

30.09.2022
Ct. 5
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WPA 9920 of 2022
With
CAN 1 of 2022

M/s. Sri Ganesh Engineering Works
-Vs-
Union of India & Ors.

Mr. Samrat Sen,
Ms. Manali Bose,
Ms. Amrita Panja

... for the petitioner

Mr. Sandip Kumar Bhattacharyya,
... for the Union of India

First, the maintainability point.

According to learned counsel appearing for the respondent Railways, the writ petition is not maintainable in view of Section 20A of The Specific Relief Act, 1963, as amended. Counsel submits that the writ petition involves an infrastructure project and the Court cannot entertain such writ petition.

The brief answer to that would be that Section 20A of The Specific Relief Act discourages granting of injunction in a suit involving a contract relating to an infrastructure project specified in the Schedule of the Act. The Section further clarifies that the Court shall not grant injunction where such injunction would cause impediment or delay in the progress or completion of infrastructure project.

The present writ petition relates to the termination of the petitioner in connection with construction of road over a particular bridge in Andal. This does not involve any prayer for injunction that would lead to delay of the project. The petitioner approached the Court for relief against the notice of termination and against invocation of performance guarantee furnished by the petitioner. The point of maintainability is hence answered in favour of the petitioner and against the respondents.

The immediate cause of concern for the petitioner arises out of a letter written by the learned counsel appearing for the respondent to the Eastern Railway stating that the interim order granted by the Court on 9th June, 2022 is deemed to have been vacated under Article 226(3) of the Constitution. The said letter was served on the respondent Bank and the Bank has threatened the petitioner with immediate invocation of the bank guarantee based on the letter of 31st August, 2022.

It should first be clarified that by an order dated 9th June, 2022, the respondent Railways were directed not to proceed with the impugned Notices of termination, the last being of 31st May, 2022, which not only terminated the petitioner with respect to the contract but also contained a threat of forfeiting the security deposit and encashing the performance

guarantee furnished by the petitioner. The interim order continued from 9th June, 2022 until an application for vacating of the interim order was filed by the respondents sometime in August, 2022. The application was not taken up for consideration before this Court.

Article 226(3) of the Constitution is subject to two conditions, namely (a) furnishing to party copies of the petition and all documents in support of the plea for such interim order and (b) giving such party an opportunity of being heard. Any party who has been deprived of both may apply for vacating of such order.

In the present case, a copy of the writ petition was served on the respondents but without the certificate of the deponent. The certificate is now part of the application handed over on behalf of the petitioner. In any event, Article 226(3)(a) makes it clear that the copy of the writ petition and all documents which are to be served must be in relation to the plea for interim order which is made to the Court at the material point of time. The certificate of the deponent who was authorized to file the same cannot be seen to be a requirement which was necessary or essential for seeking the interim order from the Court on 9th June, 2022, which was specifically for staying of the termination Notice and for a restraint on the invocation of the bank guarantee.

Second, Article 226(3)(b) stipulates that the party who applies for vacating of the interim order was deprived of an opportunity of hearing. The interim order passed on 9th June, 2022 indicates in the first line that the Railways were served on 7th June, 2022 but chose not to appear. The affidavit of service indicating such service was taken on record. Hence, the Railways cannot complain that Railways were denied of the opportunity of being heard or that the interim order was passed ex parte without notice to the Railways.

In view of the above, the letter written by the counsel for the respondent to the Railways stating that the interim order has been vacated by reason of Article 226(3) is contrary to facts and cannot be sustained. This Court is of the view that the interim order remains subsisting till date.

Even if this Court is to discount the argument on Article 226(3) of the Constitution, the invocation of the bank guarantee is not in terms of the bank guarantee, as would be evident from the records before the Court. The performance guarantee furnished by the petitioner on 15th November, 2017 makes it clear from paragraph 2 thereof that the concerned Bank undertakes to pay the amount due through a particular designated officer of the Railways. The other condition is that the loss or damage caused or the prejudice suffered by reason of

the breach by the contractor must be stated in the invocation.

The impugned letter of invocation dated 6th June, 2022 fails to fulfil either of the conditions in paragraph 2 of the performance guarantee.

Hence, on both counts, the threatened invocation of the bank guarantee furnished by the petitioner cannot be sustained.

Considering all the above points, including that of maintainability of the writ petition, nothing further remains to be decided. The respondent Railways are restrained from invoking the bank guarantee furnished by the petitioner. Since the bank guarantee is due to expire on 30th September, 2022, which is today, the petitioner shall extend the bank guarantee in accordance with the terms of the contract. The interim order dated 9th June, 2022 is confirmed.

WPA 9920 of 2022 and CAN 1 of 2022 are disposed of in terms of the above.

The prayer for stay of this order made on behalf of the Railways authorities is considered and rejected in view of the fact that the interim order remained in place from 9th June, 2022 onwards.

It is also made clear that opportunity of filing of affidavit given to the respondents was declined.

(Moushumi Bhattacharya, J.)

