

**MAT 1706 of 2022
With
CAN 1 of 2022**

**Union of India & Ors.
Vs.**

M/s. Sri Ganesh Engineering Works & Anr.

Mr. Sandip Kumar Bhattacharyya
Mr. Aneek Pandit
Mr. Ali Rizvi
Ms. Tanistha Jain
Mr. Avijeet Kundu

... ... for the appellants

Mr. Samrat Sen, Sr. Adv.
Mr. Sakya Sen
Ms. Manali Bose
Ms. Amrita Panja Moulick

... ... for the State

This intra-court appeal is at the instance of the respondent in the writ petition challenging the order of the learned Single Judge dated 30th September, 2022 whereby WPA 9920 of 2022 filed by the respondent no.1 herein (writ petitioner) has been disposed of granting certain reliefs.

The respondent no.1 had approached the writ Court with the plea that in response to the NIT floated in April, 2017 for the work of construction of Road Over Bridge (ROB Proper and Approach Portions) at LC No.22/B/T at Km 54/9-10 at Suri West End in between Andal-Sainthia, the respondent no.1 had submitted the bid and was awarded the contract. There were certain issues relating to the performance of the contract,

therefore, notice dated 27th April, 2022 was served upon the respondent no.1 requiring him to show the adequate progress of the work within the stipulated period failing which further action in terms of Clause 62 of the Standard General Conditions of Contract, 2014 was contemplated. Thereafter, notice dated 26th May, 2022 was served upon the respondent no.1 giving 48 hours notice in terms of Clause 62 of the Standard General Conditions of Contract to commence the work by clearly stating that on expiry of the period the contract will stand rescind. By the communication dated 31st May, 2022, appellant railways had rescinded the contract. Respondent no.1 had furnished the bank guarantee. Therefore, steps were taken by the appellants for encashment of bank guarantee.

Aggrieved with the termination of the contract and aforesaid action of the appellants, writ petition was filed by the respondent no.1.

Learned Single Judge by ex-parte interim order dated 9th June, 2022 had directed the railways not to proceed in terms of the impugned notices specially the last notice dated 31st May, 2022 till the matter was heard.

Thereafter, the writ petition has been heard and decided by the impugned order dated 30th September, 2022.

Submission of learned counsel for the appellants is that the issue of maintainability of the writ petition was raised in the application filed under Article 226(3) of the Constitution of India as the interim order was obtained without service of notice to the appellants.

Further submission is that the learned Single Judge has not properly decided the issue of non-service of notice in the writ petition.

Learned counsel for the appellants has also questioned the order of the learned Single Judge whereby the communication relating to encashment of bank guarantee has found to be faulty.

Opposing the appeal, learned counsel for the respondent no.1 has submitted that no error has been committed by the learned Single Judge in finding fault in the action of the appellants in invocation of the bank guarantee as the same was not by the proper authority and not in terms of the conditions prescribed in the bank guarantee.

He has further submitted that no error has been committed by the learned Single Judge in affirming the earlier interim order and disposing of the writ petition.

We have heard the learned counsel for the parties and perusing the order.

A perusal of the writ petition and prayer clause thereof reveals that the petitioner (respondent no.1 herein) had approached the Writ Court with the main

grievance relating to the termination of the contract. We find that while passing the impugned order learned Single Judge has not examined the correctness of the notices which were under challenge.

Record further reflects that in the impugned order the learned Single Judge has simply confirmed the earlier the interim order dated 9th June, 2022 and has disposed of the petition. Though in the interim order dated 9th June, 2022 learned Single Judge had taken note of the submission of the learned counsel for the writ petitioner but had not recorded even a tentative finding about any flaw in the notices impugned in the writ petition or any illegality in the order of rescinding the contract.

Hence, in the circumstances of the case the action of the appellants in termination of the contract has been put in abeyance by the learned Single Judge for forever simply by confirming the earlier interim order dated 9th June, 2022. This is worth mentioning that the notices relating to termination of contract which were impugned in the writ petition have not been set aside by learned Single Judge yet these notices have been made inoperative.

Hence, we are of the opinion that without examining the legality of action of the appellants in terminating of the contract on merit no final relief could be granted to the respondent no.1.

The impugned order further reflects that before the learned Single Judge the issue of maintainability of the writ petition was raised. Learned Single Judge has held the writ petition has been maintainable. We do not find any error in this finding of learned Single Judge.

Another issue which is involved in this matter is in respect of correctness of the action of the appellants in invoking the bank guarantee.

Learned Single Judge has found that the action of the appellants in invoking the bank guarantee to be unsustainable. The rival contentions have been raised by the learned counsel for the parties on the issue as to whether the learned Single Judge had heard the learned counsel for the parties on the issue of invocation of bank guarantee.

Impugned order does not record the rival submission of the learned counsel for the parties on the issue of invocation of bank guarantee. That apart, certain judgements have been pointed out by the learned counsel for both the parties on this issue.

Since we are of the opinion that the writ petition is maintainable and now it is to be decided on merits and we have also found that the issue of termination of the contract has not been decided on merit and now the matter is required to be sent back to the learned Single Judge for deciding the said issue on merit, therefore we find that it would be proper that the learned counsel for

the parties are also heard on the issue of invocation of the bank guarantee by the learned Single Judge.

At this stage learned counsel for the respondent no.1 has sought interim protection against invocation of bank guarantee by submitting that before the writ petition is finally heard if the appellants encash the bank guarantee then nothing will survive.

Having regard to the circumstances of the case and considering the respondent no.1 has been protected till now, we are of the opinion that the respondent no.1 needs to be protected till the issue is finally decided.

Hence, we restrain the appellants from invoking the bank guarantee till petition is finally heard.

Accordingly we set aside the impugned order of learned Single Judge and restore the writ petition to the original position for its decision in accordance with law.

Since it is a matter relating to the termination of contract and the issue of invocation of bank guarantee is also involved, therefore we are of the opinion that the writ petition itself needs to be decided at the earliest.

Learned counsel for the appellants has disputed the last sentence of the impugned order wherein it has been mentioned that the opportunity of filing affidavit given to the respondents (appellants herein) was declined and has submitted that he wants to file affidavit-in-opposition in the writ petition and the same will be filed within two weeks.

Since proper opportunity of hearing is required to be given to the appellants to place on record all the materials in support of its stand, therefore we permit the appellants to file affidavit-in-opposition before the learned Single Judge within a period of two weeks from today. Thereafter, affidavit-in-reply, if any, can be filed by the respondent no.1 within one week.

Learned Single Judge is requested to decide the writ petition as early as possible, preferably within a period of six working weeks from today.

Liberty is also granted to the learned counsel for both the parties to mention before the learned Single Judge.

Appeal is accordingly disposed of.

Connected application is also disposed of.

(Prakash Shrivastava, C.J.)

(Rajarshi Bharadwaj, J.)