

(1985) 07 OHC CK 0030
In the Orissa High Court
Case No : Civil Revision No. 331 of 1985

Misra and Company	Vs	APPELLANT
Hindustan Aeronautics Limited and Others		RESPONDENT

Date of Decision : 31-07-1985

Acts Referred:

Specific Relief Act, 1963 — Section 37

Citation : AIR 1986 Ori 22

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Advocate : R.K. Mohapatra, B. Routray and U.C. Panda, for the Appellant; Y.S.N. Murty, (for No. 1 and 2), for the Respondent

Final Decision : Dismissed

Judgement

S.C. Mohapatra, J.—This Civil Revision arises out of an order of the learned Subordinate Judge, Jeypore refusing the prayer of the petitioner to restrain the opposite parties Nos. 1 and 2 from executing the balance portion of the work left unexecuted by the petitioner.

2. Petitioner is a works contractor. He entered into an agreement with opposite party No. 1 to make some constructions. While the petitioner was executing the work, opposite party No. 1 issued notice to him that the agreement with him had come to an end with effect from 1-12-1984. The dispute arising out of the said action of the opposite party No. 1 was referred to the Deputy General Manager (opposite party No. 3) by the General Manager (opposite party No. 2). as required under the arbitration clause in the agreement. Apprehending that there would not be a fair settlement of the dispute by the opposite party No. 3, petitioner filed an application for removal of the Arbitrator on the ground of the interestedness. The trial Court removed the Arbitrator and appointed Mr. N. K. Das, a retired Judge of this Court as Arbitrator. The opposite parties Nos. 1 and 2 have filed Civil Revisions challenging the said order in this court which are pending disposal. When the matter was thus pending, the petitioner filed an

application in the Court of the learned Subordinate Judge, Jeypore for restraining the opposite parties Nos. 1 and 2, which is the subject-matter of this Civil Revision.

3. The only point submitted by Mr. K. K. Mohapatra the learned counsel for the petitioner is that the learned Subordinate Judge has failed to consider the irreparable injury that would be caused to the petitioner in case the balance of the work left out is executed through other contractors. Mr. Mohapatra submitted that the petitioner shall have no objection in case the balance work is executed departmentally through its officers by the opposite party No. 1. In support of the submission, Mr. Mohapatra has placed before me the letter under which opposite party No. 1 intimated the petitioner that with effect from 1-12-1984 the contract between the parties did not subsist. According to Mr. Mohapatra, this action of the opposite party No. 1 is the subject-matter of arbitration. Even if it is assumed that the action of the opposite parties Nos. 1 and 2 would be justified, the cancellation as intimated in the letter would fall within the scope of Clause 46 of the agreement which authorises the execution of the balance work departmentally and in that case, petitioner would be liable only for the cost of materials, labour and charges for superintendence. In case the balance work is executed through other contractors, as envisaged under Clause 17 of the special conditions, the liability of the petitioner would be much higher. The further contention of Mr. Mohapatra is that the real expenditure would not be ascertainable in case the balance work is executed by other contractors as per Clause 17 of the special conditions.

Mr. Y S. N. Murty, the learned counsel for the opposite parties Nos. 1 and 2 has seriously contested the submissions of Mr. Mohapatra and submitted that the action of cancellation of the agreement would squarely come within the scope of Clause 17 of the special conditions of contract and execution of the balance work through contractors would be justified and on account of the special skill necessary, the work cannot be executed through departmental officers. The further contention of Mr. Murty is that the entire objection of the petitioner can be decided by the Arbitrator and there will be no irreparable injury to the petitioner. Rather the balance of convenience is in refusing injunction than granting the prayer.

4. In view of the rival contentions, the arbitration clauses in Clause 57, Clause 46 and Clause 17 are to be kept in view. They read as follows :

"57. Arbitration :

All disputes between the parties to the contract arising out of or relating to the contract, any claim, right, matter or thing whatsoever, in any way arising out of, or relating to the work, or otherwise, concerning the work or the execution, or failure to execute the same, whether arising during the progress of the work or after the completion or abandonment thereof, other than those for which the decision of the works Engineer/Accepting Officer/General Manager or any other

person is by this contract expressed to be final and conclusive, shall, after written notice by either parties to the contract to the other parties, to be referred to the sole arbitration of a person to be appointed by the General Manager of the Company.

Unless the parties otherwise agree, such reference shall not take place until after the completion, alleged completion or abandonment of the work or the determination of the contract.

The venue of Arbitration shall be such a place or places as may be fixed by the Arbitrator in his sole discretion. The award of the Arbitrator shall be final, conclusive and binding on both parties to the contract.

If the arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, fixing the date of hearing.

The Arbitrator may, with the consent of both the parties to the contract enlarge the time for making the award.

The arbitrator shall give his award on all matters referred to him and shall indicate his findings, along with the sums awarded, separately on each individual item of dispute."

"46. Cancellation of contract in part or in full for contractor"s default : --

If the contractor :

(a) Makes default in commencing the work within a reasonable time from the date of handing over of the site and continues in that state after a reasonable notice from Works Engineer.

(b) In the opinion of the Works Engineer at any time whether before or after the date of extended date for completion, makes default in proceeding with the work, with due diligence and continues in that state after a reasonable notice from Works Engineer.

(c) Fails to comply with any of the terms and conditions of the contract before or after reasonable notice in writing, orders properly issued thereunder or;

(d) Fails to complete the work, work order and items of work with individual dates for completion, and clear the site on or before the date of completion or fails to achieve the progress as set out under Clause 7 of the general conditions of contract.

The accepting Officer may, without prejudice to any other right or remedy which shall have accrued or shall accrue thereafter to HAL to cancel the contract as a whole or in part thereof or only such work order or items of work in default from

the contract Whenever the Accepting Officer exercises his authority to cancel the contract as a whole or in part under this condition he may complete the work at the contractor's risk and costs provided always that in the event of the cost of completion (as certified by Works Engineer which is final and conclusive) being less than the contract cost, the advantage shall accrue to the HAL. If the cost of completion exceeds the money due to the contractor under this contract, the contract shall either pay the excess amount ordered by Works Engineer or the same be recovered from the contractor by other means.

In case the HAL completes the work or any part thereof under the provisions of this condition the cost of such completion to be taken into account in determining the excess cost to be charged to the contractor under this condition shall consist of the cost of material purchased and/or labour provided by the HAL with an addition of such percentage to cover superintendence and establishment charges as may be decided by the Works Engineer whose decision shall be final and conclusive."

"17. "Cancellation of the contract in part or in full of Contractor's default"

"The Contractor shall suspend execution of the works or any part or parts thereof whenever called upon in writing by the accepting officer to do so and shall not resume thereon until so directed in writing by the accepting officer. Further, if the contractor in the opinion of the Company fails or neglects to comply with any of the terms and conditions of the contract or with any order issued thereunder or fails to carry out the contract to the satisfaction of the Company within the period fixed for the purpose or at any time repudiates the contract before the expiry of such period, the Chief Engineer or any other Officer of the Company so authorised may without prejudice to the right of the Company to recover from the contractor damages for the breach of contract, terminate the contract as a whole or terminate a part of the contract at the risk and cost of the contractor without prior notice and get the balance work executed through some other agency and hold the contractor liable for all the losses and expenses incurred by the Company. In the event of cancellation of the contract in the circumstances aforesaid, the contractor shall on demand by the Company or the authorised representative thereof, hand over immediately to the Company stores, components in the possession or custody of the contractor without waiting for any payment or settlement of any claim already made or intended to be made by the contractor In the event of termination of contract, the contractor will be entitled to be paid sums at contract, rates after deduction of all amounts due to the Company for the work already completed which in the opinion of the Company is in accordance with the terms of the contract."

A bare glance at Clause 57 of the Arbitration clause will indicate that it is wide enough to bring within its scope any dispute relating to the contract Whether the letter containing the intimation that there is no subsisting contract with effect from 1-12-1984 would come within the scope of Clause 46 or Clause 17 is a dispute which would be a subject-matter for arbitration if raised before the

Arbitrator. Any observation in that regard by me is likely to prejudice either party. Accordingly, I do not enter into that question.

5. From the submission of Mr. Mohapatta, I am satisfied that the petitioner has a fair case for being raised before the Arbitrator. I am, however, of the view that the balance of convenience is in favour of refusing the injunction. Opposite party No. 1 is a Company which is a corporate body. It has no living mind. It is to act through individuals. Whether the individuals through whom it would execute the balance of the work would be the officers of the Company or employed by contract for the said purpose would make no difference. The Arbitrator can easily ascertain from the materials produced before him what would be the cost of materials, the labour and what would be the reasonable charges for superintendence. In case he comes to the conclusion that Clause 46 would be attracted, he will allow the compensation to the opposite parties to that extent only. There is some force in the submission of Mr. Murty that the company may not have officers who can efficiently execute the balance work as efficiently as a person proficient to that effect can and in the event of any restraint is put there may not be any work at all. I am not also satisfied that any injury far less to speak of irreparable injury would be caused to the petitioner by execution of the balance work to be completed. Even assuming that there would be any injury, the same can be compensated as the ultimate goal for such construction by the petitioner was to do business and gain profit. Even if the petitioner is ill-reputed for such closure of contract with him the same can adequately be compensated.

6. On my finding that the balance of convenience is not in favour of the petitioner and there would be no irreparable injury, I am not inclined to entertain the Civil Revision for restraining the opposite parties. In this view of the matter, the question whether an application u/s 41 of the Arbitration Act after disposal of the proceeding for removal and appointment of Arbitrator by the learned Subordinate Judge is entertainable, as raised by Mr. Murty, is not necessary to be answered.

7. In the result, there is no merit in this Civil Revision and the same is accordingly dismissed. No costs.