

(2007) 01 OHC CK 0042
In the Orissa High Court

Kalinga Mining Corporation and Another	APPELLANT
Vs	
Arbind Construction Company Pvt. Ltd. and Others	RESPONDENT

Date of Decision : 04-01-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 14, 36, 41, 9
Specific Relief Act, 1963 — Section 14, 41, 8, 9

Citation : (2007) 2 ARBLR 37 : (2007) 103 CLT 432 : (2007) 1 OLR 256

Hon'ble Judges : A.K. Parichha, J

Bench : Single Bench

Final Decision : Allowed

Judgement

A.K. Parichha, J.—In this appeal the order of status quo passed u/s 9 of the Arbitration and Conciliation Act, 1996 (for short called as "the Act") by the Learned District Judge, Cuttack in Arbitration proceeding No. 28 of 2006 is under challenge.

2. The Appellant is a partnership firm carrying on business of mining operation. It obtained three mining lease from the Government of Orissa for mining of specific ore and executed mining lease agreements dated 22.6.1973, 22.6.1973 and 11.12.1990. As the Appellant found difficulties to execute the mining activities, it entered Into an agency agreement dated 14.3.1991 with Respondent No. 1 and executed irrevocable power of attorney dated 25.3.1991 giving Respondent No. 1 the authority to execute the mining work for and on their behalf. Respondent No. 1 thereafter used its own resource, personnel and continued the agency activity. The agency agreement was last extended for a period of 3 years with effect from 1.4.2003 stipulating virtually the same terms and conditions as in the original agency agreement. When the matter stood thus, the Respondent No. 1 vide its letter dated 9.11.2005 submitted a proposal to extend the agency agreement beyond 31.3.2006, but the Appellant No. 1 declined to extend the agency agreement beyond 31.3.2006 on the plea that the Appellant-firm would carry out the mining activities itself after 31.3.2006.

Respondent No. 1 felt that the agency agreement could not be terminated unilaterally by the Appellant and such agreement can be terminated only by the mutual consent of the parties. It therefore, invoked the arbitration Clause XVII of the agency agreement, nominated Mr. Sanjib Jain as Arbitrator on its behalf and sent notice of the arbitrator to the Appellant. In response, the Appellant also appointed Mr. Rajat Kumar Rath of Cuttack as co-arbitrator. The two arbitrators were required to appoint a 3rd arbitrator within 30 days of their appointment, but as they failed to do so, Respondent No. 1 approached this Court u/s 11(4)(b) of the Act for appointment of an umpire to constitute a complete Arbitration Tribunal vide Arbitration Proceeding No. 3 of 2006. As the agreement was terminated and the Appellant asked the Respondent No. 1 to stop work with effect from 1.4.2006, Respondent No. 1 filed an application u/s 9 of the Act with a prayer to direct the Appellant not to terminate the agency agreement and to maintain status quo till adjudication of the dispute by the Arbitrators.

3. Appellants 1, 2, 7 & 8 as Opp. Parties filed their counter separately. These Appellants as contesting Opp. Parties resisted the prayer made by the Respondent No. 1 basically on the ground that the agency agreement made between the parties is a determinable contract and as its life span has already expired by efflux of time, no interim arrangement u/s 9 of the Act is permissible, that even if for argument sake, it is held that the termination of the agency contract is bad in law or contrary to the terms of the agreement, the loss sustained by Respondent No. 1 can be compensated by cost and damages and so the provisions of Sections 14 (1) & 41 of the Specific Relief Act operates as a bar for grant of injunction. Opp. Parties 3 to 6 in their counter took the stand that the agreement dated 14.3.1991 was for 10 years and there has been no renewal of the agreement by them after Its expiry in 2001 as they had already resigned from the partnership before 2001 with the knowledge of Respondent No. 1. They simply took the stand that they are now in no way connected with the Appellant-firm and are not to be dragged into this litigation. Learned District Judge after considering the documents and submission of the parties allowed the petition filed u/s 9 of the Act and directed the parties to maintain status quo of the contract till the dispute is referred to the Arbitration Tribunal. Aggrieved with that order, the Appellants have preferred the present Appeal No. 8 of 2006, calling the order of status quo as illegal.

4. Mr. S.P. Mishra, Learned Counsel for the Appellants made the following submissions:

(i) That, when the contract was for a fixed period and was to expire on 31.3.2006 by efflux of time, it was a determinable contract and in view of the bar provided u/s 14(1) of the Specific Relief Act, 1963 an order of injunction by way of status quo could not have been granted.

(ii) That, the Mining Lease being there in the name of Appellant No. 1, it is liable for action for any kind of violation of the provisions of the statute, rules or terms of the lease agreements, so the Respondent No. 1 who is now having strain

relationship with the Appellants and is litigating with them could not be allowed to operate the mines as because any lapse or overt act by it would lend the Appellants in legal problem leading to cancellation of the lease. He submits that once this aspect is considered, the balance of convenience automatically tilts in favour of the Appellants.

(iii) That, even if it is admitted for the sake of argument that the termination of the agency agreement of the Respondent No. 1I by the Appellants is contrary to the terms of the agreement, yet the loss suffered by the Respondent No. 1 due to such cancellation can be compensated by way of damages or cost and would never amount to irreparable injury and for that reason order of status quo u/s 9 of the Arbitration and Conciliation Act was unwarranted.

(iv) That, Respondent No. 1 after obtaining the order of the Court has not taken any step for progress or disposal of the arbitration proceeding; and so he cannot be allowed to enjoy the benefit of the interim arrangement. Mr. Mishra cited a number of case laws in support of his contentions.

5. Mr. Milan Kanungo, Learned Counsel appearing for the Respondent No. 1 submitted counter argument indicating the following grounds:

(i) That, as per Clause-xvi of the agency agreement dated 14.3.1991, the agency agreement was terminable only on mutual consent of both the parties in writing which pre-supposes that right of continuation of the agreement with the existing terms and conditions is automatic so long as both parties have not terminated the agreement by mutual consent and for that reason Respondent No. 1 has right to continue the mining operation.

(ii) That, pursuant to the agency agreement Respondent No. 1 has made huge investment and the unilateral cancellation of the agency agreement by the Appellants would put the Respondent No. 1 to irreparable loss and injury, which cannot be otherwise compensated.

(iii) That, as per the agency agreement the Respondent No. 1 is entitled to 90% of the profit and the M/s. Kalinga Mining Corporation (in short, "M/s. KMC") Appellant No. 1 is entitled to 10% of the profit which by itself indicates that balance of convenience is in favour of the Respondent No. 1. Besides the above noted submissions, Mr. Kanungo advanced a further argument that the Appellant No. 1 is not the same firm, which entered into the agency agreement with the Respondent No. 1 and for that reason it has no locus standi to file this appeal. He pointed out that the M/s. KMC having Registration No. 71 of 1949 entered Into the agency agreement with Respondent No. 1 and M/s. KMC having Registration No. 595 of 2005 being a separate firm, the present Appellant is not the lease holder of the mines in question and therefore, it cannot maintain the present appeal. In support of this contention he cited the cases of Munshi Ram and Others Vs. Municipal Committee, Chheharta, and Bihari Lal Jaiswal and Others Vs. Commissioner of Income Tax and Others, . Section 9 of the Act, provides interim measure, which can be granted by a competent Court. The said Section

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 purpose of arbitral proceedings; 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 authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing 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 the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

A close reading of the Section would show that the power of the Court is very limited u/s 9 of the Act. The Court cannot enter into the area of dispute raised by the parties as those disputes are to be adjudicated by the Arbitration Tribunal and any opinion expressed by the Court in that regard would be premature and may cause prejudice to the parties during the arbitration proceedings. The only thing that the Court can examine is whether interim arrangement till the finalization of the arbitration proceeding is required to be made by way of appointment of receiver or grant of injunction or maintenance of status quo etc. It is well settled that the principle, which applies to the grant of temporary injunction under Order 39 Rules 1 & 2, CPC in a civil proceeding, also applies to a proceeding Under Section 9 of the Act. Therefore, in order to obtain an interim arrangement u/s 9 of the Act the party seeking the interim arrangement must establish the 3 essential ingredients, namely; (i) that, he has a prima facie case in his favour; (ii) that the balance of convenience is in his favour; and (iii) that he will suffer irreparable loss if the interim measure prayed for is refused.

6. Whether the contract is terminable by efflux of time stipulated or whether it would continue till terminated by mutual consent of the parties is a matter to be decided by the Arbitration Tribunal. However, for the sake of finding out if

Respondent No. 1 has a prima facie case, a cursory glance into the facts & circumstances is necessary.

7. Admittedly the original agency agreement was for a period of 10 years and it was extended for a further period of three years virtually on the same terms and conditions and that extended period expired on 31st March, 2006. According to the plea of Respondent No. 1, he sent a proposal to the Appellants to extend the agency agreement for a further period of three years, but the Appellants turned down that proposal on the plea that the Appellant No. 1 would itself undertake the mining operation. These undisputed facts prima facie indicate that the agency agreement was for a fixed tenure extendable from time-to-time with the consent of the parties, which would mean that the agreement period couldn't be extended if one of the parties refuses to consent. The plea of Respondent No. 1 is that even though the leaseholder Appellant becomes unwilling to extend the tenure of the agency agreement still then that agreement would continue until both parties consent for its termination. The very fact that the Respondent No. 1 sent a proposal for extension of the agency agreement for a further period of 3 years prima facie indicates that extension or continuance of the agreement was not automatic. However, this aspect is under controversy and is to be resolved by the Arbitration Tribunal. In the above noted situation, prima facie case cannot be said to be in favour of Respondent No. 1, rather it is in favour of the Appellants. Section 14(1) of the Specific Relief Act specifically provides that a contract, which is in its nature determinable, cannot be specifically enforced and no injunction can be granted. The same position is reiterated in Section 41(e) of the Specific Relief Act, which provides that injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforced. In the cases of *Percept D" Mark (India) Pvt. Ltd. v. Jaheer Khan and Anr.* 2006(2)Arb. L.R 34 (SC); *Misra and Company Vs. Hindustan Aeronautics Limited and Others*, ; *D.R. Sondhi and Ors. v. Hella KG Hueck & Co. and Ors.* 2002 (Suppl.) Arb. L.R. 502 (Delhi); *Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others*, and *Rajasthan Breweries Ltd. Vs. The Stroh Brewery Company*, ; the Apex Court, this Court and other High Courts have clarified that in a case of contract for a specific period or in a contract which is terminable on the happening of a particular event, it would be presumed that the contract has come to an end and interim arrangement or injunction would not normally be made after efflux of the period of contract or after happening of the event stipulated.

8. The facts and circumstances of the present case prima facie show that the agency agreement was for a specific period and now the leaseholder Appellant has refused to extend that period of contract after its term has expired. In such a situation, at this stage there is no scope for the Court to make an interpretation other than the words offered on the original agreement and the extended agreement as it is the duty of the Court to interpret the words in which the contract is expressed by the parties and not to make a new contract however reasonable if the parties have not made it themselves. This view is supported by

the observations of the Apex Court in the cases of General Assurance Society Ltd. Vs. Chandumull Jain and Another, ; Polymat India P. Ltd. and Another Vs. National Insurance Co. Ltd. and Others, and also by this Court in the case of Orissa State Financial Corporation Vs. Narsingh Ch. Nayak and Others, .

9. As has been said by this Court in the cases of Misra and Company v. Hindustan Aeronautics Limited and Ors. (supra), National Highway Authority of India and Ors. v. Bumihiway DDB Ltd (JV) and Ors. 2004 (2) OLR 664; Orissa Manganese and Minerals (Pvt) Ltd. v. Adh, k Steel Ltd. 2005 (Supp.) OLR 690; Kiran Mohanty and Others Vs. Woodburn Developers and Builders (P) Ltd. and Others, and by the Apex Court in the case of Percept D" Mark (India) Pvt. Ltd. v. Jaheer Khan and Anr. (supra) as well as by the High Court of Deihl in case of Rajasthan Breweries limited v. Stroh Brewery Company (supra), by the Bombay High Court in Oil and Natural Gas Corporation Ltd., Mumbai Vs. Streamline Shipping Co. Pvt. Ltd., and several other cases, even if it is found that one of the parties to the contract is guilty of violation of terms of contract yet order of injunction or status quo cannot be granted by a Court if such breach of contract can be adequately compensated in terms of money. In the case of Bhanja Minerals Pvt. Ltd. v. Bihar Sponge Iron Ltd. 2006(11) OLR 683 recently this Court in an identical situation have held that if ultimately it would be found that the termination of contract is bad in law or contrary to the terms of the agreement, the remedy would be to seek compensation for wrongful termination, but not by claiming specific performance of agreement and for that reason in such a situation no injunction is to be issued. In the present case, the argument from the side of Respondent No. 1 is that in case the agreement is terminated it would suffer irreparable loss as it has invested huge amount of money, machinery and manpower at the mines. Copies of some of the correspondences made by Respondent No. 1 filed as Annexures show that an annual balance sheet was being prepared and loss and profit was being calculated. That apart, whenever any ore was being transported from the mines for sale it was always with the permission of the mining authorities. The Sales Tax was also being paid for the sale of ore. So, the amount of loss and profit was being quantified from time to time. In such a situation, there is no scope to say that loss if any of the "Respondent No. 1 in view of the alleged termination of the contract cannot be quantified or compensated by money. That being so, the alleged injury is not irreparable in nature.

10. The mining lease stands in the name of the Appellant and being the lessee it is bound by the Mining Rules, Regulations and terms of the lease agreement. Any overt action/omission by the agent would ultimately bind the Appellant and may make him liable for prosecution and loss of the lease. Now admittedly, the parties are litigating and in hostile terms with each other. In such a situation, the Appellants cannot be asked to trust and allow Respondent No. 1 to operate the mines on its behalf. Such being the backdrop, balance of convenience also tilts in favour of the Appellants. This view finds support from the observation of Delhi High Court in the case of Marriott International Inc. v. Ansal Hotels Ltd. 2000(1)

11. It is alleged by the Learned Counsel for the Appellants that the Respondent No. 1 is not bona fide in its approach inasmuch as despite efforts of the Arbitrator appointed by the Appellants, it is not coming forward to participate in the arbitration and is not taking any step for progress of the arbitration proceeding. According to him, a party who does not take prompt steps for initiation or disposal of the arbitration proceeding is not entitled to an interim relief u/s 9 of the Act. The counter argument is that Respondent No. 1 is never callous and that it has taken all possible steps for progress of the arbitration proceeding. The copy of the order sheet of the arbitration proceeding maintained by Arbitrator Mr. R.K. Rath shows that though the proceeding has been initiated no progress has been achieved because a 3rd Arbitrator has not been appointed, due to lack of proper response of the Arbitrator appointed by Respondent No. 1 to the letters of the Arbitrator appointed by the Appellants. A party seeking interim relief must show his eagerness and bona fide intention for initiation, continuation and disposal of the main arbitral proceeding. Law mandates that a party having succeeded in securing an interim measure of protection before arbitral proceeding cannot afford to sit and sleepover the relief conveniently for getting the "approximately contemplated" or manifestly intended in the arbitral proceeding itself. (See Reena Silicate Industries Pvt. Ltd. Vs. GAIL (India) Ltd. and Another, ; Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., etc.

12. The facts and circumstances indicated above, prima facie show lack of eagerness on the part of Respondent No. 1 for continuance and disposal of the arbitration proceeding. Be that as it may, as the Respondent No. 1 has not got a prima facie case or balance of convenience in his favour and is not likely to suffer irreparable injury as a result of the alleged breach of contract by the Appellants, it cannot get an order of status quo u/s 9 of the Act. It appears that the Learned District Judge failed to appreciate the entire situation and the provision of law while passing the interim order.

13. Learned Counsel for the Respondents offered a vehement argument that the present Appellant No. 1 is not the lease holder of the mines and is not the firm which entered into the agency agreement with Respondent No. 1. According to him, when the Appellant No. 1 is not the party for the agency agreement it has no locus standi to file this appeal. He pointed out that M/s. K.M.C. which is the leaseholder of the concerned mines is a registered partnership firm having registration No. 71 of 1949 and this firm entered into an agreement with the Respondent No. 1. But the persons who have preferred this appeal are of partners of M/s. KMC having registration No. 595 of 2005 and both the firms being distinct and separate having separate registration numbers they cannot be considered as same firm. In this regard he indicated the order of the Civil Judge (Sr. Division), Cuttack passed u/s 8 of the Act in C.S. (I) 284 of 2006. Learned Counsel for the Appellants on the other hand argued that M/s. KMC having

registration No. 71 of 49 is the same firm as M/s. KMC having registration 595 of 2005 and pointed out that in view of change of partners and because the original document of registration was missing the registering authority gave a new Registration No. 595 of 2005, but the same registering authority later on clarified in its order that the above noted registration numbers relate to the same firm. He also indicated that the correspondences made by the Respondent No. 1 with the mining authorities as well as the Appellants would show that the Respondent No. 1 knew about the change of partners and treated the present partners as the lease holder. There is no dispute that some of the partners, such as Respondent Nos. 3 to 6 resigned from the M/s. KMC and other partners were inducted in their place. Some of these newly inducted partners were arrayed as party in the proceeding before the District Judge and also in the present proceeding. Further it appears that the General Manager of Respondent No. 1. filed application for renewal of the trading licence indicating the names of the present partners of M/s. KMC. There are documents of the Bank, Income Tax returns etc. to prima facie show that M/s. KMC with registration No. 47 of 49 is the present Appellant. There is no dispute that the order of Civil Judge is under challenge in appeal and it was passed during pendency of this appeal. The documents of the Respondent No. 1 as well as clarification given by the registering authority shows that the Appellant No. 1 is a firm which is a party to the agency agreement and it has locus standi to file this appeal. The ratio of the case in Bihari Lal Jaiswal cited on behalf of Respondent No. 1 is not applicable to the present case as the facts and circumstances of that case are materially different from the present case.

14. For all the aforesaid reasons the impugned order passed by the Learned Dist. Judge, Cuttack u/s 9 of the Act directing the parties to maintain status quo is unsustainable in the eye of law. Accordingly the same is set aside and the appeal is allowed. No cost.