
(2015) 03 CAL CK 0091

In the Calcutta High Court

Case No : M.A.T. 136 of 2014 and C.A.N. 1467 of 2014

Allied-Triveni-Modern (JV)

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 03-03-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 166, 21, 226

Citation : (2015) 4 CHN 593 : (2015) 3 WBLR 949

Hon'ble Judges : Manjula Chellur, C.J.;Joymalya Bagchi, J

Bench : Division Bench

Advocate : Kashi Kanto Maitra, Arup Kumar Lahiri, Lovely Dasgupta, Anubrata Santra, Avik Dutta and Zulfikar Ali, for the Appellant; Malay Kumar Das, Advocates for the Respondent

Final Decision : Dismissed

Judgement

1. This appeal is directed against the dismissal of the writ petition dated October 09, 2013. The appellant was the writ petitioner, who approached the learned Single Judge complaining of the action of the respondent Railways as arbitrary and illegal for not affording an opportunity of hearing while the notice of termination was issued.

2. A tender was invited for earthwork in cutting and embankment with mechanical compaction, supplying, spreading and compaction of stone dust blanketing, extension of minor bridges, construction of new platform shed, and Foot over bridge, extension and widening of existing platforms, construction of panel buildings, linking of track and points and crossing, supplying, stacking and spreading of machine crushed stone ballast on cess, transporting of P. Way materials and other ancillary works between station Jiaganj and Bhagwangola in connection with doubling of railway line between Lalgola and Jiaganj.

3. It is not in dispute by virtue of letter dated May 06, 2013 work order pertaining to tender No. 37 of 2010-2011 was issued in favour of appellant.

Terms and conditions laid down in the tender notice as well as the work order or contract agreement between the parties postulated which detailed programme in the form of approved bar chart indicating how the work has to be completed within a period of 18 months as stipulated in the terms of the agreement.

4. According to the appellant, with all the right dedication without any negligence and with due diligence the appellant started work but on account of inaction of the Railway Authorities the progress of the work was hampered for no fault of the appellant. The site in question was faced with various impediments, which were beyond the control of the appellant contractor, therefore, the completion of the work in a time bound schedule did not happen.

5. According to the appellant, when a legitimate bill claiming Rs. 34,44,675/- was sent on March 08, 2013 followed by several reminders, the Railway Authorities by letter dated June 02, 2013 refused release of the said bill on the ground that though work was started but major portion of the work was not completed as stipulated in the contract.

6. It is not in dispute that subsequently other bills regarding price escalation was submitted, however, by letter dated September 30, 2013 indicating seven days' notice, Railway Authorities proposed termination of contract for poor performance and sought to invoke performance guarantee and security deposit.

7. Meanwhile another fresh tender was floated which was followed by impugned letter of termination dated September 30, 2013.

8. Aggrieved by these, appellant writ petitioner sought several reliefs in the writ petition contending when 95% of the work was completed and only 5% of the work was pending that too for no fault of the appellant writ petitioner, there was no justification in the action of the respondent authorities. According to the Railway Authorities, several disputed issues are involved which requires consideration of factual situation, therefore, the writ petition was not maintainable, specially in the light of arbitration clause in the agreement. The learned Judge opined that since factual issues require adjudication invocation of extraordinary jurisdiction under Article 226 of the Constitution was unwarranted and, therefore, dismissed the writ petition.

9. Aggrieved by the same, the present appeal is filed. According to the learned Senior Counsel Mr. Maitra, the order of learned Single judge is not justified for several reasons. The learned Judge did not take into consideration that the appellant had completed 95% of the work. He further submits that without clearing the legitimate dues of the appellant and before effectively terminating the contract they ought not to have floated another tender for completion of the unfinished work. Mr. Maitra relies upon several decisions to contend that in spite of arbitration clause in an agreement and in spite of such alternative remedy available, parties are not precluded from invoking the jurisdiction of this Court under Article 226 of the Constitution of India specially when rights of the applicants are infringed touching upon Article 14 and Article 21 of the

Constitution of India.

10. As against these, standing Counsel appearing for the respondent Railway Authorities contends that the correspondences exchanged between the parties right from June 02, 2013 till September 30, 2013, clearly indicates it was not all of a sudden appellant was put on terms to complete the said work followed by termination of contract. According to him, after alerting and cautioning the appellant that he was delaying the work, which was supposed to be completed within a time bound schedule, the Authorities have terminated the contract, therefore, there was justification in the action of the Authorities, specially when delay in execution of the work involving doubling the railway line would cause inconvenience and hardship to general public. He has placed reliance in the case of GAIL (India) Limited Vs. Gujarat State Petroleum Corporation Limited, (2013) 10 AD 187 : (2013) 11 SCALE 518 : (2014) 1 SCC 329 .

11. We have gone through the impugned order and also the annexures referred to in the course of arguments as well as citations. On perusal of correspondences between June 02, 2013 till termination of contract by letter dated September 30, 2013, we note that the respondent authorities repeatedly informed the appellant to complete the work and comply with several directions indicated in the letters for considering the bills raised by the appellant. According to them, poor performance of contractor persisted totally neglecting the time schedule for completion of work and there was unapt handling of materials. Therefore, the claim of the appellant was unjustified and illogical. This was followed by several other letters by the respondent authorities and lastly by letter of termination dated September 30, 2013.

12. The learned Senior Counsel for the appellant relies upon the decisions in the case of Union of India (UOI) and Others Vs. Tania Construction Pvt. Ltd., (2011) 2 ARBLR 115 : (2011) 5 JT 59 : (2011) 3 RCR(Civil) 821 : (2011) 4 SCALE 745 : (2011) 5 SCC 697 : (2011) 5 SCR 397 : (2011) 4 UJ 2210 wherein the dispute between the parties was of variation, rectification and novation of contract. Their Lordships opined that there was no justification on the part of the Railway Authorities to compel contractor to proceed with the work without revision of rates in view of change in the designs of two railway over bridges and specially when there was error of judgment on the part of the appellant i.e. Union of India in terminating the contract in original tender. In this context Their Lordships opined that Arbitration Clause in agreement is not a bar to invoke jurisdiction under Article 226 of the Constitution of India when injustice is caused and Rule of Law is violated. The facts involved in the said case were entirely different from the facts involved in the present case. There is no involvement of variation, rectification and novation of the contract in the present case. Then coming to another decision in the case of Shankara Co-op Housing Society Ltd. Vs. M. Prabhakar and Others, AIR 2011 SC 2161 : (2011) 5 SCALE 423 : (2011) 5 SCC 607 : (2011) 7 SCR 468 : (2011) 4 UJ 2475 : (2011) AIRSCW 3033 : (2011) 3 Supreme 569 which was cited to contend that there is no bar to entertain the

writ petition where alternative remedy is available, we find Their Lordships held that it is entirely in the discretion of the Court to entertain a petition filed under Article 226 of the Constitution of India. We have no second thoughts so far as this proposition is concerned. Relying on another decision in the case of L.G. Chaudhari Vs. Secretary, L.S.G. Department, Government of Bihar and Others, AIR 1980 SC 383 : (1979) 11 UJ 926 , learned Senior Counsel, arguing for the appellant, referred to paragraph 3 of the said report with regard to the discretion of the Court to entertain an application under Article 226 of the Constitution of India. The facts in that case was with regard to confirmation of Government servant where Article 166 of the Constitution of India was also considered. Their Lordships opined that even in absence of formal orders in terms of Article 166, Government servant concerned in writ petition could show that he had been appointed on permanent and substantive basis. Therefore, according to the learned Senior Counsel such factual issue was considered under Article 226 of the Constitution of India. Learned Senior Counsel for the appellant also relied upon an unreported decision in the case of M/s. Ram Barai Singh and Co. v. State of Bihar (Civil Appeal No. 11465 of 2014 dated December 17, 2014). The question that arose before Their Lordships was whether the writ petition could have been entertained or not. Their Lordships opined that once the respondents had not objected to entertainment of the writ petition on the ground of availability of alternative remedy, the final judgment rendered on merits cannot be faulted and set aside only on noticing by the Division Bench that an alternative remedy by way of Arbitration Clause could have been resorted to.

13. Apparently we are not faced with the similar situation in the present case. In the present case when bills were raised in the month of February followed by reminders in May 2013, the respondent authorities started pointing out non-completion of the work within the stipulated time and waited upto September 30, 2013 for improvement of performance by contractor and then proceeded to terminate the contract. In between there was lot of correspondence, which indicates several deficits, being pointed out by both the parties against each other as reasons in support of their respective stand.

14. According to appellant writ petitioner there were number of obstacles and obstructions at the site which came in the way of completion of the work. According to respondent authorities it was sheer negligence and lethargy of doing the work which caused delay, therefore, having regard to the urgency and hardship caused due to delay in the project concerned, they had to float another tender and then terminate the contract.

15. Several factual issues have to be gone into to understand whether there were genuine obstacles and obstructions for completing the work in time by the appellant as indicated in the letters. By exchanging letters they did not come to any terms. On the other hand they denied the allegations made against each other. These are the factual issues which have to be adjudicated upon by affording opportunity to the parties to tender evidence substantiating their

contentions in order to arrive at a conclusion where there was justification in the stand of the appellant contractor for not completing the work and whether there was justification in the stand of the respondent Railway Authorities in terminating the terms of the contract. No doubt though alternative remedy is available while exercising power under Article 226 of the Constitution of India this Court can entertain a writ petition provided where the issues do not involve full-fledged trial to adjudicate the controversy raised between the parties. The parties must put-forth their case by way of evidence in the present case so far as the disputed factual situation and the same cannot be ascertained by reading averments in the correspondences.

16. In that view of the matter we are of the opinion the learned Judge was justified, in the facts and circumstances of the case, opining that this was not a case where extraordinary jurisdiction of High Court under Article 226 of the Constitution of India could be exercised entertaining the writ petition.

17. Accordingly, the appeal is dismissed along with the application.

18. Certified copy of this order, if applied for, be given to the parties, on priority basis.