

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.1546 of 2017

IN

Miscellaneous Jurisdiction Case No. 2946 of 2017

=====

M/s. Maa Kali Civcon Corporation Pvt. Ltd., a Company incorporated under the Companies Act, 1956 having its Registered Office at 103, Block- B, Jagmano Shree Garden, Ved Nagar, Rukanpura, Bailey Road, Patna through its Managing Director, Dhananjay Kumar Yadav, son of Sri Ramchandra Prasad Yadav, Resident of Flat No. A-6/304, Jalapur City, Ram Jaypal Path, Bailey Road, P.S.- Rupaspur, Town and District- Patna.

.... Appellant/s

Versus

1. The Union of India, Ministry of Railway, having its office at Rail Bhavan, New Delhi
2. The General Manager, East Central Railway, having its Office at Hajipur, District Vaishali.
3. The Chief Administrative Officer (Con.)/North, East Central Railway, Mahendrughat, Patna.
4. The Chief Engineer, (Con.)/North, East Central Railway, Mahendrughat, Patna.
5. The Deputy Chief Engineer (Con.)/II, East Central Railway, Mahendrughat, Patna

.... Respondent/s

=====

Appearance :

For the Appellant/s	:	Mr. P. K. Shahi, Sr. Advocate Mr. Alok Kumar Agrawal, Advocate Mr. Alok Kumar, Advocate
For the Respondent/s	:	Mr. Anil Kumar Sinha, Advocate Mr. Yash Mathur, Advocate Mr. Ashish Sinha, Advocate

=====

CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date: 13-11-2017

This appeal has been filed under Clause 10 of the Letters Patent and challenge is made to an order dated 18.10.2017 passed by the Court in M.J.C. No. 2946 of 2017.

2. Before advertng to consider the issues, it may be



appropriate to refer to the factual aspects of the matter in nut shell.

3. The writ petitions were filed before the Court being C.W.J.C. No. 19468 of 2014 and C.W.J.C. No.19623 of 2014 by the present applicant (M/s. Maa Kali Civcon Corporation Pvt. Ltd) and in the writ petition, the petitioner prayed for quashing of an order dated 25.09.2014 passed by the Deputy Chief Engineer (Con.)/II, East Central Railway, Samastipur, whereby a contract entered into was cancelled.

4. Similar prayers were made in both the writ petitions and it was argued that the act of the Railway Administration in rescinding and cancelling the contract and taking penal action for forfeiture of the earnest money and security deposit was illegal and mandamus was sought for to quash the impugned action and direct for refund of the forfeited amount. When the matter was being heard, it was pointed out to the Court that there is an arbitration agreement between the parties and a prayer was made that an independent arbitrator may be appointed for resolving the dispute. The Railway Administration even did not object to the prayer for appointment of an arbitrator, but pointed out that in view of Clause 64(3)(a)(ii) of the General Conditions of Contract, the petitioner should invoke the jurisdiction under the Arbitration and Conciliation Act, 1996 and it is not appropriate to invoke the jurisdiction of the Court in the writ



petition.

5. However, in para 7 of the order, while disposing of the writ petitions on 06.04.2016, the learned Writ Court took note of the submissions and came to the conclusion that no useful purpose would be served in directing the petitioners to take recourse to the remedy of taking recourse to the proceedings under the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator, which would mount the multiplicity of the proceedings and interest of justice requires that keeping in view of the provisions of the Arbitration and Conciliation Act, a retired Judge of this Court be appointed as an Arbitrator by the learned Writ Court exercising its jurisdiction under Article 226 of the Constitution and ordered accordingly.

6. Be that as it may, the writ petition was disposed of by the aforesaid order, all concerned accepted the order passed, none challenged the order, the Arbitrator appointed by the Court proceeded to decide the issue in question and all concerned submitted to the jurisdiction of the Arbitrator and the records indicate that the arbitration proceedings continued till the stage of recording of evidence by the parties.

7. It is pointed out that even argument on behalf of the claimants was concluded and at the stage of counter argument, it is submitted by the Railway Administration that the learned Arbitrator



was appointed as Lokayukta of the State of Bihar and he indicated his inability to continue with the arbitration proceedings, but even then the Arbitrator was willing to continue with the proceeding, but in view of the statutory impediment he gave option to seek further clarification or order from the Court. This resulted in filing of M.J.C. No. 2946 of 2017 where a prayer was made that the Arbitrator appointed be directed to continue with the arbitration proceedings in spite of his appointment as Lokayukt of the State of Bihar.

8. The learned Court in M.J.C. No. 2946 of 2017 by the impugned judgment/order dated 18.10.2017 came to the conclusion that once the Arbitrator has been appointed as Chairman in the office of Lokayukt, State of Bihar, it would not be proper to issue any direction to him. Instead, while rejecting the prayer for modification of the judgment, directed the petitioner to take recourse of alternative remedy under the provisions of the Arbitration and Conciliation Act, 1996, inter alia, contending that even if the order could not be modified and the Arbitrator could not be directed to proceed with the arbitration, the learned Writ Court, which has originally appointed the Arbitrator could have appointed another Arbitrator to proceed with the arbitration proceeding from the stage, it was left by the previous Arbitrator and for the said purpose to take recourse to the provisions of the Arbitration and Conciliation Act.



9. Even though during the course of hearing, learned counsel by referring to the Bihar Lokayukt Act tried to indicate that there is no prohibition in the Arbitrator already appointed to continue with the arbitration, but we are of the considered view that this issue is not free from conflicts and controversy and to permit Lokayukt to continue with the arbitration, it would be necessary not only to hear the Advocate General, but also to re-examine the issue based on the statutory proceedings existing.

10. We do not propose to undertake the said exercise in the present proceedings. Instead, we are of the considered view that interest of justice would be met, in case another person is appointed as Arbitrator exercising the jurisdiction of this Court under Article 226 of the Constitution and the said Arbitrator is directed to proceed with the matter in accordance with law from the stage that the earlier Arbitrator had left the proceeding.

11. We are not in agreement and with respect to disagree with the observations made by the learned Writ Court in M.J.C. No. 1547 of 2017 while relegating the petitioner to take recourse to the remedy available under the Arbitration and Conciliation Act, 1996. The only provision under the aforesaid Act is the provisions of Section 11 of the Act for appointment of an Arbitrator by designated Judge or the Justice or Section 11 for



terminating the mandate of arbitration. In the present case, the Arbitrator was not appointed exercising the jurisdiction under Section 11 of the Arbitration and Conciliation Act. Instead, the Arbitrator was appointed exercising the extra ordinary jurisdiction of this Court under Article 226 of the Constitution and if in execution of an order passed under Article 226 of the Constitution, the eventualities, as are indicated hereinabove, arose, the learned Writ Court in M.J.C. No. 2946 of 2017 could very well have exercised its jurisdiction, as if it was exercising the jurisdiction under Article 226 of the Constitution and by appointing a fresh Arbitrator could have continued with the arbitration proceedings.

12. In our considered view, this having not been done, it is a fit case where the interest of justice requires that it should be done now in this appeal filed under Clause 10 of the Letters Patent.

13. Accordingly, we allow this appeal, quash the order dated 18.10.2017 passed in M.J.C. No. 2946 of 2017, modify the order dated 06.04.2016 passed in C.W.J.C. No. 19468 of 2014 and direct that now, in view of the changed circumstances, in stead of arbitration proceedings continuing under the Arbitratorship of Justice (Retd.) Shri S. K. Sharma, the arbitration proceeding shall now commence from the state it was left by the previous Arbitrator [Justice (Retd.) Shri Shyam Kishore Sharma]. We, hereby, appoint Justice



(Retd.) Shri Samarendra Pratap Singh, as Arbitrator, with a request to continue with the arbitration proceeding from the stage it was left by Justice (Retd.) Shri Shyam Kishore Sharma. However, the newly appointed Arbitrator shall proceed with the arbitration after the stage of evidence was recorded. Arguments of both the parties would be heard afresh and the matter proceeded with.

14. With the aforesaid, this appeal stands disposed of.

(Rajendra Menon, CJ)

Uday/-

(Anil Kumar Upadhyay, J)

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	22.11.2017
Transmission Date	NA

