SUPREME COURT OF INDIA

M/s. Ram Barai Singh & Co.

Vs.

State of Bihar

C.A.No.11465 of 2014

(M.Y. Eqbal and Shiva Kirti Singh JJ.)

17.12.2014

JUDGMENT

SHIVA KIRTI SINGH, J.

Heard the parties. Leave granted.

This appeal is directed against final judgment and order dated 12.01.2011 passed by the Division Bench of Patna High Court in L.P.A. No.762 of 2009 whereby the Letters Patent Appeal preferred by the respondents herein was allowed and order of the learned Single Judge dated 18.02.2009 in Writ Petition bearing C.W.J.C. No.10173 of 2008 was set aside on the sole ground that there was an arbitration clause in an agreement between the parties and since such alternative remedy was not availed by the appellant, the writ petition itself was not maintainable.

Learned counsel for the appellant has assailed the aforesaid order of the Division Bench on facts as well as on law. On law, it was contended that the writ petition could not have been held not maintainable, more so when no such objection was taken by the other side. On facts, it was submitted that the agreement noticed by the Division Bench no doubt contained an arbitration clause entitling either of the parties to invoke arbitration by the concerned Superintending Engineer in case of any dispute arising out of the agreement but the Division Bench failed to notice that the agreement itself was no longer in existence because the work was completed long back and payments

including payment on account of labour escalation costs amounting to Rs.9.53 lacs was paid in February 1992. Thus, according to the appellant, the agreement dated 06.02.1989 had worked itself out and it was much later that a dispute arose when the respondent authorities withheld the security amount of the appellant of Rs.30 lacs for a long period. On persistent demand, Rs.20 lacs out of the security amount, was returned after 10 years in December 2002 and that too without any interest. At that stage appellant came to know that Engineer-in-Chief vide an order dated 09.06.2001 had ordered for making a recovery of Rs.9.53 lacs from the appellant which had been paid long back on account of labour escalation cost.

The appellant preferred a writ petition bearing C.W.J.C.No.3686 of 2005 to claim the interest on undue delay in refunding the security deposit and against the direction for recovery of labour escalation cost. The respondents did not raise plea of arbitration clause and that writ petition was disposed of on 20.09.2006 allowing 12% interest on account of delay in payment of security amount. The issue of labour escalation cost was remanded back to the concerned Engineer-in-Chief who was directed to pass a reasoned order after hearing the appellant or his representative, within a fixed period. The appellant was granted liberty to seek his remedy if he was aggrieved by the order that may be passed by the Engineer-in-Chief. The respondents preferred a Letters Patent Appeal bearing No.877 of 2006 in which also they did not raise the issue of alternative remedy by way of arbitration clause. The LPA was disposed of on 11.12.2007 with the following direction :

> ".... .... Since the matter is going on remand, the State has to apply its mind afresh to the facts and circumstances of the case and, therefore, the direction, as quoted above would be juxtaposition to the order of remand. The question of payment of interest by either side, however, will abide by the ultimate determination of the question by the State of Bihar.
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> It goes without saying that the matter would be examined and re- determined by the State expeditiously."

The Engineer-in-Chief passed a fresh order on 21.05.2008 against the appellant over-ruling the various grounds and objections raised by the appellant in his representation relating to merits of the matter as well as jurisdiction of the Engineer-in-Chief who, according to appellant, had no role in the issue which was to be finalized at the stage

of Executive Engineer and the Superintending Engineer. The appellant challenged the order of Engineer-in-Chief through writ petition bearing C.W.J.C. No.10173 of 2008 which was allowed by the learned Single Judge on 18.02.2009 by a reasoned order. There is no dispute that respondents filed a counter affidavit but did not raise any objection of alternative remedy by way of an arbitration clause in the agreement dated 06.02.1989. The learned Single Judge allowed the writ petition preferred by the appellant by setting aside the order of the Engineer-in-Chief dated 21.05.2008. The Court found that the Engineer-in-Chief had raised demand of interest in the year 2008 along with refund of labour escalation cost only to offset the State's liability to pay interest on refund of security deposit after a delay of about 10 years. Thus the action of the respondents was held to be for ulterior reasons and objection to labour escalation cost after a long gap from its actual payment was held to be arbitrary and unreasonable.

The aforesaid order of the learned Single Judge dated 18.02.2009 was set aside by the Division Bench by the order under appeal on the ground already noticed earlier.

We find ourselves in agreement with case of the appellant that the Division Bench failed to notice the relevant facts including the history of earlier litigation. It also failed to notice that the agreement itself had worked out long back and in the earlier round of litigation as well as in the present round the respondents never raised any objection on the basis of arbitration clause.

The Division Bench noticed the judgment of this Court in the case of State of U.P. & Ors. v. Bridge & Roof Company (India) Ltd. (1996) 6 SCC 22 as well as in the case of ABL International Ltd. & Anr. v. Export Credit Guarantee Corporation of India Ltd. & Ors. (2004) 3 SCC 553 for coming to the conclusion that where the contract itself provides an effective alternative remedy by way of reference to arbitration, it is good ground for declining to exercise extraordinary jurisdiction under Article 226 of the Constitution of India and that the Court will not permit recourse to other remedy without invoking the remedy by way of arbitration, "unless, of course, both the parties to the dispute agree on another mode of dispute resolution."

In our considered view, the aforesaid two decisions did not warrant setting aside of the judgment of learned Single Judge without going into merits and dismissing the writ petition at appellate stage on ground of alternative remedy when no such objection

was taken by the respondents either before the writ court or even in the Memorandum of Letters Patent Appeal. In our view, a constitutional remedy by way of writ petition is always available to an aggrieved party and an arbitration clause in an agreement between the parties cannot ipso facto render a writ petition "not maintainable" as wrongly held by the Division Bench. Availability of alternative remedy is definitely a permissible ground for refusal by a writ court to exercise its jurisdiction in appropriate cases. But once the respondents had not objected to entertainment of the writ petition on 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.

In our view, learned counsel for the appellant has made out a case for setting aside the order under appeal both on the facts noticed above which show that there was no existing agreement because the work had been completed and payment had already been made long back and also on the question of law raised in this appeal that a constitutional remedy through a writ petition cannot be held to be not available and not maintainable on account of an alternative remedy. It is for the writ court to consider whether in an appropriate case, writ petitioner should be relegated to avail alternative remedy or not. But once writ petition is heard at length and decided against one or the other party on merits, such a decision/order cannot be held to be bad in law only on the ground that writ petition was not maintainable due to availability of alternative remedy. Having considered the matter on merits as reflected by the order of the learned Single Judge, we find sufficient merit in this appeal and hence it is allowed. The order under appeal is set aside and the judgment and order of the learned Single Judge is restored along with a cost of Rs.25,000/- (Rupees twenty five thousand) to be paid by the respondents to the appellant within two months.