

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No. 10441 of 2024

Orissa Metaliks Private Ltd.

Vs.

The Union of India and others

For the petitioner : Mr. Ranjan Bachawat, Ld. Sr. Adv.,
Mr. Jishnu Chowdhury,
Mr. Debrup Bhattacharjee,
Mr. Satyaki Mukherjee,
Mr. Raghunath Ghose,
Ms. Tonoya Ghose,
Ms. Shusna Santra

For the
respondent nos. 1 to 5 : Mr. Asok Bhaumik

For the respondent no. 6 : Mr. S. N. Mookherjee, Ld. Sr. Adv.,
Mr. Ratnanko Banerji, Ld. Sr. Adv.,
Mr. Shounak Mitra,
Mr. Yash Singhi,
Ms. Shivangi Thard

Hearing concluded on : 02.05.2024

Judgment on : 10.05.2024

Sabyasachi Bhattacharyya, J:-

1. The present writ petition has challenged a letter bearing no. W/DRG/WL/SER-KGP-2023-offline-66 dated April 3, 2024 and a letter bearing Way leave/RMPL/West/953 dated April 4, 2024. By virtue of the impugned documents, the Railway Authorities have granted purported revival of a Way leave permission to the respondent no. 6 for constructing and running a water-pipeline under Railway property.

2. It is contended by learned senior counsel for the petitioner that way leave permission had been granted to the respondent no. 6 for a water-pipeline at 1.2 m depth on July 10, 2007 which was valid for ten years and expired in the year 2017.
3. Subsequent thereto, way leave permission was granted to the petitioner by the Railways on February 1, 2019 for a two-span underpass starting at the depth of 800-900 mm.
4. An agreement was entered into between the petitioner and the Railways for such underpass on February 27, 2019. As per Clause 25 of the said agreement, the underpass would be constructed in terms of the plan approved by the Railways, which was accordingly done.
5. Again, on June 2, 2022 a way leave permission was granted to the petitioner by the Railways for a one-span underpass starting also at the depth of 800-900 mm.
6. Pursuant to the same, on June 2, 2022 an agreement was entered into which had a similar Clause 25 as the previous agreement, which was also complied with.
7. It is relevant to mention here that according to both parties, the route of the underpass was approximately at right-angles with the water-pipeline which had previously been constructed by respondent no. 6 and the two crisscrossed each other manner. Accordingly, it is submitted by the petitioner, at the time of building the underpass, the previously existing unused pipeline had to be broken and removed where it intersected with the underpass.

8. However, it is argued that in January, 2024, the petitioner discovered that the respondent no. 6 was constructing a pipeline which would interfere with the petitioner's right to use the underpass. Later, way leave permission was revived in favour of the respondent no. 6 to construct water pipeline, prompting the present challenge.
9. The petitioner contends that the impugned way leave permission was granted under Clause 1033 of the Railway Engineering Code (for short, "the Code"). However, in terms of the said Clause, grant of such permission can only be considered in the event there is no provision of water supply from any other source/direction. Clause 1033(3)(ii) provides so. In the present case, it is submitted, the Kangshabati river runs close by, which is a huge source of water which can readily be used by the respondent no. 6. Thus, being aware that a fresh application would be barred by Clause 1033(3)(ii), the respondent no. 6 has been granted a new permission in the garb of renewal in the year 2024 with retrospective effect from 2017. Such action, it is argued, is *mala fide* and in abuse of powers of the respondent-authorities.
10. Learned senior counsel for the petitioner next argues that Clause 1033(12) of the Code stipulates that there can be no construction, whether permanent or quasi-permanent, other than Road Over Bridge (ROB) and Road Under Bridge (RUB), over railway land. Thus, an overhead pipeline cannot be constructed since it would be contrary to the said provision. However, as per the respondents, for the area covered by the underpass of the petitioner, permission has been

granted for the pipeline to take a detour over the railway line by building an overhead structure. Such construction is patently barred by Clause 1033(12).

11. That apart, the design of the said proposed construction has not yet been sanctioned by the Railways. Even before such approval, the way leave permission has been granted, which is palpably *de hors* the law and the provisions of the Code of the Railways themselves, apart from endangering railway property and the petitioner's underpass.
12. The petitioner next argues that the Master Circular on Policy for Management of Railway Land dated October 4, 2002 issued by the Railway Board, by virtue of Clause 7.5.2 thereof, contemplates only existing way leave facility users to migrate to the policy. The purported renewal granted to the respondent no. 6 on April 3, 2024 is in terms of Clause 7.4 of the Policy and therefore such renewal could not have been granted, since the way leave permission of respondent no. 6 had already expired seven years ago in 2017.
13. Learned senior counsel for the petitioner next seeks to highlight the alleged *mala fides* of respondent no. 6 in requesting for depositing way leave permission fee from the financial year 2017-2018 to 2026-2027 for revival of a water line, suppressing that in the intervening period, much after the expiry of the earlier agreement, a right has been created in favour of the petitioner to build an underpass and it would be impossible for the pipeline to be made operational without interfering with such underpass, since the underpass crosses the route of the previously existing pipeline.

- 14.** The application dated March 27, 2023 for revival of way leave permission suffers from such suppression.
- 15.** In the agreement dated April 3, 2024 granted in favour of the respondent no. 6, which is apparently for laying water-pipe across/through railway land, it is mentioned that it is a renewal; in other words, there is an existing pipeline. Way leave permission for pipeline always has to be underground, since additional construction is prohibited to be erected as per sub-clause (12) of Clause 1033. The agreement does not disclose permission to construct any section of the pipeline overhead.
- 16.** A joint survey report annexed at page 19 of the bunch of documents handed over by respondent no. 6 shows that the survey specifically records that work will be executed excepting the area covered by the underpass/sub-way of the petitioner, which is sought to be violated by constructing over the underpass.
- 17.** From the letter dated April 4, 2024 issued by the petitioner, also a part of the compilation of documents of the respondents, the existing pipeline was evidently damaged in three to four places, which needs repair, on the basis of which the work has been started. However, there is no mention thereof erecting a structure over the petitioner's underpass.
- 18.** The plan submitted by the respondent no. 6 shows erection or building of structure over the petitioner's underpass which has been suppressed in the letters/application of the respondent no. 6.

- 19.** Dealing with the arguments of respondent no. 6 that the petitioner failed in its bid in a Corporate Insolvency Resolution Process (CIRP) and is now trying to foil the revival of the respondent no. 6-industry by its present management, it is argued by the petitioner that the petitioner is merely protecting its existing rights to use its underpass. Mere failure of the petitioner in the bid does not necessarily imply that the present challenge is motivated by *mala fides*.
- 20.** As per Clause 22 of the petitioner's agreement, the rights of the respondent no. 6 regarding its pipeline are not preserved at all. A reading of the said clause, it is argued, makes it clear that should the petitioner's pipe/cable/facility (here, the underpass) cause any loss or damage to Railway or third-party property, the petitioner would be liable for such damages. The petitioner, however, has constructed its underpass as per approved plan of the Railways in the year 2019 after the respondents no. 6's agreement expired in 2017. The unused pipeline was not of the respondent no. 6 but of the Railways which had permitted the petitioner to construct its underpass along a route including a cross-section where the pipeline had previously existed.
- 21.** The argument of the respondents that the petitioner has no *locus standi* to complain since its underpass will not be affected is refuted by the petitioner. Learned senior counsel for the petitioner argues that the effect of the purported renewal of license from 2017 to 2027 would directly interfere with the petitioner's right to operate its underpass.

- 22.** Regarding the contention that the Railway Engineering Code is only an administrative instruction and not binding, it is argued that the Railways have relied upon two Circulars dated April 24, 2014 and November 27, 2001 both of which reaffirmed the said Code and the clauses thereof. Moreover, in terms of Section 3 of the Railway Boards Act, 1905, any instruction of the Railway board has binding effect and is of statutory force.
- 23.** It is further argued that the construction of the overhead pipeline proposed by the respondent no. 6 would directly jeopardize the underpass of the petitioner, since no specifics of the structure have been disclosed even in the plan relied on by respondent no. 6 and/or approved till date by the Railways.
- 24.** Learned senior counsel appearing for the respondent no. 6, in reply, contends that the writ petitioner has not approached this Court with clean hands since at the juncture when the respondents no. 6 had shut down its operations in June 2010, it had an existing way leave permission for its pipeline which had been granted on July 10, 2007 and was valid till July 2017. The respondent no. 6, not being able to service its loans, applied under Section 10 of the Insolvency and Bankruptcy, Code (IBC), 2016 for a corporate insolvency resolution which commenced on January 8, 2018. The petitioner and a consortium of S.S. Natural Resources Limited and Shyam SEL Power Limited applied for being selected to revive the respondent no. 6. The Committee of Creditors accepted the bid of the Resolution Applicant and respondent no. 6 was declared the H-2 bidder. The writ

petitioner, having failed to acquire the respondent no. 6-Company, caused a financial creditor of the respondent no. 6 to apply for liquidation of the Company on the basis that the petitioner was available to purchase assets if sale was conducted in liquidation, which attempt of the petitioner was also foiled. Having so failed, the writ petitioner has sought to deter the present endeavour of the respondent no. 6, which is sought to be revived by its new management, as a competitor of the present management of the respondent no. 6, in order to render the resolution process infructuous and defeating the very objective of the IBC of corporate insolvency resolution in a time-bound manner for maximization of value of assets and to promote entrepreneurship.

- 25.** It is next argued by respondent no. 6 that the petitioner has no *locus standi* since the way leave permission does not affect the petitioner's underpass in any manner. The approved drawings handed over to the court would show that no work is to be carried out underground, nor is the pipeline going to rest on the roof or over the underpass of the petitioner. There is a gap of 500 mm between the roof of the underpass and the pipeline over it. Thus, the petitioner is not going to be affected in any manner.
- 26.** The next contention of respondent no. 6 is that there is no violation of either the Railway Code or the Master Circular dated October 4, 2022. The latter does not prevent either a renewal of an expired way leave permission or grant of new way leave permission. Clause 7.5.2, it is argued, does not provide that it would apply only to way leave

permissions subsisting on the date of the Master Circular and does not take away the right of renewal of a previously expired way leave permission.

- 27.** The Railway Code also does not prevent such grant of way leave permission.
- 28.** Other factors also merit consideration such as, the respondent no. 6 already had an underground pipe system in place by virtue of its earlier way leave permission and the municipality had agreed to supply water by an agreement dated February 9, 2024 to respondent no. 6 for its plant and the drawings which had been approved would not affect the petitioner's underpass in any manner.
- 29.** Respondent no. 6 argues that Clause 1033(12) also does not stand in the way as in reality, the way leave permission was for underground pipelines and it was only where the underpass has been constructed by the petitioner that the pipeline would be overhead without there being any construction on the land, as demonstrated by the drawings handed over at the time of hearing. Moreover, both the Master Circular and the Railway Code are mere administrative directions and cannot confer any right on the parties.
- 30.** Clause 15.14 of the Resolution Plan is binding on all stakeholders, including the petitioner, it is argued. The Railways have accepted the same by granting requisite permissions and the petitioner cannot have any complaint in that regard. Thus, it is submitted that the writ petition should be dismissed.

31. The issue which has fallen for consideration is, thus, whether the grant of renewal of the way leave permission to respondent no. 6, which had expired in the year 2017, is valid in the eye of law and/or interdicts the rights conferred in the meantime on the petitioner in any manner.
32. The admitted position is that the way leave permission granted to the respondent no. 6-Company on July 10, 2007 had expired in the month of July, 2017.
33. The rights of the petitioner regarding construction of an underpass were first created by way leave permission on February 1, 2019, followed by an agreement dated February 27, 2019 and next by the way leave permission of June 1, 2022, followed up by an agreement dated June 2, 2022.
34. Thus, when the petitioner was granted such permission, there was no existing way leave permission operating in favour of the respondent no. 6. Such permission, having expired almost two years prior thereto, was in no manner subsisting at the juncture when the petitioner's rights were created. At that point of time, it cannot be said that the pipeline situated on railway property still belonged to the respondent no. 6-Company, as its way leave permission had already expired long back.
35. Coming to the impugned document dated April 3, 2024, the subject-matter of the same has been described as "revival of way leave permission". As per the said permission, the way leave permission has been described as a "renewal ... for revival of pipeline". Hence, the

way leave permission sought to be granted is not shown as a fresh way leave permission but as a renewal with retrospective effect from seven years back, that is, 2017.

- 36.** There are several palpable irregularities in the mode adopted by the Railways in granting such renewal. First, for a permission to qualify as a “renewal”, such renewal has to occur before the expiry of the previous permission, or at least within a reasonable time immediately thereafter. There is a distinction between renewal and novation. The moment a previous permission expires, it ceases to exist and there cannot be any “renewal” of the same. Anyway leave permission granted thereafter would be new contract/permission. The said common-sense principal applies all the more in the present case, since the renewal sought to be granted is after a prolonged period of seven years, long before which the previous agreement has been given a decent burial. One cannot just come up after seven years and say that a dead permission, which had met its demise seven years back, is sought to be renewed. Thus, for all practical purposes, the description of a fresh way leave permission as “renewal” was nothing less than a fraud practised upon the petitioner in collusion between the Railway Authorities and the respondent no.6 as well as a fraud on the applicable Laws and Regulations.

- 37.** There are several other discrepancies as well. Clause 1.3 of the Policy of Management of Railway Land, which is binding on the Railway Authorities, having the force of law since issued by the Railway Board and having been relied on by the Railway Authorities time and again,

the said policy is applicable for the grant of lease/license/way leave permissions for all cases under consideration, new cases and renewal of cases. Clause 7.4 contemplates renewal. The language is that on expiry of lease/license/ way leave agreement, further renewal up to thirty-five years or for period as stipulated in the agreement can be done based on mutual agreement.

38. Clause 7.5.2 thereof deals with *existing* users of way leave and stipulates that all *existing* way leave facility users shall be able to migrate to the policy regime only after expiry of period of existing way leave agreement and payment of all dues. The respondent no.6 was not an existing way leave facility user, nor was the way leave granted to it a renewal, for two very important reasons:

- i) The way leave permission had expired seven years back and any grant after such period can only be a fresh way leave and not a 'renewal', particularly as no application for extension of the previous way leave had been filed during its subsistence or was pending at any point of time; and
- ii) Such 'renewal' totally suppressed the valuable rights created in favour of the petitioner in the meantime by virtue of the valid way leave permissions and follow-up agreements granted in February 2019, and June 2022 respectively, which has been fully acted upon by the petitioner by expending huge resources with the approval of the railways and having built and put into operation the underpass-in-question. Such valuable rights cannot be taken away at the stroke of a pen

merely by describing a fresh way leave, which is mutually exclusive with the existing rights of the petitioner, as a 'renewal'.

39. In the communication by the Assistant Divisional Engineer (West) of the South Eastern Railway to ADEN, dated April 4, 2024, an impression was given that the agency had found some damage in pipeline from Jharia Pump House to the plant of respondent no. 6 (the area covered by the petitioner's underpass) which needed "repair" and the "repairing work" would be started from April 9, 2024 from 10:00 hrs. The said communication is a fraudulent and deliberate attempt by the Railways to underplay the huge new project which was to be undertaken for reviving the water pipeline of the respondent no.6 which had ceased to be used since the year 2017. The expressions "repair" and "repairing work" are diametrically opposite to the factual work required at the locale. In order to 'revive' the pipeline, the underpass of the petitioner has to be crossed, which cannot but render the underpass totally unusable, rendering the valid and subsisting way leave permissions and agreements held by the petitioner nugatory.
40. In both the communications, as well as the agreement sought to be entered into with respondent no.6, the Railway Authority seeks to give out an impression, in tandem with the respondent no.6, that the permission was being given for reviving an *underground* water pipeline. The said attempt itself, evidently, is to bypass the effect of sub-clause (12) of Clause 1033 of the Railway Engineering Code,

which provides that in all cases of way leave facilities (except ROB/RUBs, and underground pipelines), no construction (whether permanent, quasi permanent or temporary) other than a kuchcha or pucca road in cases the facility is expressly given for the same, is to be permitted on railway land. If any such construction comes up subsequently, the same should be immediately removed as soon as noticed and the way leave facility discontinued with.

41. An ROB has been defined in the said Code as “Road Over Bridge” and RUB as “Road Under Bridge”. The construction now sought to be made by the respondent no.6 is neither of the two and as such does not fall within the purview of the exceptions to sub-clause (12). By admission, respondent no.6 gives out that the construction now required would involve an overhead structure, which would again not be an *underground* pipeline.
42. The impugned way leave permission has been given specifically for repairing and reviving and renewal of way leave permission to operate an *underground pipeline* and not any overhead structure. By no stretch of imagination can an overhead structure to be built over the railway lines be defined as an ‘underground pipeline’.
43. Thus, the very effort on the part of the Railway Authority and the respondent no.6 reeks of a surreptitious and *mala fide* effort to bypass the Railway Engineering Code as well the Master Circular operating in respect of Railway lands, which comprise a policy decision taken by the Railway Authorities and have the status of statutory guidelines.

44. The respondent no.6 seeks to have the cake and eat it too. The impression given in the way leave permission and the communication is that mere repair work is to be done to the underground pipeline and a way leave permission is to be given for such purpose, whereas the structure shown the map submitted by the respondent no.6 clearly contemplates an overhead construction over the Railway property.

Such attempt is barred of several counts:

- i) Clause 1033, sub-clause (12) debars any such overhead construction.
- ii) The way leave permission sought to be given is a fresh way leave permission in the garb of a 'renewal', which cannot now be given in view of the intervening underpass of the petitioner, regarding which two sets of way leaves and agreements subsist between the petitioner and the Railways.
- iii) The effect of the impugned grant of permission cannot be 'renewal' as described in the permission since the tenure of the previous way leave permission expired long seven years back in 2017 and there was never any application for renewal filed or pending at any point of time.

45. Coming to the other objection taken by the petitioner regarding violation of sub-clause 3(ii) of Clause 1033 of the Code, the same would involve a factual consideration as to whether the alleged non-feasibility of the provisions of water supply applies in the present case. Although it is alleged that the Kangshabati river nearby furnishes such alternative source of water, evidence regarding that, and as to

whether use of such supply is a practical alternative, cannot be undertaken by the writ court.

46. Even apart from the same, however, in view of the above reasons, the effort in granting a fresh renewal of an expired lease is *mala fide* and *de hors* the provisions of the Master Circular of the Railway as well as the Railway Engineering Code and would be violative of the rights of the petitioner.
47. The other argument advanced by respondent no. 6 is that the petitioner is trying to frustrate the Resolution Plan which has been approved in connection with a CIRP initiated by the respondent no. 6. Clause 15.14(ii)(a) of the same provides that the Resolution Applicant prayed that upon approval of the Resolution Plan by the Adjudicating Authority and since the Resolution Applicant would acquire the Corporate Debtor on an going concerned basis, *subsisting* consents, licences, approvals, rights, entitlements, benefits and privileges shall be deemed to continue without disruption of the benefit of the Corporate Debtor.
48. The Resolution Process itself commenced on January 8, 2018 whereas the way leave permission of the respondent no. 6 for its prior pipeline had expired in July, 2017. Hence, even from the inception of the CIRP, there was no 'subsisting' permission or consent or licence in favour of the respondent no. 6. The resolution plan was approved much later and as such, the already expired way leave permission of the respondent no. 6 could not come within the purview of such "subsisting" approvals/licences/permissions. Thus, the very premise

of the argument of respondent no. 6 that the Resolution Plan is sought to be frustrated does not have any legs to stand on.

49. That apart, the “Clean Slate Theory” propounded by the Supreme Court and followed by several High Courts in respect of approved Resolution Plans under the IBC applies only to efface previous debts and liabilities of the Corporate Debtor, to enable the successful Resolution Applicant to revive the concern with a ‘clean slate’. However, the said legal fiction cannot be doubly applied to generate another legal fiction of creation of new rights which is entirely *de hors* the ambit of the IBC itself. The rights under different laws than the IBC cannot be deemed to be created or permitted to be created under a Resolution Plan, since such an interpretation of law would confer powers on the authorities prescribed under the IBC which are not vested in them by law. Hence, even apart from the fact that there was no subsisting permission in favour of the successful Resolution Applicant (respondent no. 6) at the relevant juncture, no new rights could be created in favour of the respondent no. 6 merely by virtue of the approval of the Resolution Plan.

50. In *Embassy Property Developments Private Limited vs. State of Karnataka and others*, reported at (2020) 13 SCC 308, relied on by the petitioner, the Supreme Court held that in the light of the statutory scheme as culled out from various provisions of the IBC, it is clear that wherever the Corporate Debtor has to exercise a right that falls outside the purview of the IBC, especially in the realm of the public law, they cannot, through the Resolution Professional, take a bypass

and go before the NCLT for the enforcement of such a right. The said proposition is fully applicable in the present case.

51. In view of the Railway Authorities having themselves relied on the Master Circular on Policy for Management of Railway Land and the Railway Engineering Code on several occasions, as demonstrated by the petitioner, and in view of the fact that those have been adhered to at all material times by the Railways and are binding on them, the argument that those are not binding and may be flouted by the Railways at their sweet will cannot be accepted, more so at the behest of the respondent no. 6 where the Railways themselves have not gone to the extent of arguing so.
52. The failure of the petitioner in the Resolution Process has no bearing on the present dispute and as such, *mala fides* cannot be read into the resistance of the petitioner to an illegal attempt by the respondent no. 6 to create rights where there do not exist any.
53. The very attempt to package the unlawful grant of new way leave permission directly to the detriment of the rights already conferred in favour of the petitioner by the Railways as a 'renewal' is itself *mala fide* and fraudulent, being detrimental to the Engineering Code of the Railway itself and the Master Circular.
54. The other aspect of the matter is that respondent no. 6 attempts to project that the overhead structure would not affect the rights of the petitioner in any manner. However, in view of the specific bar in Clause 1033, sub-clause (12) of the Code, no overhead construction can be allowed, except in case of ROB or RUB, by the Railway

Authorities and if discovered, the same will be immediately demolished and the way leave permission cancelled. Thus, the grant of permission by the Railways to construct an overhead structure over the underpass of the petitioner is void and illegal *ab initio*.

- 55.** Also, the petitioner has raised a valid question as to whether, without submission of any properly approved structural design and/or safe architectural plan, on the basis of the “sketchy” sketch map relied on by the respondent no. 6, way leave permission could be granted to respondent no. 6 at all. There is much substance in such contention. The Railway Authorities cannot take such a huge risk by approving an overhead structure which is not only violative of Clause 1033(12) of the Code but also jeopardizes the Railway line/property underneath it and the petitioner’s underpass running close beneath the surface level at the same location. Without a structural and architectural verification by appropriate authorities; such construction might lead to disastrous results, causing huge loss of life and limb apart from destroying the underpass of the petitioner and the Railway line/property which is public property. Such an irresponsible act on the part of the Railway Authorities is strongly deprecated.
- 56.** The action of public authorities of the stature of the Railways has to be transparent and aboveboard and cannot be actuated by petty profit-motives, giving a go-bye to safety standards and violating existing valid agreements with third parties.
- 57.** In view of the above, WPA No. 10441 of 2024 is allowed on contest, thereby setting aside the way leave permission granted to the

respondent no. 6, for renewal/revival or otherwise, by virtue of the letter bearing no. W/DRG/WL/SER-KGP-2023-offline-66 dated April 3, 2024 and the letter bearing Way leave/RMPL/West/953 dated April 4, 2024. All consequential steps, if taken by the respondents in terms of the said permission, are also hereby quashed. The respondents shall take immediate steps to reverse any action, if taken pursuant to the quashed way leave and 'revival' permission. The respondent no. 6 shall, at its own cost, restore the property adjoining the location underneath which the petitioner's underpass runs, which has been already dug up and/or on which full or partial construction has been made by the respondent no. 6. Such site shall immediately be restored to its original position as it stood before the commencement of construction and allied work by respondent no. 6 and its agents, as expeditiously as possible, positively within July 31, 2024.

- 58.** There will be no order as to costs.
- 59.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)