
(2005) 10 OHC CK 0008
In the Orissa High Court
Case No : Arbitration Appeal No. 19 of 2003

Kiran Mohanty and Others	Vs	APPELLANT
Woodburn Developers and Builders (P) Ltd. and Others		RESPONDENT

Date of Decision : 07-10-2005

Acts Referred:

Arbitration Act, 1940 — Section 20, 8
Arbitration and Conciliation Act, 1996 — Section 11, 21, 36, 37, 40
Contract Act, 1872 — Section 201, 202
Negotiable Instruments Act, 1881 (NI) — Section 138
Specific Relief Act, 1963 — Section 14

Citation : AIR 2006 Ori 31 : (2006) 101 CLT 176 : (2005) OLR 987 Supp

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

Bench : Single Bench

Advocate : J.K. Mishra, N.C. Mishra and S.K. Behera, for the Appellant; N.C. Pati, N.C. Mohanty, R.K. Mohanty, S.K. Patnaik, U.C. Mohanty and M.K. Pati, for the Respondent

Final Decision : Allowed

Judgement

B.P. Das, J.—This appeal u/s 37 of the Arbitration and Conciliation Act, 1996 (in short "the Act") is directed against the order dated 10.4.2003 passed by the District Judge, Cuttack, in Misc. Case No. 17 of 2003 allowing the application filed by respondent Nos. 1 & 2 u/s 9 of the Act and restraining the appellants and pro forma respondent No. 3 from proceeding with the construction of "Bansi Tower" on Schedule "A" land. Pro forma respondent No. 3 has also filed a cross-appeal challenging the self-same impugned order.

2. The brief facts giving rise to the filing to the present appeal, as revealed from the averments made in the memorandum appeal, may be stated thus.

Respondent Nos. 1 & 2 as petitioners filed an application u/s 9 of the Act before the District Judge, Cuttack seeking an interim order to restrain the appellants and pro forma Respondent No. 3, who were Opp. Party Nos. 1 to 5, from

proceeding with construction of a multi-storied building, namely, "Bansi Tower" on Schedule "A" land pending final adjudication of the dispute through arbitration as provided in the agreement dated 5.7.1997. (n the aforesaid application it was stated that Schedule "A" land belonged to Late Satya Prasad Mohanty, the predecessor-in-interest of Opp. Party Nos. 1 to 4, i.e. the present appellants, who had entered into an agreement with the petitioners on 5.7.1997 for developing a multi-storied building with independent flats. As per the agreement, the building was to be completed within 48 months from the date of sanction of the building plan by the Cuttack Development Authority ("CDA" in short) and extension of one year was provided in case of delay in completion of the building within the stipulated period not attributable as negligence on the part of the owner or petitioner-respondent Nos. 1 & 2. The aforesaid agreement contained an arbitration clause that any dispute between the parties touching the terms and conditions of the agreement would be referred to an Arbitrator. The further case of respondent Nos. 1 & 2 before the District Judge was that pursuant to the aforesaid agreement, Satya Prasad Mohanty had executed a deed of irrevocable power of attorney in favour of Respondent No. 2, Plaban Mohany on 5.7.1 997, for the purpose of carrying out the development and building work over the said plot of land. According to Respondent Nos. 1 & 2, delay was caused in the process of sanction of the building plan in the office of the CDA and in the meantime Satya Prasad Mohanty died on 16.10.1998 leaving behind the present appellants as his legal heirs. On 18.10.2001 the Appellant, Opp. Party Nos. 1 to 4 rescinded the agreement and entrusted the construction of "Bansi Tower" to pro forma respondent company which compelled the present respondents to file the application u/s 9 of the Act before the District Judge praying to restrain the appellants and the pro forma respondent from proceeding with the construction of "Bansi Tower".

The present appellants, who were Opp. Party Nos. 1 to 4 in the proceeding before the District Judge, jointly filed a counter denying the case of the petitioners, inter alia, taking stands that (i) no notice as required u/s 21 of the Act having been served on the Opp. Party appellants, the arbitration proceeding never commenced and, therefore, the application u/s 9 of the Act was not maintainable; (ii) the so-called agreement dated 5.7.1997 executed by Satya Prasad Mohanty, (hereinafter called "deceased Satya Prasad") was ab initio void as the disputed property was the ancestral property of Opp. Party Nos. 1 to 4 who were not parties to the said agreement; (iii) deceased Satya Prasad had no authority to execute the agreement unilaterally and, therefore, his unilateral execution did not bind Opp. Party Nos. 1 to 4, (iv) Opp. Party Nos. 1 to 4 were never aware of execution of any power of attorney unilaterally by deceased Satya Prasad in favour of petitioner No. 2 for which the said power of attorney could not bind Opp. Party Nos. 1 to 4 in any manner whatsoever, (v) the agreement as well as the power of attorney having lost their enforceability with the death of Satya Prasad, the same could not be acted upon nor were they binding on Opp. Party Nos. 1 to 4, and (vi) the notice dated 18.10.2001 intimating automatic

rescission of the contract after expiry of three years from the date of death of Satya Prasad having been issued to the petitioners followed by newspaper publication of such notice in the daily "Samaj" dated 20.10.2001, there was no infirmity and irregularity committed.

3. The District Judge, after hearing the parties and on going through the documentary evidence produced before him, by the impugned order dated 10.4.2003 allowed the application u/s 9 of the Act and restrained the appellants as well as pro forma respondent No. 3 from proceeding with the construction of the building over the disputed plot. The District Judge recorded his findings on several issues including on the question of limitation raised by the Opp. Party appellants.

4. In the present appeal, the appellants challenge the aforesaid order, inter alia, on the grounds, namely (i) the Learned District Judge erred in law in coming to the conclusion that the agreement dated 5.7.1997 could at best be said to be voidable but not a void agreement, in as much as the deceased Satya Prasad being the Karta of the family had executed the agreement for legal necessity, (ii) the court below should have held that the power of attorney allegedly executed by the deceased Satya Prasad had lost its force after the death of the executant deceased Satya Prasad, and Section 202 of the Contract Act was not applicable as no interest had been created in favour of the attorney by virtue of such document, (iii) the Court below committed an error in holding that the deceased had executed the power of attorney as Karta of the joint family and hence the agency continued even after the death of the Karta. (iv) since the cause of action arose on 16.10.1998, i.e. the date of death of deceased Satya Prasad, the case having been filed three years thereafter, the same was barred by limitation and, therefore, the finding of the Court below that the case was filed within the period of limitation as prescribed u/s 137 of the Limitation Act is wrong.

5. Shri J.K. Mishra, Learned Counsel for the appellants, submitted that when time was the essence of the contract, due to the laches of Respondent Nos. 1 & 2, the development in the work did not progress in time. According to him, the date of accrual of cause of action was 16.10.1998 i.e., the date of death of deceased Satya Prasad, which was known to and admitted by respondent Nos. 1 & 2 in their application filed u/s 9 of the Act. Shri Mishra further submitted that the notice dated 18.10.2001 on behalf of the appellants was admittedly given to apprise Respondent Nos. 1 & 2 of waiver and/or extinguishments of all their legal rights on and from 15.10.2001, i.e. the date of expiry of the period of three years from the date of death of Satya Prasad, to enforce the Building Contract against the legal heirs of Late Satya Prasad and survival of no subsisting interest with them because of their default, negligence and long silence over the matter in consequence whereof the contract got automatically rescinded followed with forfeiture of caution money and restoration of possession of the land in question to the appellants which they had taken over. According to Shri Mishra, the petitioner-respondent Nos. 1 & 2 had lost all their rights to invoke jurisdiction u/s

9 and/or Section 8/11 of the Act of the Court. The Learned Counsel further argued that the power of attorney executed on 5.7.1997 by deceased Satya Prasad in favour of Respondent No. 2 stood revoked on 16.10.1998 when said Satya Prasad died. By that time no building permission was obtained by the petitioner-respondent Nos. 1 & 2 from the CDA.

In this regard Shri Mishra referred to a decision of this Court in Secretary to Government of Orissa, Irrigation Dept. and Others Vs. Raghunath Mohapatra, , and of the Apex Court in Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta, . Both these decisions related to the old Arbitration Act, 1940. In Raghunath Mohapatra's case, this Court held that it was for the arbitrator and not the Court to deal with the question whether the claim of a party to the arbitration agreement was barred by the law of limitation. However, the question whether an application u/s 8 or 20 of the old Act was barred by the law of limitation was to be decided by the Court to which the application was made and not by the arbitrator. The Apex Court in Panchu Gopal's case (supra) held that where a party slept over his rights for more than ten years, the Court would be justified in permitting the other party to rescind the arbitration agreement.

6. In opposition to the contentions raised on behalf of the appellants, the Learned Counsel for respondent Nos. 1 & 2 submitted that there was no laches on the part of the said respondents in proceeding with the construction of the building in question in terms of the agreement dated 5.7.1997 and immediately after execution of the aforesaid agreement, on the same day the deceased owner Satya Prasad also had executed an irrevocable power of attorney in favour of Respondent No. 2 in pursuance of Clause 6 of the Agreement. Immediately these respondents took necessary steps for soil exploration work and submitted the building plan to the CDA for approval on 26.9.1997 and pending approval of the building plan, Bhumi Puja was performed on 26.6.1998 and respondent Nos. 1 & 2 started construction by spending huge sum of money over piling works, laying the plinth and raising columns up to 2.5 metres of the proposed building. On 18.10.2001 Respondent Nos. 1 & 2 received a letter from the appellants rescinding the agreement dated 5.7.1997 and forfeiting the caution money on the ground that time was the essence of the contract and alleging that no development was made in spite of reminders after the death of Satya Prasad. They also intimated that they were taking possession of the construction site and in spite of all efforts for an amicable settlement of the dispute, as the appellants entrusted the work to a third party, the respondents had no other alternative but to approach the District Judge with the application u/s 9 of the Act.

While supporting the impugned order, the Learned Counsel for the respondents submitted that even if the disputed property was ancestral property of the appellants, deceased Satya Prasad being the father and Karta of the family had special power to alienate the same including the interest of the minor coparceners, if any unless the transaction was tainted with any illegal or immoral purpose. According to the Learned Counsel for the respondents, the agreement

in question was a commercial one by virtue of which Respondent Nos. 1 & 2 did not act as the agent of deceased Satya Prasad and while Satya Prasad, the owner of the land, was entitled to 25% of the built-up area, the builder was entitled to 75% of the built-up area. So, there was no question of relationship of principal and agent between Satya Prasad or the appellants and Respondent Nos. 1 & 2. As such Section 201 of the Contract Act had no application. In view of Section 40 of the Act, the agreement dated 5.7.1997 was enforceable against the appellants after the death of Satya Prasad despite the fact that the same was executed by Satya Prasad in his individual capacity, or as the Karta of the family.

As regards the question of limitation, counsel for the respondents submitted that the limitation to sue was three years from the date of cause of action and as per the clause of the agreement the construction work was to be completed within 48 months from the date of obtaining approval of the plan from CDA. The respondents have taken all possible steps to get the plan sanctioned. So when there was no sanction of the plan, no cause of action did arise on the date Satya Prasad died. The agreement, according to the respondents, was valid and the cause of action arose only on 18.10.2001, when the contract was rescinded and Section 9 application was filed within three years from the said date, i.e. 18.10.2001.

The further plea of the respondents is that a conjoint reading of the agreement and the power of attorney makes it clear that an interest was created in favour of Respondent Nos. 1 & 2 in the subject matter in agency and in the opening paragraph of the power of attorney, the executant made it binding on his legal heirs. Therefore, the power of attorney did not cease on the death of Satya Prasad. That apart, it was never a fact that no work was undertaken by the respondents. There is no question of construction by pro forma Respondent No. 3 as Respondent Nos. 1 & 2 are still in possession of the land in question.

7. Pro forma Respondent No. 3, Nabalaxmi Constructions has filed a cross-appeal. Learned Counsel appearing for the pro forma respondent submitted that the contract for developing the multi-storied building "Bansi Tower" could not be enforced for the reasons, namely (i) compensations in terms of money is the adequate relief u/s 14(i)(a) of the Specific Relief Act, 1963, (ii) the contract for building the tower runs into minute and numerous details and execution is dependent on the personal qualification and volition of Respondent No. 1, M/s. Woodburn Developers & Builders (P) Ltd. and Court could not enforce specific performance of its material terms; and (iii) since specific relief could not be granted in favour of Respondent No. 1, Woodburn and Respondent No. 1 had not started any work till cancellation of the agreement after four years, and respondent No. 1 has been dispossessed on 24.1.2002, no injunction could also be granted against the pro forma respondent stopping it from continuing the construction. Apart from the above, Learned Counsel for the pro forma respondent also submitted that Respondent No. 1 had practised fraud on the members of the public and had received booking amounts showing some forged

approved plan and did not start any construction as admitted in his letter dated 8.12.2000 and has not been able to refund the booking amounts for which Respondent No. 1 has been punished u/s 138 of the Negotiable Instruments Act and till date has not obtained the building plan. So, there is no prima facie case in favour of Respondent No. 1 and balance of convenience also does not lean in favour of Respondent No. 1. Loss, if any, can be adequately compensated in money value. It was submitted that the facts revealed from the consumer case belied the plea that Respondent No. 1 had constructed a part a Bansi Tower even though the building plan was not approved, which was relied upon by the Learned District Judge. According to the pro forma respondent, as it (the pro forma respondent) had raised the construction up to roof level of the first floor, stoppage of work would bring irreparable loss to the pro forma respondent for which the impugned order passed by the District Judge may be set aside.

8. Before going into the merit of the rival contentions of Learned Counsel for the parties, it would be worthwhile to re-produce Section 9 of the Act hereunder:

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 the appointment of a guardian for a minor or a person of unsound mind for the purposes 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.

9. In a proceeding u/s 9 of the Act, the Court can exercise the power u/s 9 for

interim protection. While granting interim injunction, the Court has to satisfy itself that there exists a valid arbitration agreement.

In view of the aforesaid provisions of Section 9 of the Act, as an interim measure the Court can grant interim injunction or pass an order for appointment of receiver. Here is a case where the interim order of injunction has been granted by way of restraining the present appellants from proceeding with the construction over the land in question pursuant to the agreement dated 24.1.2002 executed by the appellants, who are the legal heirs of deceased Satya Prasad. For granting the order of restraint or injunction, it is the bounden duty of the Court to see that three pre-conditions for grant of injunction must have to satisfy that there is a prima facie case; that the applicant will suffer irreparable injury if the injunction is not granted; and that there is balance of convenience in favour of the applicant. Further, the Court is also to, be satisfied that in order to protect the party from apprehended injury, which may be irreparable in nature, interference of the Court may be necessary. The Court is also to be satisfied that the comparative mischief or the inconvenience which may likely to result by withholding the injunction will be greater than that may arise by granting it. See 63 (1987) CLT 14 : S. N. Corporation v. Umakanta Rath.

10. Here is a case where even if the injunction is not granted, in the event the respondents succeed, they can be compensated in terms of money value. Because, the expression of irreparable injury means that it must be material one which cannot be adequately compensated by way of damages, the Court has to see that the plaintiff may sustain such injury, which cannot possibly and adequately be remedied by way of damages and the damages may be inadequate in the case of success of the plaintiff. In this case, I find that the Court below has not dealt with the age-old principles laid down and detailed above" while passing the impugned order of restraint against the present appellants.

11. For the aforesaid reasons, I allow this Arbitration Appeal and set aside the impugned order of restraint passed by the Court below.

The Arbitration Appeal is disposed of and so also the cross-appeal.