

(2013) 09 OHC CK 0017

In the Orissa High Court

Case No : Writ Petition (C) No. 6989 of 2009

M/s. Trafalgar House Construction (T) Satyam
Shankarnarayan Joint Venture (TSSJV) and Another

APPELLANT

Vs

Government of Orissa, Department of Energy and Others

RESPONDENT

Date of Decision : 12-09-2013

Acts Referred:

Citation : (2014) 117 CLT 467 : (2014) 1 ILR (Ori) 18 : (2014) 1 OLR 287

Hon'ble Judges : M.M. Das, J

Bench : Single Bench

Advocate : D.K. Dwibedi, A.N. Mohanty, S.K. Ray Choudhury, B. Guin and G.M. Rath, for the Appellant; R.K. Rath , N.C. Mohanty, B.K. Mohanty and S.K. Dash for O.P. No. 1, for the Respondent

Final Decision : Disposed Off

Judgement

M.M. Das, J.—Heard learned counsel for the parties on the question of maintainability of this writ petition, which was raised by the learned counsel for the opposite party No. 1. Facts involved in the present case in short are that an agreement dated 6.4.1995 was entered into between the opp. party No. 1 and the petitioner No. 1 for execution of the work, namely, "Construction and completion of works (i) Head Race Tunnel (HRT) and, (ii) Muran Massonary Dam of Upper Indravati Hydro-Electric Project". Subsequently, two supplementary agreements were executed on 18.5.1998 in between the parties. As a dispute between the parties arose, the petitioner No. 1 filed OJC No. 4692 of 2000 to stall encashment of Bank Guarantee given by it. In the said writ petition, initially, a stay order was passed which continued till 14.9.1997 when the said writ petition was dismissed by this Court. It is stated that the petitioner No. 1 thereafter filed a SLP challenging the order passed by this Court and obtained an order of stay from the Hon'ble apex Court which is still continuing and the SLP is still pending. The opp. party No. 1 vide letter dated 23.06.2003 invoked the arbitration clause in the agreement and nominated the opp. party No. 4 as their

chosen arbitrator and requested the petitioner No. 1 to appoint an Arbitrator from their side. The petitioner No. 1 suggested the name of opp. party No. 2 as their nominated Arbitrator. The opp. party No. 3 was then appointed by the President, Institute of Engineers India as per the terms of the agreement as the Presiding Arbitrator.

2. Before the Arbitration Tribunal, a number of sittings have been held after filing of the claim and counter claim etc. by the parties. After completion of the pleadings, the Arbitration Tribunal formulated eight issues, which were subsequently enhanced to twenty four issues. When the matter was at the stage of argument and the parties were advancing their arguments, an application was filed by the opp. party No. 1 u/s 16(3) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") raising jurisdictional issue. Objection was filed to the said application by the petitioner No. 1. On 5.12.2005, the Tribunal passed an order on the application u/s 16(3) of the Act filed by the opp. party No. 1, the relevant portion of which is as follows:-

46(i) The application U/s. 16(3) of the claimant is disposed of with the stipulation that the matters No. I and II advanced in the argument is rejected without prejudice to the right of the respondent to argue on merits of his case and without prejudice to the contention of the respondent that the contractual obligation was only for completion of balance quantities of work as on 1.10.97 out of Original B.O.Q.

(ii) This order is without any prejudice to the rights of both parties to present their case and argue on merits on the basis of their respective pleadings and documents.

Challenging the said order, the opp. party No. 1 filed an appeal u/s 37(2)(a) of the Act registered as Arbitration Appeal No. 1/06 before the learned District Judge, Bhubaneswar on 19.6.2006 challenging the said order dated 5.12.2005 as well as another order dated 23.4.2006. The opp. party No. 1 also filed another application u/s 14 of the Act registered as ARBP No. 240 of 2006 for termination of the mandate of the Arbitration Tribunal. The petitioner No. 1 filed a counter in both the Arbitration Appeal No. 1 of 2006 as well as ARBP No. 240 of 2006 raising objection to both the cases. The cases were transferred to the court of the learned District Judge, Cuttack and, accordingly, ARBA No. 1 of 2006 was renumbered as ARBA No. 227 of 2008 and ARBP No. 240 of 2006 was renumbered as Arbitration Petition No. 207 of 2008. The learned District Judge by order dated 20.2.2009 disposed of Arbitration Petition No. 207 of 2008 which was an application u/s 14 of the Act by his order dated 20.2.2009 allowing the said application and terminating the mandate of the Arbitrator granting liberty to the parties to take steps for appointment of a substituted Arbitral Tribunal. Aggrieved by the said order, the petitioners have preferred the present writ petition.

3. Mr. R.K. Rath, learned senior counsel appearing for the opp. party No. 1 raised

the question of maintainability of the writ petition contending, inter alia, that a writ petition against the impugned order is not maintainable in view of various decisions of the Hon''ble apex Court and the petitioners are required to file a Civil Revision u/s 115 C.P.C. as the impugned order is a revisable order. He relied upon the decisions in the cases of I.T.I. Ltd. Vs. Siemens Public Communications Network Ltd., Nirma Ltd. Vs. Lurgi Lentjes Energietechnik GMBH and Another, Shin-Etsu Chemical Co. Ltd. Vs. Vindhya Telelinks Ltd. and Others, and A.E.S. Orissa Distribution Private Limited and Others Vs. Grid Corporation of Orissa Limited and Others,

4. Learned counsel for the petitioners vehemently urged that the action which is impugned before the learned District Judge is an order of interlocutory nature and passed during the pendency of an arbitration proceeding by the Arbitration Tribunal. Had the order of the learned District Judge gone in favour of the present petitioners, it would not have finally determined the suit or other proceeding as in the instant case "other proceeding" means the Arbitration Proceeding. He relied upon various decisions of the Hon''ble apex Court with regard to maintainability of a revision after amendment of section 115 of the C.P.C. and submitted that during pre-award stage what fell for adjudication before the learned District Judge is appreciation of conduct of the Arbitration Tribunal and their authority to continue with the proceeding. Thus, it is an intermittent appreciation of conduct of the Tribunal in a continuing proceeding. As such, the order passed by the learned District Judge in the applications u/s 14(2) of the Act is in the nature of interlocutory appreciation. Hence, the proceeding before the learned District Judge cannot be treated to be within phrase "other proceeding" independent of the proceeding pending before the Arbitration Tribunal.

5. Mr. Rath, learned senior counsel appearing for the opp. party No. 1, on the contrary, relying upon the aforesaid decisions of the Hon''ble apex Court submitted that the Hon''ble Supreme Court in the aforesaid decisions has laid down that an order as impugned in the present writ petition can be challenged only in a revision u/s 115 C.P.C. and the writ jurisdiction of his Court under Article 226 or its power of superintendence under Article 227 of the Constitution cannot be invoked.

6. From the rival submissions of the parties, the following issues emerge:-

(i) Whether revision u/s 115 of the CPC is maintainable to assail an order passed u/s 14 of the Act at the behest of the petitioner, who is defending an action u/s 14 of the Act before the District Judge, particularly, after amendment of CPC in the year 2002?

(ii) Whether, existence of alternative remedy by way of revision u/s 115 of the CPC debars the petitioner from assailing an order passed u/s 14 of the Act by the District Judge by invoking the supervisory jurisdiction under Article 227 of the Constitution?

7. In the case of M/s. I.T.I. Ltd. (supra), the Hon''ble Supreme Court while considering whether a revision is maintainable against an order passed in an appeal preferred u/s 37 of the Act by the Civil Court, held that the fact that a Second Appeal is statutorily barred under the Act and the CPC is not specifically made applicable to a proceeding under the Act, what is to be noted is: is there an express prohibition against the application of the Code to a proceeding arising out of the Act before a civil court?. When there is no express provision, it cannot be inferred that the Code is not applicable. It is well settled that the jurisdiction of the civil court to which a right to decide a lis between the parties has been conferred can only be taken away by a Statute in specific terms and such exclusion of right cannot be easily inferred because there is always a strong presumption that the civil court has jurisdiction to decide all question of civil nature. Therefore, if at all there has to be an inference, the same should be in favour of the jurisdiction of the Court rather than the exclusion of such jurisdiction and there being no such exclusion of the Code in specific terms except to the extent stated in section 37(2) (Bar to second appeal) an inference that merely because the Act has not provided the C.P.C. to be applicable, the Code is inapplicable, cannot be drawn. The Hon''ble Supreme Court in the said case further held that it cannot be said that a revision u/s 115 C.P.C. would be a judicial interference not provided for in section 5 of the Act. Thus, analyzing, ultimately it was held in the said decision that the revisional jurisdiction of the High Court gets attracted and the order passed u/s 37 of the Act is revisable.

(emphasis supplied)

8. In the case Nirma Ltd. (supra) in a short order, the Hon''ble Supreme Court refused to grant leave to file Civil Appeal against an appellate order of City Civil Court No. 11 Ahmedabad, passed under sub-section (2) of section 37 of the Act by holding thus:-

.....We are not inclined to entertain this SLP inasmuch as, in our opinion, an efficacious alternate remedy is available to the petitioner by way of filing a revision in the High Court u/s 115 of the Code of Civil Procedure. Merely because a second appeal against an appellate order is barred by the provisions of sub-sec. (3) of section 37, the remedy of revision does not cease to be available to the petitioner, for City Civil Court deciding an appeal under sub-section (2) of section 37 remains a Court subordinate to the High Court within the meaning of section 115 of the C.P.C. In taking this view, we find support from a decision of this Court in Shyam Sunder Agarwal and Co. Vs. Union of India,

Similar was the view taken by the Hon''ble Supreme Court in the case of Shin-Etsu Chemical Co. Ltd. and others (supra).

9. The order impugned in the present writ petition is an order passed u/s 14 of the Act by the learned District Judge, Cuttack. Keeping the well settled position of law that if an alternative efficacious remedy is available to the petitioner, the writ court should not interfere with the matter, it is to be examined as to whether

an order passed u/s 14 of the Act is revisable or not. For appreciating the above question, it would be appropriate to quote section 14 of the Act as well as section 115 of the Code of Civil Procedure.

10. Section 14 of the Act reads as follows:-

14. Failure or impossibility to act: (1) - The mandate of an arbitrator shall terminate if-

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

11. Section 115 C.P.C. reads as follows:-

115. Revision - (1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears-

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit:

(Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.)

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

((3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court)

Explanation - In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding.

12. The application under the aforesaid section 14 of the Act filed under sub section (2) thereof and the Court in which, such application is filed is required to decide on the termination of the mandate of the Arbitrator/Arbitration Tribunal.

13. In the afore-quoted decisions of the Hon"ble Supreme Court, it has been well settled that a proceeding under the Act comes within the para meter of "other proceeding". The order passed by the learned District Judge, which is impugned in the present writ petition is clearly revisable if it comes within clause (ii) of the second proviso to section 115 C.P.C. It is, therefore, found that by now it being a settled position that section 115 C.P.C. will be applicable to a proceeding under the Act, the impugned order if would be found to be one, which, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the petitioner No. 1 against whom it has been made, the same can be revised in a civil revision filed by the petitioners. This Court, therefore, finds that the petitioners have an alternative remedy to challenge the order passed u/s 14 of the Act by the learned District Judge, Cuttack, which is impugned in the present writ petition by filing a revision u/s 115 C.P.C. which is an alternative remedy available to the petitioner.

14. In view of availability of such alternative remedy, this Court is not inclined to exercise its power of superintendence under Article 227 or to issue a writ of certiorari under Article 226 of the Constitution by quashing the impugned order. The writ petition, therefore, is found to be not maintainable and is accordingly disposed of.