
(2008) 05 OHC CK 0070
In the Orissa High Court
Case No : A.R.B.A. No. 22 of 2007

Orissa Manganese and Minerals Private Limited	APPELLANT
Vs	
Monnet Ispat and Energy, Ltd. and Others	RESPONDENT

Date of Decision : 02-05-2008

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 37(1), 9
Civil Procedure Code, 1908 (CPC) — Section 20
Contract Act, 1872 — Section 28
Mineral Concession Rules, 1960 — Rule 37(1)
Specific Relief Act, 1963 — Section 14(1), 41

Citation : (2008) 05 OHC CK 0070

Hon'ble Judges : L. Mohapatra, J

Bench : Single Bench

Advocate : R.K. Mohanty and D.K. Das, for the Appellant; M.R. Mohanty, A.K. Panigrahi, L.K. Behera and K.S. Patnaik Advs., for the Respondent

Judgement

L. Mohapatra, J.—Opposite party No. 1 before the learned District Judge, Khurda, Bhubaneswar is, the Appellant before this Court. This appeal has been preferred u/s 37(1)(a) of the Arbitration and Conciliation Act, 1996 (hereinafter called "the Act") assailing legality of the order dated 11.10.2007 passed in an application filed u/s 9 of the said Act by Respondent No. 1.

2. The case of the Respondent No. 1 in its application u/s 9 of the Act is that it is having Integrated Steel Plants and Ferroalloys Plants for manufacturing steel, power and ferroalloys in the State of Chhattisgarh. It has also signed a memorandum of understanding for establishing an Integrated Steel Plant in the State of Orissa and, accordingly, has initiated the process of purchasing land in the district of Angul for the said purpose. In order to establish the said Integrated Steel Plant in the district of Angul and also fulfil its obligations under the memorandum of understanding entered into between it and the State Government of Orissa, an agreement was entered into between the Appellant and Respondent No. 1 on 6.3.2006 for purchase of Manganese Ore from the

mines located in the district of Sundargarh, which had been given on lease in favour of the Appellant by the State of Orissa. According to Respondent No. 1, pursuant to the said agreement, it had paid a sum of Rs. 55,00,000/- (Rupees fifty five Lakhs) to the Appellant between 2.3.2006 to 20.12.2006 as advance. The agreement entered into between the Appellant and Respondent No. 1 provides that the Appellant shall sell the entire quantity of manganese ore extracted from the leasehold area exclusively to the Respondent No. 1 and in turn, Respondent No. 1 agreed to purchase the entire quantity of all grades of manganese ore from the Appellant at such rate as specified in the schedule of the agreement exclusive of all royalties, taxes, duties etc. Under Clause 3 of the Agreement, the Appellant was allowed only four months time from the date of agreement to discharge its obligations but it failed to carry out its obligation under the said agreement. In the meantime, Respondent No. 1 learnt that M/s. Adhunik Steel Ltd., and/or Futuristic Steel Pvt. Ltd., has taken over management of the Appellant and the Appellant has become a subsidiary company of M/s. Adhunik Steel Ltd. and/or Futuristic Steel Pvt. Ltd., and, as such all the disputes between the Appellant and M/s. Adhunik Steel Ltd., and/or Futuristic Steel Pvt. Ltd. have come to an end and ceased to be pending any further and due to non-fulfillment of the obligations under the agreement by the Appellant, the Respondent No. 1-company has suffered substantial financial losses. Respondent No. 2 through its authorized signatory requested the Board of Directors of the Appellant in its letter dated 24.5.2007 for immediate commencement of supply of manganese ore from the mines in terms of the agreement. It is also the case of the Respondent No. 1 that on 18.6.2007, it came to know that the Appellant is relating ore from six mines and disposing of the same either by way of selling or transferring to parties other than the Respondent No. 1 in a deceptive manner. Respondent, No. 1 also learnt that the Appellant has already initiated steps for creating third party interest in six mines under its possession by virtue of lease instead of fulfilling its obligations under the agreement with it. On these allegations, an application u/s 9 of the Act was filed to restrain the Appellant from selling or otherwise part with or disposing of any manganese ore raised from the lease hold area to any other party and for a further direction that it is the Respondent No. 1 alone, who has right to purchase the entire ore from six mines pursuant to the agreement entered into between the Appellant and Respondent No. 1.

3. The Appellant filed an objection questioning the maintainability of the application on the ground that the learned District Judge, Bhubaneswar lacks jurisdiction in entertaining the application since the mines in question in respect of which dispute has arisen are situated in the district of Sundargarh and the agreement between the parties was entered into in the State of West Bengal. The further case of the Appellant in its objection is that Clause 7 of the agreement provides that the agreement shall come into force after mutual abandonment and termination of the contract entered into by the Appellant with M/s. Adhunik Steels Ltd. and withdrawal of Court cases pending in different

Courts/tribunal or other authorities in various parts of the country relating to M/s. Adhunik Steel Ltd. and Futuristic Steel Pvt. Ltd. It is also provided in the agreement that in the event the contract entered into by the Appellant with M/s. Adhunik Steels Ltd. and/or Futuristic Steel Pvt. Ltd., is not abandoned mutually and the pending Court cases are not withdrawn, then the agreement shall not come into force and no rights whatsoever shall accrue to either party under this agreement. According to the Appellant, the dispute between it and M/s. Adhunik Steel Ltd. is pending before the Arbitrator appointed by the Apex Court in Civil Appeal No. 6569 of 2005 and Civil Appeal No. 6570 of 2005 and, therefore, the agreement between the Appellant and the Respondent No. 1 has not commenced and cannot be invoked for the purpose of an order for injunction. It is also the case of the Appellant that under the agreement, it will be directly financed to a substantial extent for carrying out its mining operations which is not permissible under Rule 37(1) of the Mineral Concession Rules, 1960 since the agreement has not been entered into with the previous consent in writing with the State Government and, therefore, the agreement is void being hit under Rule 37(1) of the said Rules. It was contended by the Appellant before the trial Court that even if any injunction order is not granted, for any damage or loss the Respondent No. 1 can be compensated in terms of money and, therefore, the agreement between the Appellant and the Respondent No. 1 cannot be specifically enforced considering the Section 14(1)(a) read with 14(1)(c) of the Specific Relief Act, 1963. It was also contended that the interim relief prayed for cannot be granted in view of the statutory prohibition contained in Section 41(e) of the Specific Relief Act, 1963. The other Respondent M/s. Adhunik Metaliks Ltd. filed separate objection but the State of Orissa did not file any objection.

4. The trial Court from paragraph 6 onwards continued to decide the case on merit and rendered some findings on merit but suddenly in paragraph 12, it observed that during course of argument it was contended on behalf of the Appellant that it is willing to supply manganese ore to the Respondent No. 1 subject to Respondent No. 1 furnishing details of quantity of manganese Ore required by it. Pursuant to such submission, the Respondent No. 1 having filed an affidavit in the Court on 17th August 2007 indicating the quantity of manganese ore of different grades required by it, the application u/s 9 of the Act was disposed of on concession with the following directions:

In the result, the Arbitration petition is allowed on contest: against, the O.P. No. 1 and dismissed against O.P. Nos. 2 to 4, but in the circumstances without any cost. The O.P. No. 1 is directed to effect sale and supply of the required quantity of manganese ore of different grade as per the affidavit of the Petitioner-company which it shall raise, on its own, from the leasehold area to this Petitioner strictly against payment and other conditions as determined in the agreement, till the commencement of the arbitral proceeding. If the Petitioner fails to comply the conditions of the agreement, the liability of the O.P. No. 1 will cease.

The Petitioner is directed to take steps within a period of two months hence for commencement of arbitral proceeding, failing which the interim protection granted u/s 9 of the Act shall be automatically recalled.

5. A preliminary objection was raised by the learned Counsel appearing for the Respondent No. 1 to the effect that an application has been filed before the District Judge, Bhubaneswar for modification of the impugned order on the ground that no such concession had been given on behalf of the Appellant on the basis of which the impugned order had been passed. The very same impugned order based on such concession having been challenged in appeal before this Court, the Appellant should choose one forum and cannot invoke both the forums for redressal.

6. Shri R.K. Mohanty, the learned Counsel appearing for the Appellant submitted that though an application has been filed before the learned District Judge, Bhubaneswar for modification of the impugned order on the above ground, in the impugned order the Court having also dealt with the merits of the case, an appeal was required to be filed since it is not permissible for the Court to decide the case on merit if it is to be disposed of on consent of both the parties.

Though such a preliminary objection was issued by the learned Counsel appearing for the Respondent No. 1, the learned Counsel appearing for the parties argued at length on the question as to whether this Court has any jurisdiction to decide whether such concession had been advanced by the Appellant before the Court below or not as well as on merits of the case.

7. So far as preliminary objection raised by the learned Counsel for the Respondent No. 1 is concerned, reference may be made to a decision of the Apex Court in the case of *State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another*, where the Apex Court held that the principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts so stated that no one can contradict such statements by affidavit or other evidence. In the case of *Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others*, it was contended before the Apex Court that various contentions raised before the High Court were not gone into while deciding the case. In that context, the Supreme Court held as follows:

Though it had been submitted that various other contentions had also been raised before the High Court, but the Supreme Court would not go into the said contentions inasmuch as assuming the same to be correct, the remedy of the Appellants would lie in filing appropriate application for review before the High Court.

8. In view of the above two decisions, there cannot be doubt in mind that the question as to whether such concession had been given by the Appellant in course of argument or not can only be decided by the very same Court and this Court cannot entertain such an objection. The learned Counsel for the

Respondent No. 1 to substantiate his argument submitted that such concession had in fact been given and referred to the order dated 8.8.2007 passed by the learned District Judge in the said proceeding. Referring to the said order, it was contended by the learned Counsel for the Respondent No. 1 that pursuant to the concession given by the Appellant, Respondent No. 1 had filed an affidavit indicating its requirement of different grades of manganese ore, which was subsequently taken into consideration by the learned District Judge in the impugned order.

Shri R.K. Mohanty, the learned Counsel appearing for the Appellant in this regard contended that the order dated 8.8.2007 does not speak of any concession rendered by the Appellant and, according to Shri Mohanty, the impugned judgment shows that the so-called concession was given in course of argument which took place much after the said date i.e. in September, 2007.

Be that as it may, in view of the aforesaid two decisions, this Court lacks jurisdiction to entertain such a question, which is within the competency of the learned District Judge, Bhubaneswar to decide as to whether such concession had been rendered by the Appellant or not.

9. The other question raised by the learned Counsel appearing for the Appellant is that if the Court had to decide the application filed u/s 9 of the Act on concession given by the Appellant, there was no necessity for the Court to deal with the matter on merits. The learned Counsel for the Respondent No. 1 though did not answer this point raised by the learned Counsel for the Appellant, submitted that since the matter is to be decided afresh before the learned District Judge as to whether such concession was given by the Appellant or not, the matter should be kept open for the learned District Judge, Bhubaneswar to decide the issue in accordance with law.

In course of argument it was submitted by the learned Counsel for the Respondent No. 1 that though pursuant to the impugned order arbitrators have been nominated by both the parties, the arbitration" proceeding has not commenced and therefore the interim arrangement made by the learned District Judge in the impugned order should continue.

10. On perusal of the entire impugned judgment, it is found that the learned District Judge has dealt with the respective cases of the parties upto paragraph 5 of the judgment. From paragraph 6 onwards, it started discussing on merits and found that it had jurisdiction to entertain the application, there is cause of action for filing an application u/s 9 of the Act, the agreement is not hit u/s 37(1) of the Mineral Concessions Rules 1960 and the power under" Section 9 of the Act in granting interim relief is not prohibited even on consideration of the provision contained in the Specific Relief Act. However, in paragraph 12 of the impugned judgment after rendering findings on merits of the case, the Court observed in the following manner:

During course of argument it was submitted by the learned Counsel for the O.P.

No. 1 that the O.P. No. 1 is willing to supply manganese ore to the Petitioner-company subject to the Petitioner-company furnishing the quantity of manganese ore required. On such submission, the Petitioner-company filed an affidavit in the Court on 17th August, 2007 showing the quantity of manganese ore of different grade required by it. In view of the above submissions made by the learned Counsel for the O.P. No. 1, the other points raised above are of academic interest.

11. As is evident from the impugned order, the trial Court proceeded with the judgment on merits but suddenly concluded by referring to the concession and also issued directions on the basis of such concession but not on merits. Therefore, there is considerable force in the submission of the learned Counsel for the Appellant that if the trial Court issued directions on the basis concession stated to have been given by the Appellant, there was no necessity for him to deal with merits of the case having observed that other points are of academic interest. However, the learned Counsel for the Appellant and Respondent No. 1 having made submissions on merits also, it will be appropriate to record such submissions and find out correctness of the findings though the findings, if any, given by the trial Court or this Court in an application filed u/s 9 of the Act are only prima facie findings and as such are not binding on the Arbitrators, who are to adjudicate the dispute between the parties with reference to the agreement entered into between the parties without being guided by any such finding.

12. So far as question of jurisdiction is concerned, the learned Counsel for the Respondent No. 1 drew attention of the Court to Clause 18 of the Agreement, which provides the Arbitration Clause. The said clause, however provides that the place of arbitration or sitting shall be at Bhubaneswar. For any dispute, the Courts in Bhubaneswar (having jurisdiction of lease hold area) will have sole jurisdiction. Clause 18 of the agreement is quoted below for convenience.

If at any time any dispute or question arises between the parties touching the meaning, construction or effect of this agreement or of any clause or thing herein contained or regarding the respective liabilities and rights under this agreement then every such dispute or question except where specifically provided shall be referred to arbitration, as per the provisions of the Arbitration and Conciliation Act, 1996, as amended from time to time to two arbitrators, one each to be appointed by each party hereto, within one month from the date of notice invoking this arbitration clause is issued to the opposite party and the arbitrators shall enter upon reference within one month from the date of their respective appointment and the arbitrators/umpire shall give a speaking award. The place of arbitration or sitting shall be at (Bhubaneswar.) For any dispute, the Courts in Bhubaneswar (the Court having jurisdiction of lease hold area) will have sole jurisdiction

Admittedly, in this case lease hold area is within the district of Sundargarh and, therefore, there appears to be a defect in the said Clause. It was contended by the learned Counsel for the Respondent No. 1 with reference to the above that the lease having been granted by the State from its Office at Bhubaneswar, the

term "lease hold area" should be interpreted to say that the place from where the lease had been granted. I am unable to accept such contention considering that the lease is between the State and the Appellant and the said lease is not in dispute. Therefore, such contention of the learned Counsel does not explain the defect in the said clause. In this connection, the learned Counsel for the Respondent No. 1 cited a decision of the Supreme Court in the case of Hani Era Textiles Ltd. v. Puromatic Filters (P) Ltd. reported in 2004 4 ACC 671. In the aforesaid case interpreting Section 20 of the Code of Civil Procedure, the Supreme Court held that when there is restriction by agreement with regard to place of suing, such restriction is permissible where two or more Courts have jurisdiction under CPC and agreement restricts place of suing to any one of them and such an agreement is not contrary to public policy and does not contravene Section 28 of the Contract Act 1872. The Supreme Court in the said decision also held that the parties cannot by agreement confer jurisdiction on a Court which it does not possess under Code of Civil Procedure. If this part of the judgment is taken into consideration, possibly the parties by agreement could not have conferred jurisdiction on a Court in Bhubaneswar when admittedly the agreement was executed in the State of West Bengal and the lease hold area in respect of which such agreement had been executed is located within the jurisdiction of Courts of Sundargarh district. Para 13.1 of the application filed u/s 9 of the Act before the trial Court deals with the question of jurisdiction. In the said paragraph it is averred that the Court at Bhubaneswar has jurisdiction in view of the following two grounds:

1. The sittings of arbitration shall be at Bhubaneswar.
2. The lease in favour of present Appellant has been granted at Bhubaneswar by the State of Orissa.

For the purpose of sitting of the arbitrators any place could be agreed upon by the parties irrespective of the fact that the jurisdiction to adjudicate a dispute by a Civil Court may be at one or more places. As stated earlier the lease granted in favour of the present Appellant by the State Government is not the subject matter of dispute between the parties and, therefore reference to the said lease cannot confer jurisdiction on a civil Court at Bhubaneswar. In this connection reference be also made to another decision of the Apex Court in the case of New Moga Transport Company, through its Proprietor Krishanlal Jhanwar Vs. United India Insurance Co. Ltd. and Others, where a similar view has been expressed.

13. I have carefully gone through the documents filed before the Court below but could not find any document on the basis of which it can be said that the learned District Judge, Bhubaneswar could exercise jurisdiction in entertaining the application filed u/s 9 of the Act. The agreement having been executed in the State of West Bengal and lease hold area being located in the district of Sundargarh, in absence of any other material to show that the Court at Bhubaneswar had any jurisdiction to entertain the application, the parties by an agreement cannot confer jurisdiction on a Court which it does not have

otherwise. The learned District Judge in the impugned order has not taken note of these factors while deciding the question of jurisdiction. I am, therefore of the view that the matter should be remitted back to the learned District Judge for reconsideration after giving an opportunity to the parties to produce further documents to show that the learned District Judge, Bhubaneswar has jurisdiction to entertain the application.

14. Another ground of challenge before this Court relates to interpretation of Clause-7 of the agreement entered into between the parties on 6th March 2006. Clause-7 of the agreement is quoted below:

The validity of this agreement shall be for a period of ten years from the effective date of its coming into force. Upon expiry thereof, the agreement should be renewed for such further periods upon terms and conditions that may be mutually agreed upon. The agreement shall only come into force after mutual abandonment and termination of the contract entered into by OMM with Adhunik Steels Ltd. and withdrawal of Court-cases pending with Courts, Tribunals or other authorities in various parts of the country relating Adhunik Steels Ltd. and Futuristic Steel Pvt. Ltd. so as to make mines fully operational as per law.

In the event the contract entered into by OMM with Adhunik Steels Ltd. and/or Futuristic Steel Pvt. Ltd. is not abandoned mutually and the pending Court cases are not withdrawn in terms of settlement to be entered by OMM with Adhunik Steels, Ltd. and Futuristic Steel Pvt. Ltd. then this agreement shall not come into force and no rights whatsoever shall accrue to either party under this agreement.

Referring to the aforesaid Clause, it was contended by the learned Counsel for the Appellant that admittedly an arbitral proceeding is pending between the Appellant and M/s. Adhunik Steels Ltd. and, therefore the agreement entered into between the parties cannot take effect so long as the said proceeding is not concluded finally. The aforesaid Clause in the agreement specifically provides that it shall come into force after mutual abandonment and termination of the contract entered into by OMM with M/s. Adhunik Steels Ltd. and withdrawal of Court cases pending with Courts, Tribunals or other authorities in various parts of the country relating M/s. Adhunik Steels Ltd. and Futuristic Steels Pvt. Ltd. so as to make mines fully operational as per law. It is further provided in the said Clause that unless the pending cases are disposed of in terms of withdrawal, settlement or otherwise the agreement shall not come into force. The learned District Judge in the impugned order observed that pursuant to an order passed by the Apex Court in Civil Appeal No. 6569 of 2005 and Civil Appeal No. 6570 of 2005, a former Chief Justice of the Supreme Court had been nominated as the Arbitrator to decide the dispute between the OMM and M/s. Adhunik Steels Ltd. and an order of injunction was granted in favour of M/s. Adhunik Steels Ltd. restraining OMM from entering into a transaction for mining and lifting of the ore with any other individual or concern making it clear that OMM can on its own, carry on the mining operations in terms of the mining lease. The learned District Judge also held that the arbitral proceeding between the OMM and M/s. Adhunik

Steels Ltd. has commenced but the agreement between the Appellant and Respondent No. 1 being only for sale, it does not violate the order of injunction granted by the Apex Court and Clause-7 of the agreement does not appear to be stand on the way in commencement thereof. Clause-7 in terms clearly lays down that in the event the contract entered into by OMM with M/s. Adhunik Steels Ltd. and/or Futuristic Steel Pvt. Ltd. is not abandoned mutually and the pending Court cases are not withdrawn in terms of settlement to be entered by OMM with M/s. Adhunik Steels Ltd. and Futuristic Steel Pvt. Ltd. then this agreement shall not come into force and no rights whatsoever shall accrue to either party under the agreement. Admittedly, the arbitral proceeding between the OMM and M/s. Adhunik Steels Ltd. having commenced and the said proceeding having not been finally concluded, there appears to be a considerable force in the contention of the learned Counsel for the Appellant that Clause-7 comes into operation in it's terms. So far as commencement of agreement is concerned, the approach of the learned District Judge in this regard does not appear to be in consonance with the specific terms and conditions laid down in the aforesaid Clause in the agreement.

The third ground which was raised by the learned Counsel for the Appellant is with regard to requirement for grant of injunction when a party can be compensated in absence of an order of injunction. In this regard reference may be made to a decision of this Court in the case of Bhanja Minerals Pvt. Ltd. v. Bihar Sponge Iron Ltd. reported in 2006 (2) OLR 683. This Court in the aforesaid decision has laid down the principles either for grant of injunction or refusing an application filed u/s 9 of the Act. Since I am remitting the matter back to the trial Court for reconsideration, the learned District Judge shall also decide the question as to whether there is no necessity for grant of injunction when an affected party can be compensated in terms of money and the aforesaid decision of this Court shall be taken into consideration.

15. I, therefore set aside the impugned order and remit the matter back to the learned District Judge, Khurda at Bhubaneswar for reconsideration in the following manner:

1. The parties to the proceeding shall be given opportunity to produce further documents relating to the question of jurisdiction and the learned District Judge on the basis of documents and with reference to the agreement between Appellant and Respondent No. 1 shall decide as to whether it has jurisdiction to entertain the application.
2. In the event, learned District Judge holds that it has jurisdiction to entertain the application, the question as to whether the Appellant had made any such concession to supply the materials to Respondent No. 1 or not shall be decided.
3. In the event, learned District Judge holds that it has jurisdiction to entertain the application but no such concession had been given by the Appellant, it shall decide the case afresh on merits.

The appeal is accordingly disposed of.