

JPD 01 20.04.2023
 RP Ct. No. 01
 AN

MAT 57 of 2023
 with
 IA No. CAN 1 of 2023

M/S. Divya Shakti Construction & Anr.
 Vs.
 State of West Bengal & Anr.

Mr. Kishore Dutta, Sr. Adv.
 Mr. Srijib Chakraborty
 Mr. Aditya Mondal
 Mr. Deeptangshu Kar

... For the appellants

Mr. Nilotpal Chatterjee
 Mr. Varun Kothari

... For the State

1. This intra-Court appeal preferred by the writ petitioners is directed against the order dated 10th April, 2023 passed by the Jalpaiguri Circuit Bench of this Court in WPA 674 of 2023. By the said order the learned Single Bench declined to grant any interim order in favour of the appellant, who was served with a termination notice by the Superintending Engineer, Government of West Bengal, National Highway Circle No. III, Siliguri dated 30.08.2022 terminating the work allotted in favour of the appellant, namely, Rehabilitation of landslide location along with slope protection and drainage improvement at Paglajhora. The appellant did not challenge the termination notice/order immediately and approached the Court about eight months later by filing a writ petition contending that the extension of time sought for by the appellants to complete the work made by their representation dated 23rd February, 2022 ought to have been considered and the time for completing

the balance work should have been extended. The reason for approaching the Court belatedly was sought to be explained by contending that the respondents were about to float a fresh tender for completion of the balance work at the risk and cost of the appellants.

2. The respondents raised preliminary objection with regard to the maintainability of the writ petition contending that in terms of the contract there is an arbitration clause and the appellant has to resort to such procedure.

3. The learned Single Bench after noting the facts of the case, commencing from the date of the awarding work and as to how the earlier order of termination was passed on 30th July, 2019 and how the same was revoked etc. held that the appellants have not made out any case for grant of any interim order and directed affidavits to be filed. The Court also ordered that the point of maintainability raised by the respondents shall remain open and shall be considered. Thus, the learned Writ Court while declining to grant interim order has left the issue relating to the maintainability to be considered. In our view, the question would be as to whether termination notice vide office Memorandum dated 30th August, 2022 was just and proper. To examine the correctness of the same, the facts are to be gone into which cannot be decided by way of affidavits.

4. Mr. Dutta, learned senior counsel for the

appellants is right in his submission that merely because an arbitration clause is in existence it cannot be a universal bar in all cases to approach this Court under Article 226 of the Constitution of India. It may be true that Courts have intervened when there is an arbitration clause in an agreement in circumstances warranting such interference. In our view, considering the facts and circumstances of the case on hand, we are of the opinion that such circumstances do not exist in the instant case for us to exercise jurisdiction under Article 226 of the Constitution of India for considering the correctness of the order of termination dated 30.08.2022. One more reason which has prompted us to make such an observation is on account of conduct of the respondents. As mentioned above, the contract was terminated on 30th July, 2019 on the ground of non-performance/lack of adequate performance as according to the respondents, only 5% of the work had been completed on the said date. The appellant had immediately approached before the learned District Court, Darjeeling and filed an arbitration application being, Misc. Arbitration Case No.15 of 2018. In the said application, the respondent department had entered appearance and the appellant was called upon to amicably settle the matter at New Delhi with the Ministry of Road Transport and Highway by approaching them on 25th February, 2019 as the fund to complete the project was allotted by the Central Government. Subsequently, at the intervention of the Ministry vide communication dated 25th February, 2019

respondents were advised to revoke the termination order and after getting approval of the respondent department, the termination was revoked vide Memo dated 28.03.2019. These details have been clearly mentioned in the supplementary agreement dated 22.08.2019 which was entered into between the appellants and the respondents/department after the earlier order of termination was revoked.

5. Therefore, we are of the opinion that the writ petition cannot be entertained at this juncture. The apprehension of the appellants is that effective steps have been taken by the respondents/department to call for fresh tender for completion of the balance work at the risk and cost of the appellant and if that is done the appellant would be prejudiced. In such circumstances it may take a reasonable time to invoke the arbitration clause if the appellants so desire.

6. Learned counsel for the State would submit that till date fresh tenders have not been floated but the respondents are awaiting approval from the competent authority of the Central Government for allocation of the balance work by calling for fresh tenders. If such be the circumstances, we are of the opinion that leaving it open for the respondents to pursue their request with the competent authority of the Central Government for approval, the respondents shall not finalize the re-tender for allocation of the balance work for a limited period so that the appellant would be able to work out the remedies under the

provisions of the Arbitration and Conciliation Act, 1996.

7. In the result, the appeal stands disposed of with an observation that the writ petition is not maintainable and the appellants are directed to avail the remedies available under the relevant clause under the agreement read with provisions of the Arbitration and Conciliation Act, 1996. The appellants are directed to avail such remedies within a period of four weeks from the date of receipt of the server copy of this order and till then the respondent department shall not finalize any of the re-tendering process if they so desire to do.

8. We make it clear that in the event, the appellants approach the concerned Court by invoking the Arbitration and Conciliation Act, 1996, any prayer sought for before the concerned Court or the Arbitrator shall be decided on merits and in accordance with law without being influenced by any of the observations made in this order.

9. With the aforesaid observations and directions, both the writ petition and the appeal stand **disposed of**. Consequently, the connected application also stands disposed of.

(T. S. Sivagnanam)
Acting Chief Justice

(Hiranmay Bhattacharyya, J.)