
(2010) 02 OHC CK 0039

In the Orissa High Court

D.T.M. Construction (India) Ltd.

APPELLANT

Vs

Capt. P.K. Srivastava and Another

RESPONDENT

Date of Decision : 11-02-2010

Acts Referred:

Arbitration Act, 1940 — Section 37
Arbitration and Conciliation Act, 1996 — Section 2, 36, 37, 9
Civil Procedure Code, 1908 (CPC) — Section 115, 25
Constitution of India, 1950 — Article 227

Citation : AIR 2011 Ori 61 : (2010) 109 CLT 623 : (2010) 1 OLR 647

Hon'ble Judges : Sanju Panda, J

Bench : Single Bench

Judgement

Sanju Panda, J.—In this writ application, the petitioner has challenged the order dated 13.1.2010 passed by the learned District Judge, Puri in ARBP Case No. 56 of 2010 returning the petition filed by the petitioner u/s 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") to present the same in a proper Court at Mumbai.

2. The facts of the case are as follows:

The petitioner is a construction Company which deals in projects relating to construction and dredging. Opposite party No. 1 is a proprietor concern which deals in hiring of dredger and its accessories by procuring margin. Opposite party No. 2 is a Company which used to let out dredgers. The Irrigation Department of the Government of Orissa issued a work-order in favour of the petitioner for dredging and distillation in the rivers connected with Chilika Lagoon in the district of Puri to protect the same.

Hence, the petitioner-D.T.M. Construction (India) Ltd. approached opposite party No. 1 for hiring of dredger and opposite party No. 1 accepted the said proposal of the petitioner. He intimated that though the dredger belongs to opposite party No. 2 from whom he (opposite party No. 1) obtained the said dredger on hire basis, he can sub-let the same. The petitioner brought the dredger from Mumbai

to river Makara. However, several defects were found in the dredger which were rectified by opposite party Nos.1 and 2. But the situation did not improve. The petitioner entered into an agreement with opposite party No. 1 on 1.9.2008 regarding hiring of the dredger on good faith and with the belief that opposite party No. 1 had correctly revealed the condition of the dredger. Opposite party No. 2 gave a letter authorising opposite party No. 1 to sub-let the dredger. As per the said agreement, the petitioner paid Rs. 30,00,000/- (Rupees thirty lakhs) to opposite party No. 1 and also paid another sum of Rs. 10,00,000 (Rupees ten lakhs) in the month of July 2009. Regarding hiring charges, opposite party No. 1 demanded more amount from the month of April, 2009 to June, 2009. To solve the dispute, a joint meeting was held with opposite party Nos.1 and 2 and opposite party No. 1 also recommended to reduce the hiring charges to opposite party No. 2, but no fruitful purpose was served. Despite the fact that the dredger did not function at all for some months, opposite party No. 2 informed opposite party No. 1 by e-mail that the petitioner should pay minimum charges for the period from 14th February to 15th April, 2009. However, the petitioner paid sum of Rs. 40,000 (Rupees forty thousand) out of the total dues of Rs. 45,000/- irrespective of the fact that the dredger due to defects, did not work and also the petitioner spent Rs. 71,74,451/- for repair of the said dredger. The petitioner had to arrange two more dredgers to complete the job in time as the dredger obtained from opposite party No. 1 did not work. Since dispute arose between the parties and the opposite parties tried to take away the dredger without settling the dues, finding no other way, the petitioner filed an application u/s 9 of the Act before the learned District Judge, Puri which was registered as ARBP Case No. 56 of 2010 claiming interim relief to restrain the opposite parties from taking away the dredger on the ground that if the dredger will be taken away, the petitioner will sustain further loss and injury and the balance of convenience is in favour of the petitioner. The learned District Judge issued notice to the opposite parties and also passed an interim order protecting the petitioner. After appearance of the opposite parties, the learned District Judge heard the matter on the question of maintainability of the application and by the impugned order, he held that the Court has no jurisdiction to decide the said application and directed to take back the petition to present before a proper Court at Mumbai and also vacated the interim order.

3. Learned Counsel for the petitioner submitted that the learned District Judge should not have returned the application of the petitioner taking into consideration Clause 19.3 of the agreement with regard to the venue of the arbitration. He further submitted that since the dredger in question was available and its utilization was within the jurisdiction of the Court, the petitioner rightly moved the application u/s 9 of the Act for interim protection as provided. The Court had issued notice to the opposite parties. Therefore, instead of returning the said application filed u/s 9 of the Act by the petitioner, the learned District Judge should have decided the application on merit as Section 9 of the Act provides that the application is to be presented before the Court for interim relief.

4. In the present case, the opposite parties appeared by filing a Caveat Petition. Learned Counsel for the opposite parties submitted that the writ application is not maintainable as the impugned order is subject to appeal u/s 37 of the Act. Therefore, the impugned order is appealable and this Court need not interfere with the same in a writ application.

5. Learned Counsel for the petitioner further submitted that Section 37 of the Act provides that if the Court has allowed or refused the application, the appeal will be maintainable but not in other circumstances. In the present case, since the learned District Judge returned the application to present it before a proper Court, the petitioner has challenged the said order by invoking the jurisdiction of this Court under Article 227 of the Constitution of India as the order was not revisable, as provided u/s 115 of the Civil Procedure Code.

6. From the above rival submissions made by the parties, it appears that by the impugned order, the learned District Judge returned the application to present it before a proper Court at Mumbai taking into consideration Clause 19.3 of the Agreement. For better appreciation Clause 19.3 is extracted hereunder:

19.3 The venue of the arbitration shall be at Mumbai. The arbitration will be governed as per Indian Laws.

From the above clause of the agreement, it appears that the venue of the arbitration shall be at Mumbai and the arbitration shall be governed by Indian Laws.

7. The impugned order is not coming within the purview of Section 37 of the Act which provides that the order granting or refusing to grant measures u/s 9 of the Act is appealable. In the present case, by the impugned order since the Court has returned the application, the said order was not appealable under Order 7 Rule 10, CPC which provides for return of a plaint to present it before a proper Court. The said order was appealable under Order 43, Rule 1, CPC and the procedure prescribed in the CPC is specific regarding the remedy available to a party when the Court has returned the plaint. However, in the Arbitration Act, no procedure has been prescribed for return of the application nor is the CPC applicable in a strict sense to the arbitration proceeding. Therefore, this Court is of the view that the writ application is maintainable against the impugned order.

8. On merits, the learned Counsel for the petitioner submitted that the petitioner had moved an application u/s 9 of the Act and jurisdiction of the Court was not ousted by the agreement between the parties. Therefore, the learned District Judge should have heard the matter on merits. Clause 19.3 of the Agreement provides for the venue of the arbitration and the dispute was not referred to the arbitration. He cited the decisions of the apex Court reported in *Bhatia International Vs. Bulk Trading S.A. and Another*, and AIR 2000 SC 1886 (*P. Anand Gajapathi Raju and Ors. v. P.V.G. Raju (died) and Ors.*) where it has been led that if the word "only" or "ouster" has been used in the agreement, the jurisdiction of other Courts is ousted by the said agreement and the parties of the agreement

can only seek their remedies before the Court as agreed in the agreement. The other Courts have no jurisdiction to entertain the application. However, in the present case since the word "only" or "ouster" has not been used in the said clause of the agreement, the jurisdiction of the Court at Puri is not ousted by the agreement. Hence, the Court at Puri has jurisdiction to hear the same. In support of his contention, he further cited the decisions of the apex Court reported in A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, and Hakam Sing Vs. Gammon (India) Ltd.,

9. Learned Counsel for the opposite parties submitted that opposite party No. 2 is not a party to the agreement. Therefore, the application is not maintainable against him. The agreement is only between the petitioner and opposite party No. 1. Since both the parties agreed that the arbitration will be held at Mumbai, the petitioner should have moved the Court at Mumbai, not the Court at Puri. In support of his contention he cited a decision reported in 2010 (1) Civil LJ 79 : 2009 (II) OLR 845 Balaji Coke Industry Pvt. Ltd. v. Maa Bhagwati Coke (Guj) Pvt. Ltd. wherein the apex Court has held that since the parties had knowingly and voluntarily agreed that the contract arising out of the High Seas, Sale Agreement would be subject to Kolkata jurisdiction and even if the Courts in Gujarat also had jurisdiction to entertain any action arising out of the agreement, it has to be held that the agreement to have the disputes decided at Kolkata by an Arbitrator in Kolkata, West Bengal. He further submitted that since the petitioner did not file any application to refer the dispute to the arbitrator, he lacked bona fide and in support of the said contention, he cited the decision of the apex Court reported in Percept D"Mark (India) Pvt. Ltd. Vs. Zaheer Khan and Another, .

10. The petitioner filed an application u/s 9 of the Act before the learned District Judge, Puri seeking interim relief. On a plain reading of Section 9 of the Act, it appears that the said provision can be invoked by a party, before, or during arbitral proceedings or at any time after the making of the arbitral award and only restriction imposed in the said section is that the provision can be invoked before the award is enforced in accordance with Section 36 of the Act. The provision is made for an interim measure of protection in respect of any of the matters regarding preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement, interim injunction, receiver, etc. The provision has been enacted in accordance with the principles underlying Rule 1 of Order 38 of the Civil Procedure Code. Therefore, before exercising the powers conferred by the said provision, a Court should be satisfied on two points. The first is that the plaintiff's cause of action is prima facie an unimpeachable one subject to his proving his allegations made in the plaint. The second one is that the Court should have reason to believe on adequate materials that unless the jurisdiction is exercised there is a real danger that the defendant will remove himself from the Court. The Court is specifically empowered by this section to pass interim orders that may be deemed necessary. The Court is vested with powers to pass interim order to safeguard and protect the interests of the parties. However, there is nothing in the said section to warrant the assumption

that the well-established principles governing the grant of temporary injunction like prima facie case, balance of convenience and irreparable injury are not applicable to the exercise of power under the said section. The scope of the said section is only deals with the interim measure by the Court. Obviously it is not within the scope of the said section to enquire into the claim and the counter-claim made by both the parties in regard to the custody of the articles and for protection of it pending dispute between the parties in regard to them. The word "Court" mentioned in Section 9 as defined in Section 2(1)(e) of the Act, means the principal civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil Court of a grade inferior to such principal civil Court, or any Court of Small Causes. In the present case there is no doubt that the dredger is the subject matter and the dispute between the parties is the said dredger and its consequential matters as per the agreement. Therefore, the petitioner rightly invoked the jurisdiction of the Court of the learned District Judge, Puri for interim relief before the dispute is referred to arbitration as per the agreement. In view of the above, the decision of the apex Court in the case of Percept D" Mark (India) Pvt. (supra) cited by the learned Counsel for the opposite parties is not applicable to the facts and circumstances of the present case.

11. From the decision of the apex Court in the case of Balaji Coke Industry Pvt. Ltd. v. Maa Bhagawati Coke (Guj) Pvt. Ltd. (supra, it appears that in the said case an application was filed u/s 25 of the CPC for transfer of Arbitrator Application No. 1 of 2008 pending before the Court of the Principal Civil Judge (Senior Division), Bhavnagar (Gujarat) which was transferred to the Calcutta High Court taking into consideration the arbitration clause, i.e. Clause-11 of the agreement between the parties of the said case which reads as under:

In case of any dispute or difference arising between the parties hereto or any claim or thing herein contained or the construction thereof or as to any matter in any way connected with or arising out of these presents or the operation thereof or the rights, duties or liabilities of either party thereof, then and in every such case the matter, differences in disputes shall be referred to an Arbitrator in Kolkata, West Bengal, India in accordance with and subject to the provisions of the Arbitration and Conciliation Act, 1996, or any other enactment or statutory modifications thereof for the time being in force. The place of arbitration shall Kolkata.

In that case, the apex Court held that the decisions in A.B.C. Laminart (P) Ltd's case and Hakam Singh's case (supra) are very clear on the point. Therefore, in view of Clause 19.3 of the agreement of the present case already quoted and the aforesaid two decisions of the apex Court as well as the decision of this Court reported in Mr. Bhaskar Bhatt (Manager Director) Titan Industries Limited Golden Enclave and Others Vs. Crescent Art Times Pvt. Ltd., , since the word "only" or

"ouster" was not included in the arbitration clause of the Agreement, the jurisdiction of other Courts was not ousted totally.

12. In view of the discussion made in the foregoing paragraphs, the impugned order dated 13.1.2010 passed by the learned District Judge, Puri in ARBP Case No. 56 of 2010 is an error apparent on the face of record as he has only considered Clause 19.3 of the agreement wherein it was only mentioned that the venue of the arbitration shall be at Mumbai. But the said agreement does not oust the jurisdiction of the Court at Puri where the subject matter of the dispute was available and required to be protected. Hence, in exercise of the jurisdiction under Article 227 of the Constitution of India, this Court remands the matter to the learned District Judge, Puri to consider the application filed by the petitioner u/s 9 of the Act on merits and the interim order vacated by the said Court is restored back for the interest of justice.

With the above observations, the writ application is disposed of.

No costs.