
(2004) 08 OHC CK 0020
In the Orissa High Court
Case No : Misc. Appeal No. 105 of 1995

Bhargabi Cold Storage and Another	Vs	APPELLANT
GRID Corporation of Orissa and Another		RESPONDENT

Date of Decision : 19-08-2004

Acts Referred:

Arbitration Act, 1940 — Section 20

Citation : (2004) 2 OLR 447

Hon'ble Judges : B.P. Das, J

Bench : Single Bench

Advocate : D.R. Swain, for the Appellant; B.K. Nayak, J.K. Mohanty and S.S. Patra, for the Respondent

Final Decision : Allowed

Judgement

B.P. Das, J.—Heard Shri D.R. Swain, learned Counsel for the Appellants, and Shri B.K. Nayak, learned Counsel for the respondents.

2. The plaintiffs are in appeal against the judgment dated 16.12.1994 passed in O.S. No. 49 of 1977-I by which the Civil Judge (S.D.), Puri, has dismissed the suit filed for referring the dispute between the parties to Arbitrator under Sections 8(2) and 20 of the Arbitration Act, 1940 (hereinafter called 'the Act?').

3. The brief facts leading to this appeal are that plaintiff No. 1-M/s. Bhargabi Cold Storage, Pipili, which was represented by its Proprietor-Somanath Misra, plaintiff No. 2, was registered as a small scale industry under the Director of Industries, Orissa, and was set up in the year 1963 with the financial assistance of the Orissa State Financial Corporation on the recommendation made by the Director of Industries. The industry was set up in order to facilitate storage of seed potatoes and it was a registered partnership firm. The Plaintiffs entered into an agreement with the Defendant-Orissa State Electricity Board (in short ? Board?) on 7.2.1963 for supply of electricity to the Plaintiff-industry for a period of twenty years. The industry was closed in the year 1966 on account of

difference amongst its partners. In 1974 the Defendant raised a claim for Rs. 24,000/- against the Plaintiffs towards electricity charges. Plaintiff No. 2 represented to the concerned authorities of the Board and requested them not to raise any electricity charges since during the closure period no power supply was given to the industry. During pendency of the matter, the power supply to the industry was disconnected for which seed potatoes worth Rs. two lakhs stored in the cold storage were damaged on account of such non-supply of electricity for which the Plaintiffs sustained a huge loss of Rs. 11 lakhs. The Defendant in the meantime filed a money suit being Money Suit No. 133 of 1976-III for recovery of a sum of Rs. 12,000/- and odd. In the said money suit the Plaintiffs filed an application u/s 34 of the Act for stay of the suit till the matter was decided by the Arbitrator as the subject-matter of the suit fell within the purview of Clause 24 of the agreement entered into between the parties. The trial Court stayed the further proceeding of the money suit. Thereafter the Plaintiffs issued a notice on 23.4.1977 through their advocate calling upon the Defendant to refer the dispute to arbitration and on failure of the Defendant to comply with the said notice, the Plaintiffs filed the present suit for referring the dispute to the Arbitrator under Sections 8(2) and 20 of the Act.

The defendant filed its written statement pleading inter alia that the suit was not maintainable; the dispute was not arbitrable as per Clause 24 of the agreement; and the loss sustained by the Plaintiffs did not come within the purview of Clause 24 of the agreement. On the aforesaid grounds, the defendant prayed for dismissal of the suit.

The trial Court on the pleadings of the parties framed as many as five issues and considering the oral and documentary evidence has dismissed the suit by the judgment passed on 16.12.1994. The trial Court held that the dispute that the Plaintiffs were liable to pay the minimum charges did not come under the purview of the arbitration clause and that as per the terms of the agreement, the plaintiffs were liable to pay the minimum charges irrespective of the fact that they had consumed electricity or not. The trial Court further found that even though the Plaintiffs stated that the industry was a partnership firm, plaintiff No.2 filed the suit as its proprietor and there was nothing in the plaint to disclose the names of the partners. The agreement, which was marked as Ext. 12, could not be treated to be the agreement between the Plaintiffs and the Defendant after 1976. The aforesaid judgment is under challenge in the present misc. appeal.

4. This case has a chequered career. The plaintiff-appellants had approached this Court earlier in Civil Revision No. 506 of 1979 challenging the dismissal of the suit and this Court by its order dated 10.1.1983 dismissed the said Civil Revision and confirmed the finding of the trial Court that there was no agreement between the Appellants and the respondent-Board and, therefore, it was not possible to entertain the application filed under Sections 8 and 20 of the Act. The appellants challenged the aforesaid revisional order in Civil Appeal No. 1503 of

1993 before the Apex Court. The Apex Court by its order dated 31.3.1993 set aside the orders passed by the trial Court as well as the this Court in revision and remanded the matter to the trial Court with a direction to proceed with the suit afresh. The order passed by the Apex Court is extracted hereunder:

...That application was dismissed by the learned Subordinate Judge saying that as there was no agreement between the appellants and the said Board, it was not possible to entertain the application aforesaid. The High Court affirmed the said order by dismissal of the Civil Revision filed on behalf of the appellants.

The learned Counsel appearing for the appellants pointed out that the Board itself had filed a suit in the year 1976 in the Court of Subordinate Judge, Puri for recovery of electrical charges amounting to Rs. 12,997.97 against the appellants on basis of the agreement dated 7.2.1963. In this connection attention was drawn to Paragraph 1 of the plaint of the said suit filed on behalf of Board which is as follows:

That M/s. Bhargabi Cold Storage, Pipili executed an agreement with Orissa State Electricity Board (OSEB) on 7.2.63 for a period of 20 years from the date of power supply. As per the contract and demand 27 K.W. power was given during February 1964. The agreement is, therefore, valid till 1984.

When it is the admitted position, that electricity was being supplied to M/s. Bhargabi Cold Storage, appellant No. 2 by the Board on basis of the aforesaid agreement dated 7.2.1963 and suit has been filed against them for recovery of electrical charges in terms of the said agreement, how a plea could have been taken in the proceeding under Sections 8 and 20 of the Arbitration Act that there was no agreement between the appellants and the Board. The learned Counsel who appeared for the Board could not point out as to how when the Board has been filing suit for realisation of the dues in respect of electric charges from the appellants on basis of the agreement dated 7.2.1963 which was valid according to their own case for a period of 20 years i.e., upto January, 1984, the application under Sections 8 and 20 of the Arbitration Act filed on behalf of the appellants could have been dismissed by the learned Subordinate Judge on 21.9.1978, saying that there was no agreement between the parties and as such it was not possible to entertain an application under Sections 8 and 20 of the Arbitration Act.

Accordingly, the orders passed by the learned Subordinate Judge and the High Court are set aside. The learned Subordinate Judge shall proceed with the application aforesaid filed on behalf of the appellants. However, we make it clear that we are not expressing any opinion on the merit of the said application. No costs.

5. After the aforesaid order of the Apex Court, the trial Court heard the suit afresh and by the impugned judgment dismissed the suit with the findings already indicated above.

6. The sum and substance of the argument advanced by the learned Counsel for the respondents is that though the agreement was entered into between O.S.E.B. and one Bhargabi Storage, the suit was filed by M/s. Bhargabi Cold Storage, which was a proprietorship firm and, therefore, the suit has been rightly dismissed by the trial Court as not maintainable.

7. The Apex Court in its order passed in the Civil Appeal, which is extracted above, has categorically held that when it was the admitted position that electricity was being supplied to M/s. Bhargabi Cold Storage, appellant No. 1, by the O.S.E.B. on the basis of the aforesaid agreement dated 7.2.1963 and the suit had been filed against them for recovery of electrical charges in terms of the said agreement, how a plea could have been taken in the proceeding under Sections 8 and 20 of the Act that there was no agreement between the appellants and the respondent O.S.E.B. So, in view of the decision of the Apex Court, as quoted above, nothing remains to be decided either by the trial Court or by this Court on the question of locus standi of the appellants to bring the suit. The civil Court has gone into the said aspect and also decided the question of liability of the appellants to pay any amount under the head "minimum charges". In a proceeding u/s 20 of the Act, the Civil Judge is not empowered to do the same. The finding of the Civil Judge that the dispute regarding liability of payment of penal charges did not come within the purview of the agreement is also fallacious because Clause 24 of the agreement provided that any dispute or difference arising between the consumer and the supplier as to the supply of electrical energy or as to the interpretation of the agreement or the right of the supplier or the consumer respectively to determine the same or any other question, matter or thing arising hereunder, shall be referred to a single Arbitrator.

8. Law is well settled in this regard that in dealing with an application u/s 20 of the Act, all that the Court has to do is to satisfy itself whether there is a written agreement between the parties which is valid and subsisting and which has been executed before filing of any suit and that the disputes have arisen with regard to the subject-matter of the agreement and are within his jurisdiction. Once the Court reaches this satisfaction, it is bound to make a reference u/s 20 of the disputes. (See *Indian Metals and Ferro Alloys Ltd. v. Orissa State Electricity Board* ILR (1972) Ori 784). To my utter surprise I find that the trial Court while passing the impugned judgment has not kept in view the aforesaid settled principle of law and has passed the impugned judgment as if deciding the lis between the parties to the suit. The order passed by the trial Court is not sustainable in law and the trial Court has gone wrong in rejecting the application. Accordingly, the impugned judgment dated 16.12.1994 passed by the Civil Judge (Senior Division), Puri, in O.S. No. 49 of 1977-I is set aside and the trial Court is directed to decide the matter in terms of the observations made by the Apex Court in the Civil Appeal. Since this is a suit of the year 1977, I direct both the parties to appear before the trial Court on 20.9.2004 and on their appearance the trial Court shall fix a date of hearing and dispose of the suit within a period of two months thereof.

The Misc. Appeal is accordingly allowed. There shall be no order as to cost.