
(2004) 06 GAU CK 0023
In the Gauhati High Court
Case No : Writ Petition (C) No. 4042 of 2004

Archcon and Others

APPELLANT

Vs

Sewda Const. Co. and Others

RESPONDENT

Date of Decision : 29-06-2004

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 37, 9
Constitution of India, 1950 — Article 226, 227
Specific Relief Act, 1963 — Section 14(1)

Citation : AIR 2005 Guw 58 : (2005) 2 ARBLR 156 : (2005) 1 GLR 526 : (2005) GLT 708 Supp

Hon'ble Judges : Aftab H. Saikia, J

Bench : Single Bench

Advocate : P.K. Goswami, P. Khataniar, A. Das and M. Bordoloi, for the Appellant; P.K. Roy Choudhury, N.D. Nath, N.G. Kundu and A. Khan, for the Respondent

Final Decision : Allowed

Judgement

A.H. Saikia, J.—Heard Mr. P.K. Goswami, learned senior counsel assisted by Mr. P. Khataniar, learned counsel for the petitioner. Also heard Mr. P.K. Roy Choudhury, learned counsel for the respondents.

2. Considering the urgency and nature of controversy involved in this case and also on consent of the learned counsel for the parties, this court purposes to dispose of this writ application at the stage of motion hearing itself.

3. The correctness and legality of the order dated 8.6.2004 passed by the learned District Judge, Kamrup, Guwahati, in Misc. Case No. 313/ 04 arising out of Misc. (Arb) Case no. 288/04 has been assailed in this writ application preferred under Articles 226 and 227 of the Constitution of India.

4. At the very outset, a question has been raised as regards the maintainability of this writ petition on the ground that against the order impugned appeal lies before this court u/s 37 of the Arbitration and Conciliation Act, 1996 (for short

"the Act") and the same being the alternative remedy available to the petitioner, the present petition under Article 226 read with Article 227 of the Constitution of India is not maintainable. Undoubtedly, against an order u/s 9 of the Act, a statutory appeal is maintainable u/s 37 of the Act but it cannot be said that the same will be a bar for invoking the power under Article 226 read with Article 227 of the Constitution of India. If the order suffers from basic illegality or passed in contravention of the established principles of law, the High Court, in exercising its power under Articles 226 and 227, can interfere with such order. Though alternative remedy is available to the petitioner by way of appeal against the impugned order, the said remedy should not only be an adequate and efficacious but also comprehensive one than the one under Articles 226 and 227 in the context of the fact situation of the case and hence, the High Court, being a writ court under Article 226 and having conferred with a power of superintendence under Article 227, has the absolute authority to extend its judicial majesty to the courts below if it is shown that grave injustice has been done to party. The power of Article 227 of the Constitution is not confined to administrative superintendence only but also includes the power of judicial review over all courts and tribunals even where no application under such provision lies to the High Court under ordinary law. This power involves a duty on the High Court to keep the inferior Courts and Tribunals within the bounds of their authority and to see that they do what their duty requires and that they do in the legal manner. In that view of the matter, I hold that despite having an alternative remedy, not being adequate and efficacious in the given facts and circumstances of the case, this application under Articles 226 and 227 of the Constitution of India is maintainable.

5. The brief facts leading to the filing of this petition as emerged from the pleadings of the parties, are that the petitioner No. 1, a Registered Partnership Firm, having its principal place of business at MC Road, Barowari, Uazanbazar, Guwahati, has been engaged in construction of building real estate development etc. wherein the petitioner Nos. 2 and 3 are the Partners. The petitioners entered into an agreement with the respondents being a Registered Partnership Firm on 11.9.2003, inter alia, on such terms and conditions, engaging the respondents for the purpose of construction and erection of a multistoried building in the name and style of "Surya Enclave" at a cost of Rs. 2.65 crores to be paid by the petitioners. As per the agreement, the said construction had to be completed within a period of 24 months from the date of agreement i.e. 11.9.2003 and the respondents would have to purchase the raw materials, i.e., cement, iron, sand, stone chaps etc. in other words, housing construction materials. Though the agreement was executed on 11.9.2003, the construction works was started only in the month of November 2003 as the petitioners, as alleged by respondents, were unable to provide drawing designs of the proposed building in due time. In the mean time, the respondents invested a substantial amount of money in the project in purchasing the materials and engaging man power. Raw materials worth more than 30 lacs, collected by the respondents, have also been lying at

the site.

6. But during the inspection and supervision of the ongoing construction works by the petitioners' consulting Architects, it transpired that the respondents have been using substandard materials as well as substandard unskilled workers which did not conform to the prevailing I.S. standards and specification. The said fact was brought to the notice of the petitioners by the concerned Architects of the petitioners in the months of February 2004, and May 2004, vide communication dated 26.2.2004 and 20.5.2004 (Annexures-II and III to the writ petition). Responding to such comments of their Architects and taking serious view of substandard and very poor quality of construction works, the petitioners immediately vide communication dated 21.5.2004 (Annexure-IV to the writ petition) requested the respondents to take necessary steps for rectifying their mistakes and defects ascertaining quality construction works at the site to the satisfaction of their Architects and expedite the construction work at the site for maintaining time schedule without stopping the construction work, as noticed, with clear indication that non-compliance of instructions would compel the petitioners to terminate the contract agreement with the respondents and take up the construction work themselves as per terms of agreement. Since the respondents failed to initiate any corrective steps in spite of the factual position being brought to their notice, ultimately, by notice dated 26.5.2004 (Annexure-V to the writ petition) the petitioners terminated the agreement dated 11.9.2003 entered into with the respondents by involving Clause 18 of the said agreement with the request to hand over the site of "Surya Enclave" positively by 10.00 a.m. on 29.5.2004. Eventually, the site of the "Surya Enclave" was taken over by the petitioners at 10.30 a.m. on 29.5.2004.

7. Meanwhile, the respondents moved the Court of learned District Judge, Kamrup, Guwahati through Misc. (Arb) case no. 288/04 by preferring an application u/s 9 of the Act for interim measure of protection against the termination order dated 26.5.2004 and the court by order dated 29.5.2004, while issuing notice to the petitioners, fixed the matter on 2.6.2004 for filing objection and hearing and granted ex-parte interim relief to the respondents directing to maintain the status quo as on that day. Thereafter, the respondents filed objection for vacation or correction of the said status quo order passed on 29.5.2004 stating that despite the caveat being filed by them in the related case, they had not been heard. The said application was heard on 2.6.2004 fixing 15.6.2004 for passing necessary orders extending the status quo order till the disposal of the said application. Though, the case was fixed for orders on 15.6.2004, the learned District Judge on 8.6.2004, in entertaining an application filed by the respondents praying for specific direction to maintain the ex-parte status quo order passed on 2.6.2004 restraining the petitioners from performing any construction works over the disputed site, after hearing the learned counsel of both the parties, granted interim relief to the respondents u/s 9 of the Act by restraining the petitioners not to resort to any construction at the disputed site. Hence, this order dated 8.6.2004 has been placed on the anvil of judicial scrutiny.

8. On close scrutiny of the impugned order including the materials available on record as well as having given anxious consideration to the extensive submissions advanced by the learned counsel representing the respective parties, it is seen that the contract for the construction work in question was terminated by the petitioners on 26.5.2004 and possession of the disputed site has also been taken over on 29.5.2004 before passing of the ex-parte status quo order dated 29.5.2004. Thereafter, when the petitioner prayed for cancellation/modification of the said ex-parte status quo order, the arguments on behalf of the parties were heard on 2.6.2004 fixing 15.6.2004 for passing necessary orders. Instead of passing any order on 15.6.2004, the learned District Judge, on being confronted by an application presented by the respondents praying for giving direction to restrain the petitioners from making any construction work in the disputed site, passed the impugned order on 8.6.2004 granting the interim relief as has been noticed herein above.

9. For the sake of convenience, it would be appropriate to refer to Section 9 of the Act which reads as follows :

"9. Interim measures, etc. by Court. - A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a court -

(i) for appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceeding; or

(ii) for an interim measure of protection in respect of any of the following matters, namely :-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of authority party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to be court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, any in relation to, any proceedings before it."

10. A bare perusal of the above provision of law, it goes to show that a party to

the arbitration agreement may apply to the court for any interim measure of protection before the commencement of arbitral proceedings or during arbitral proceedings or at any time after making of the arbitral award but before it is enforced in accordance with Section 36 of the Act. In other words, it clearly indicates that an interim order including injunction can only be passed relating to any arbitral proceeding and that too before or during such proceeding.

11. Now the question that needs consideration herein is - whether there was/has been any arbitral proceeding. In the instant case, as per Clause 23 of the agreement which provides that in any case of any dispute or difference arising between the parties, over the agreement, the parties, if so they desire mutually, settle the dispute and difference by taking recourse to the provisions of the Act. It makes abundantly clear that the dispute or difference can only be settled in terms of the provisions of the Act if the parties of the agreement desire mutually to do so. Record does not show that there was any initiation of any arbitration proceeding by the parties mutually as provided under Clause 23 of the agreement. Unless the parties agree mutually to refer the dispute or difference to be settled through arbitration, in my opinion, Clause 23 shall have no applicability. In the instant case, no arbitral proceeding as referred to u/s 9 of the Act has been proposed to be initiated and/or in existence at the time of entertaining the application under such provision of law. Even there is nothing in the record to indicate that certain effective steps have been taken to commence the arbitral proceeding by both the parties as stipulated under Clause 23 of the agreement. It may also be noted that the operation and effectiveness of Clause 23 of the agreement depends on mutual desire of the parties and if both the parties do not render consent, the said Clause cannot be treated as arbitration agreement. Hence the court is not empowered to pass any interim measure as provided under the said provision of law.

12. That apart, since the matter relates to contract for the construction of building, which is in its nature determinable in terms of Section 14(1)(c) of the Specific Relief Act, 1963 (for short "the Act"), in my considered view, Section 9 of the Act shall not apply to such contract inasmuch as for such breach of contract, the person aggrieved can be adequately compensated in damage by way of initiation of civil action and accordingly, no interim relief by way of injunction can be granted in view of Section 41 of the Act of 1963.

13. More importantly, in granting such injunction u/s 9, the three golden principles under Law of Injunction i.e. (1) Prima-facie case, (b) Balance of convenience and (3) Irreparable loss and injury, have to be followed. In the instant case, the petitioners engaged respondents for construction of Multi-Storied Building i.e. Ground + 5 Storied RCC building having 24 Nos. of three bed room flats and 16 Nos. of two bed room flats, as shown in the plan of the building for housing the intending flat purchasers but due to the respondents' very poor quality of work and sub-standard materials used in such construction, the said contract was terminated in terms of Clause 18 of the agreement on

26.5.2004 and possession was taken over on 29.5.2004. Since the building construction of such nature has been carried out for the benefit of intending flat purchasers from whom finance has been drawn with assurance of the completion of the construction work within a time frame, the balance of convenience tilts in favour of the petitioners. Moreso, by the impugned injunction order, passed in favour of the respondents, has further delayed the construction work to the prejudice of the interest of the intending flat purchasers for which the petitioners would suffer irreparable loss and injury. In view of such factual scenario, it can be safely held that no prima-facie case has been made out by the respondents for granting such injunction. Given facts and circumstances of the case, a building contract cannot be enforced by granting interim relief u/s 9 of the Act.

13. In view of what has been discussed and observed, as indicated above, this court is of the view that this impugned order deserves interference and accordingly, the same stands quashed and set aside.

14. In the result, this writ petition stands allowed.