

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.1679 of 2011

In

Civil Writ Jurisdiction Case No.4088 of 2011

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1. The Union of India through General Manager, E.C. Railway, Hajipur, Distt.- Vaishali
 2. The Divisional Railway Manager, E.C. Railway, Danapur, Khagaul, Distt.- Patna
 3. The Senior Divisional Electrical Engineer (TRD) E.C. Railway, Danapur At Khagaul, Distt.- Patna
 4. The Divisional Electrical Engineer (TRD) E.C. Railway, Danapur, Distt.- Patna

... .. Appellant/s

Versus

M/S ABSD Electricals Upper Bazar, Mahabir Chock, Ranchi, through its Partner Ajay Singh, S/O Sri Ram Janam Singh, R/O Upper Bazar, Mahabir Chock, Ranchi

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ashok Kumar Keshari, Sr. Advocate Mr. Sanjay Kumar Singh, Advocate
For the Respondent/s	:	Mr. Gautam Bose, Sr. Advocate Mr. Ajay Kumar, Advocate Mr. Vikash Jha, Advocate Mr. Rohit Mishra, Advocate.

CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 14-09-2017

Seeking exception to an order passed by the learned writ court on 7.7.2011 in CWJC No. 4088 of 2011, this appeal has been filed under Clause 10 of the Letters Patent.

Facts in brief goes to show that respondent was a Government registered firm and entered into an agreement with East Central Railway on 12.5.2010 for the purpose of executing a



work pertaining to extension of Platform for accommodating 24 coaches in 5 railway stations as are detailed in the agreement. However, while executing the work it seems that a derailment of a train bearing No. 3241 UP occurred. It is said that the train hit a still structure which was being carried across the railway track for erection of a mast in execution of the contract in question.

Be that as it may be, on account of the aforesaid act which was committed, attributing the acts of omission and commission on the part of the respondent-contractor in execution of the contract, their contracts were terminated. This resulted in the respondent filing a writ petition before this Court being CWJC No. 19160 of 2010 and on 24.11.2010 a Bench of this Court found that before terminating the contract the requirement of following the principles of natural justice and giving a show cause was not followed and the Railway administration being State under the provisions of the Act, the writ petition was allowed and the impugned order of termination was quashed and the Railway was directed to issue show cause and pass a speaking order. After the aforesaid procedure was complied and a speaking order was passed on 1.2.2011 terminating the contract after rejecting the exploitation of the respondent, the writ petition in question being CWJC No. 4088/2011 was filed and the writ court having allowed



the writ petition and issued a mandamus to the respondents to accept the show cause of the respondent-contractor, this appeal has been filed by the Railway administration.

Two fold submissions were made before us in support of the contention of the appellant. Clause 64 of the general conditions and terms and condition of the contract which contemplates for arbitration. The issue in question involves disputed question of fact which can be more appropriately dealt with by appointment of an Arbitrator and in spite of specific objections being raised in this regard, the writ court exercised extra ordinary jurisdiction under Article 226 of the Constitution and directed for accepting the show cause. It is stated that the writ court committed error in doing so in rejecting the objection of the railway administration. Apart from the said ground even if an alternative contention is accepted that the show cause of the contractor was not considered, the writ court should have remanded the matter back for consideration and could not have issued mandamus for accepting the show cause.

Learned Senior counsel for the contractor disputing the aforesaid contention, invited our attention to the supplementary counter affidavit, various documents and materials available on the record, observations made by the writ court from para 14 onwards and argued that there was no disputed question of fact or materials.



The writ court decided the matter based upon the correspondences between the parties which is nothing but admitted evidence and therefore refused to relegate the contractor to take recourse to arbitration.

Learned counsel further argued that on the date in question the contractor was not executing the work and from the evidence and documents it appears that the work was being executed by the railway officer and therefore, the contractor cannot be held responsible for the damage or the happening of accident. He argued that the writ court has found that only to save the skin of the officers who are responsible for the accident, all the actions were taken. The learned writ court has noticed all these facts in detail and held that no indulgence into the matter is called for.

We have heard learned counsel for the parties and considered the rival contentions made. We have also gone through the detailed order passed by the writ court and in para-9 of the order passed by the writ court makes the following observations:

“9. Learned counsel for the respondents averred that this writ petition is not maintainable as it is with respect to a contractual matter for which Arbitration Clause is present in the agreement between the parties and the said clause is always available to the petitioner as an adequate alternative remedy. He also averred that disputed question of fact is involved in



the instant case which cannot be validly decided by a writ court under Article 226 of the Constitution of India.”

We are of the considered view that it is from this position and stage that the writ court misdirected itself. It was a matter pertaining to execution of an agreement and the agreement in question contained an arbitration clause and merely because the documents and other materials were available and the matter has been pending based on the order passed in the earlier writ petition, we are of the considered view that the writ court should not have entered into the area of fact finding inquiry. Analyzing the position on the affidavits and documents available and decide contentious issue about execution and breach of an agreement. It was a case where once termination was made of an agreement containing arbitration clause, the writ court should not have exercised jurisdiction under Article 226 and should have relegated the parties to take recourse of arbitration. Having not done so, from para-10 onwards, learned writ court has gone into various facts and disputed aspects of the matter, took note of the fact that no departmental enquiry was initiated against the officers of the Railway. Criminal case has also been instituted, the Railway Administration, has not waited for decision of the criminal case before taking action and thereafter analyzing the communications



and documents available on the record found that various explanations submitted by the contractor having been arbitrarily considered and directed for accepting the explanation, namely, the show cause and proceeding further in the matter.

In our considered view, this was beyond the jurisdiction of the writ court. The findings recorded by the writ court with regard to the Galvanised Steel Structure Mast being carried across the track etc. are facts which are disputed by the railways in its counter affidavit filed and therefore, in the absence of their being cogent evidence or entering into all the factual aspects, the writ court should not have, based on the affidavits and counter affidavits filed, decided the issues which were disputes on fact. It is a case where with regard to execution of the agreement in question various disputed question of fact were in existence and the writ court in view of the arbitration clause should have referred it to the arbitrator or a competent authority and caused enquiry into the factual aspect of the matter after recording evidence to go into these aspect of the matter. This having not done, we are unable to uphold the order passed by the writ court.

Learned counsel referring to para-4 of the supplementary counter affidavit argued that during the pendency of the matter vide order dated 25.6.2014 in S.Tr. No. 255 of 2012 the contractor



has been acquitted of the charges and the Railway Officers have also been acquitted. We find on perusal of the order that the acquittal is because, no prosecution witness has come to give evidence before the Sessions Court and in the absence of evidence the trial was dismissed. We are of the considered view that this cannot be a ground for upholding the order of the writ court. Once we are convinced that it is a factual dispute and once we have observed that there is arbitration clause for resolving the dispute, we see no reason for upholding the order of the writ court which is not based on factual enquiry into the matter and without proper evidence as required.

That being so, we allow this appeal and quash the order passed by the writ court and grant liberty to the respondent-contractor to take recourse to remedy available under Clause 64 of the Contract and seek resolution of the dispute by resorting the procedure of arbitration.

In case, an arbitration is held, the arbitrator shall proceed to decide the matter and take a decision preferably within a period of six months from the date of institution of the arbitration case.

We make it clear that in case, the contractor take recourse to the arbitration clause, the arbitrator shall proceed in the matter in accordance with law and decide the proceedings based on the



evidence and materials available on the record and shall not be bound and prejudiced by the observations made and finding recorded in the order dated 7.7.2011 in CWJC No. 4088 of 2011.

With the aforesaid, the appeal stands allowed and disposed of.

(Rajendra Menon, CJ)

spandey/-

(Anil Kumar Upadhyay, J)

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	18.09.2017
Transmission Date	

