorari for quashing of part of the letter bearing no. CAO/CON/WT/8098 dated 24/27.04.2009 whereby the amount equivalent to performance guarantee and security deposit for the work in question has been held recoverable and a decision has been communicated regarding such recovery to be made in the manner deemed fit by the Railways;

(vii) For holding and declaring that no terms and conditions of general conditions of contract (GCC) would apply to the case of the petitioner in absence of agreement executed in terms of article 299(1) of the Constitution of India except insofar as prescribed in the LOA bearing no. CAO/Con/WT/8098 dated 09.01.2008.”

Having regard to the nature of the prayer, I.A. No. 6781 of 2016 is allowed and the petitioner is permitted to make appropriate amendments in the prayer portion at para 1 of the writ petition in course of the day.

4. The petitioner successfully participated in Tender No. 115 of 2006-07(open) for the execution of balance work for construction of (a) Major Bridge No. 39 (1x30.5 m through type) at Ch-25.501 KM and

(b) Bridge no. 50 (4x18.3 m composite girder) at Ch-34.425 KM in between Manderhill and Dumka, pursuant to which a letter of acceptance dated 09.01.2008 has been issued in its favour.

5. At the very outset, this Court takes note of the order dated 19.01.2011 passed in LPA No. 1411 of 2009 by a Division Bench of this Court in similar circumstances. Having noticed the submission of the respondent-contractor that there cannot be a binding rule by which the respondent-contractor would be forced to avail the arbitration clause in absence of any agreement, it was held that the letter of acceptance has to be treated as part of the agreement. In that view of the matter, even though there was no agreement in writing, it was held that the letter of acceptance had to be treated as part of the agreement. Having regard to the judgment of the Apex Court in the case of *State of U.P. Bridge vs. Bridge & Roof Co. (India) Ltd.*, (1996) 6 SCC 22 as well as in *ABL International Ltd. and another vs. Export Credit Guarantee Corporation of India Ltd. and others*, (2004) 3 SCC 553, the Division Bench expressed its firm view that the writ petition itself was not maintainable in view of the forum of arbitration being available.

6. In view of the decision of the Division Bench in LPA No. 1411 of 2009, the present writ petition is dismissed as not maintainable. The petitioner shall be at liberty to agitate its grievances in arbitration.

7. Before parting, this Court takes note of the submission of Mr. Gautam Kejriwal, learned counsel for the petitioner, that the matter has

been pending for several years and the petitioner may not be relegated on the grounds of alternative remedy at this belated stage.

8. This Court is not impressed with the submission of learned counsel for the petitioner. Though the writ petition was filed in the year 2009 challenging the deduction of an amount of Rs. 22,73,332/- from the running bills of the petitioner in terms of the respondents' letter dated 26.08.2009 which was merely of a consequential nature, a specific challenge in respect of the earlier letter dated 24/27.04.2009 holding the amount in question to be recoverable has itself been laid for the first time before this Court only in I.A. No. 6781 of 2016 which has been filed in the month of August 2016. It is therefore incorrect to say that the subject matter of the writ petition has been pending before this Court for several years.

9. Moreover, this Court also takes note of the newly substituted provisions of Section 12(1) of the Arbitration and Conciliation Act, 1996 providing for a stipulated period of 12 months for concluding the arbitration, and hence such remedy would be sufficiently efficacious for the petitioner.

B.T/Chandran

AFR/NAFR	AFR
CAV DATE	N.A.
Uploading Date	05.09.2016
Transmission Date	N.A.

(Vikash Jain, J)