

(2005) 03 OHC CK 0014
In the Orissa High Court
Case No : AREA No. 26 of 2004

Orissa Manganese and Minerals (Pvt.) Ltd.	APPELLANT
Vs	
Adhunik Steel Ltd.	RESPONDENT

Date of Decision : 18-03-2005

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 37, 37(1), 9
Contract Act, 1872 — Section 10, 23, 73
Mineral Concession Rules, 1960 — Rule 30, 37, 37(1)
Specific Relief Act, 1963 — Section 14, 14, 14(3)

Citation : AIR 2005 Ori 113 : (2005) OLR 690 Supp

Hon'ble Judges : L. Mohapatra, J

Bench : Single Bench

Advocate : R.K. Rath and N.R. Rout, for the Appellant; S.P. Sarangi, A.K. Parija, B. Ch. Mohanty, Public Prosecutor Mohanty, D.K. Das, P.K. Dash and R.K. Tripathy, for the Respondent

Final Decision : Allowed

Judgement

L. Mohapatra, J.—This appeal u/s 37(1)(a) of the Arbitration and Conciliation Act, 1996 (hereinafter called as the "Act") is directed against the order dated 18-8-2004 passed by the learned District Judge, Sundargarh in Civil Misc. Application No. 8 of 2004 restraining the present appellant, it's servants, agents and any other person acting under the appellant from relying, acting upon, giving effect to letter dated 24-11-2003 and the purported termination of the contract on 14-5-2003. The Court further restrained the appellant from dispossessing the respondent from the mines in question and directed that the temporary injunction shall remain in force till final award is passed by the Arbitration Tribunal.

2. The respondent filed an application u/s 9 of the Act to restrain the appellant from acting upon or giving effect to letter dated 24-11-2003 and the purported termination thereby and also for restraining the appellant from dispossessing the respondent from the schedule mines and raising ore therefrom. Case of the

respondent before the learned District Judge is that the Government of Orissa granted lease of mining land at Patmunda, Orahari, Tentuldi, Kusumdihi, Sonpatholi and Bhanajikusum covering area of 1994.92 acres, 127.20 acres, 88.00 acres, 77.96 acres, 56.55 acres and 20.10 acres respectively in favour of the appellant on 1st January 1980. Further case of the respondent, is that the appellant had no expertise, equipment and resources to operate the said mines and in its attempt to work the said mines it incurred huge liability to various authorities towards Provident Fund, sales tax, income tax, payment to financial institutions, payment to workmen, etc. running to about Rs. 2.30 crores. On account of its inability to work in the said mines and keeping in mind huge outstanding liabilities, the appellant appointed respondent as it's raising contractor and executed an agreement dated 14-5-2003. Under the said agreement the respondent was required to carry out mining operation in the aforesaid mines on exclusive basis and excavate, remove manganese ore for and on behalf of the appellant and deliver the same to the customers of the appellant for a period of ten years with effect from 18-5-2003 with an option to renew the agreement on the same terms and conditions. Pursuant to the aforesaid agreement, possession of the mines was handed over to the respondent on 29-6-2003. In July, 2003 in a meeting held between both parties, it was agreed that the respondent shall allow the workmen employed by the appellant to continue in employment. Though the parties agreed to the above, the respondent alleges that the appellant neither furnished detail of the said workmen nor amount payable to them, as a result whereof the said workmen were not paid their dues. Due to non-payment of dues the workmen continued to obstruct mining operation undertaken by the respondent. It is also case of the respondent that in terms of the agreement the respondent employed present workmen for working at the mines, but the mining operation could not be taken up because of the reasons stated above and because of the reason that the appellant did not remove it's equipments lying in the mines on or before 14-5-2003 as agreed to and in the process the respondent suffered loss to the tune of Rs. 40.00 crores. While the matter stood thus, on 24-11-2003 the appellant intimated the respondent that the agreement entered between the parties was in violation of the Mineral Concession Rules, 1960 (hereinafter called as the "Rules") and therefore the same is illegal, void and terminated the agreement with immediate effect. In the said letter the respondent was asked to vacate the mines immediately and remove its workmen and equipments. The appellant again by notice dated 24-11-2003 published in daily "The Sambad" intimated that the power of attorney executed by the respondent dated 14-5-2003 stood cancelled/revoked. According to the respondent, the letter dated 24-11-2003 terminating agreement as well as notice dated 24-11-2003 revoking power of attorney are illegal, wrong and not binding on the respondent. Further case of the respondent, is that as a consequence of termination of the agreement and revocation of power of attorney it has been vested with several civil consequences as enumerated in Para 19 of the petition filed before the learned District Judge. The agreement having provided a clause for arbitration the respondent filed an

application u/s 9 of the Act for the relief as stated earlier.

3. The appellant filed counter-affidavit before the learned District Judge. The main objection as it appears from the counter-affidavit raised by the appellant is that the agreement dated 14-5-2003 which is the basis of the respondent's claim is invalid being an unregistered document. Not only the said agreement is an unregistered document but also such an agreement is hit by Rule 37 of the Rules which prohibits appointment of any agency by way of assignment, sub-letting, mortgage or transfer by the lessee. The said agreement having been executed in contravention of the aforesaid Rules, the same is not executable or enforceable u/s 23 of the Indian Contract Act. Further objection of the appellant is that the agreement having been terminated for the reasons stated above, the power of attorney had become meaningless and therefore the same was revoked. The appellant also contended in the counter-affidavit that the respondent having not paid wages of the workmen engaged by it, letters are being written by different authorities to the appellant for payment of the wages. Several other objections have also been taken in the counter-affidavit, but the same have not been dealt with in details as at the time of hearing learned counsel for the appellant confined his argument to the aforesaid objections taken in the counter-affidavit.

4. Learned District Judge on perusal of several documents filed on behalf of the both parties found that Rule 37 of the Rules has no application to the facts of the present case and therefore termination of the agreement on the above ground was not justified and consequently held that the revocation of the power of attorney was not justified. The Court further held that unless restraint order is passed, the respondent would suffer from irreparable loss which cannot be compensated in terms of the money and balance of convenience lies in favour of issuing an order of injunction against the appellant.

5. Shri R.K. Rath, learned counsel appearing for the appellant challenged the order of the Trial Court on the following grounds:

(i) Agreement between the appellant and the respondent executed on 14-5-2003 contravenes Rules 37 of the Mineral Concession Rules, 1960 and therefore such an agreement is illegal and cannot be enforced.

(ii) u/s 14 of the Specific Relief Act, 1963, the agreement dated 14-5-2003 is not enforceable as it is terminable.

(iii) The agreement dated 14-5-2003 cannot also be enforced u/s 14(3)(c) of the Specific Relief Act since the requirement of Section 14(3)(ii) is not satisfied.

(iv) The order of injunction granted by the trial Court is not of temporary nature and the findings arrived at by the trial Court practically leaves nothing for the Arbitrator to decide in the Arbitration Proceeding.

6. In support of the first ground, Sri Rath, learned counsel for the appellant drew attention of the Court to Rule 37 of the Rules. For convenience Rule 37 of the

Rules is quoted below :

"Transfer of lease- (1) The lessee shall not, without the previous consent in writing of the State Government (and in the case of mining lease in respect of any mineral specified in (Part A and Part B of) the First Schedule to the Act, without the previous approval of the Central Government)-

(a) assign, sublet, mortgage, or in any other manner, transfer the mining lease, or any right, title or interest therein, or

(b) enter into or make any (bona fide) arrangement, contract or understanding whereby the lease will or may be directly or indirectly financed to a substantial extent by, or under which the lessee's operations or undertakings will or may be substantially controlled by, any person or body of persons other than the lessee :

Provided further that where the mortgagee is an institution or a Bank or a Corporation specified in Schedule-V, it shall not be necessary for the lessee to obtain any such consent of the State Government.

(1A) The State Government shall not give its consent to transfer of mining lease unless the transferee has accepted all the conditions and liabilities which the transferor was having in respect of such mining lease.

(2) Without prejudice to the provisions of sub-rule (1) the lessee may, transfer his lease or any right, title or interest therein to person who has filed an affidavit stating that he has filed an up-to-date Income Tax returns, paid the Income Tax assessed on him and paid the Income Tax on the basis of self-assessment as provided in the Income Tax Act, 1961 (43 of 1961), on payment of a fee of five hundred rupees) to the State Government.

Provided that the lessee shall make available to the transferee the original or certified copies of all plans of abandoned workings in the area and in a belt 65 metres wide surrounding it :

Provided further that where the mortgagee is an institution or a Bank or a Corporation specified in Schedule V, it shall not be necessary for any such institution or Bank or Corporation to meet with the requirement relating to income tax:

Provided further that the lessee shall not charge or accept from the transferee any premium in addition to the sum spent by him, in obtaining the lease, and for conducting all or any of the operations referred to in Rule 30 in or over the land leased to him.

(3) The State Government may, by order in writing determine any lease at any time if the lessee has, in the opinion of the State Government, committed a breach of any of the provisions of sub-rule (1) (or sub-rule (1A) or has transferred any lease or any right, title, or interest therein otherwise than in accordance with sub-rule (2) :

Provided that no such order shall be made without giving the lessee a reasonable opportunity of stating his case."

Referring to the aforesaid provision Shri Rath, learned counsel for the appellant contended that the appellant who is the lessee in respect of the mines in question could not have entered into a contract, whereby it will or may be directly or indirectly financed to a substantial extent or under which its operations or undertakings will or may be substantially controlled by any person or body of person other than it. It was contended that while entering into the agreement with the respondent the appellant had lost sight of the aforesaid provision and when the appellant became conscious of the said provision and found that the agreement contravenes the aforesaid Rules, terminated the agreement.

Shri A.K. Parija, learned counsel appearing for the respondent, on the other hand, referred to the terms of the agreement and submitted that under the terms of the agreement the appellant continues to be owner of the mines and also continues to have control over the same. The respondent was only engaged as a raising contractor for the purpose of extraction/raising of ores from the said mines and deliver the same to the customers of the appellant for a period of 10 years with effect from 18-5-2003. Therefore, the respondent had neither ownership of the mines nor had any control over the same. Therefore, there has been no contravention of Rule 37 of the Rules as pleaded by the appellant. Shri Parija further submitted that since the agreement was not determinable, the appellant who intended to terminate the agreement took shelter of Rule 37 which has no application to the present case.

7. In order to find out the applicability of Rule 37 it is necessary to refer to some of the terms and conditions of the agreement executed between the parties on 14-5-2003. The intention of executing the said agreement is reflected in Clause 3 of the agreement under the heading "Whereas". The said clause runs as follows :

"OMM intends to appoint and ASL has agreed to undertake mining operations which includes excavation of manganese from the leasehold area on the terms and conditions hereinafter contained.

It further appears that the respondent was appointed for the above purpose with certain conditions. The clause dealing with appointment runs as follows :

"OMM hereby appoints ASL on exclusive basis to carry out mining operations in the leasehold area and excavate/extract and/ or remove manganese from leasehold area for and on behalf of OMM and to deliver the same to OMM/its customers for a period of ten years with effect from 18th May, 2003.

Plain reading of both the clauses clearly indicate that the respondent had been appointed under the agreement to undertake mining operations in the leasehold area on exclusive basis and was also required to excavate/extract and/or remove manganese from the leasehold area for and on behalf of the appellant and

deliver the same either to the appellant or to its customers for a period of ten years. Clause 2.4 under the heading "scope of work" runs as follows :

"OMM shall issue a Power of Attorney in favour of ASL authorizing them to undertake the said mining and raising operations giving them all necessary authorities for the conduct of said operations. Such Power of Attorney would be in subsistence till the pendency of this agreement."

The aforesaid clause supports the stand taken by Sri Parija, learned counsel appearing for the respondent that the respondent was only appointed as a raising contractor to excavate/extract and/or remove manganese from the leasehold area for and on behalf of the appellant. The agreement also provides quantity of ore the respondent is required to extract and remove each year as well as payment to be made for the aforesaid work for different grades of manganese. From all these terms and conditions, prima facie, it appears that the respondent had only been engaged as a raising contractor to operate the mines whereas ownership remains with the appellant as a leaseholder. So far as control over the leasehold area is concerned, all acts done by the respondent for the purpose of mining operation is for and on behalf of the appellant as is evident from "appointment" clause as well as Power of Attorney. In view of the above, control over the leasehold area also remains with the appellant. It also appears from the agreement that so far as sale of manganese ore is concerned, the respondent has also no control and same is to be delivered to the appellant or to its customers and the respondent is only entitled to get such amount depending upon the grade of manganese ore excavated. In view of the discussions made above, prima facie, there appears to be some force in the contention of the learned counsel for the respondent that Rule 37 of the Rules has no application to the present facts of the case.

Learned counsel appearing for the respondent in this connection relied upon decision of the Apex Court in the case of *Rustom Cavasjee Cooper Vs. Union of India (UOI)*, . Much reliance was placed by the learned counsel for the respondent on the observation made by the Apex Court in Para 175 of the judgment where the Apex Court has laid down the meaning of "undertaking" used in various statutes. Reliance was also placed on another decision of the Apex Court in the case of *Secretary, Madras Gymkhana Club Employees' Union Vs. Management of the Gymkhana Club*, . In the aforesaid decision also the term "undertaking" was defined as "any business or any work or project which one engages in or attempts as an enterprise analogous to business or trade".

Learned counsel appearing for the appellant relied upon a decision of the Apex Court in the case of *C.I.T., Punjab, Haryana, Jammu & Kashmir, Himachal Pradesh and Union Territory of Chandigarh v. Panipat Woolen and General Mills Co. Ltd., Chandigarh*, reported in AIR 1976 SC 640 wherein while analyzing Section 10 of the Contract Act the Apex Court observed that in order to construe an agreement the Court has to look to the substance or the essence of it rather than to its form. A party cannot escape the consequences of law merely by

describing an agreement in a particular form though in essence and in substance it may be a different transaction. A similar view taken by the Apex Court in the case of State of Gujarat (Commissioner of Sales Tax, Ahmedabad) Vs. Variety Body Builders, was also relied upon by the learned counsel for the appellant.

On reading of the aforesaid four decisions, I am of the view that the reported decisions have no direct bearing in the present case and question as to whether control over the mines remains with the appellant or has been transferred to the respondent will depend on the terms and conditions of the agreement, even though the respondent has been engaged as a raising contractor, ownership and control prima facie appear to be with the appellant and therefore Rule 37(1)(b) prima facie has no application to the facts of the present case. Shri Rath, learned counsel for the appellant referring to a decision of the Calcutta High Court in the case of Futuristic Steel Pvt. Ltd. v. Orissa Manganese and Minerals Pvt. Ltd. in A.P. No. 63 of 2004 disposed of on 21-5-2004 submitted that under similar circumstances the Calcutta High Court held that such a contract violates Rule 37 of the Mineral Concession Rules, 1960. On reading of the entire judgment I find that there is no discussion with regard to applicability, of the said provision and an observation has been made to the effect that the said Rule would also stand in the way to give effect to the agreement. Sri Rath also fairly submitted that though the point was raised, it was not discussed in the judgment and only the above observation was made. I am, therefore, of the view that the said judgment is of no assistance to the appellant.

8. Shri Rath, learned counsel appearing for the appellant also challenged the order passed by the learned District Judge, Sundargarh on the ground that under the provisions of the Specific Relief Act, 1963 no order of injunction could have been passed by the learned District Judge. Shri Rath drew attention of the Court to Section 14(1)(c) of the Specific Relief Act and submitted that the nature of contract being determinable same cannot be enforced u/s 14 of the Act and therefore the Court could not have granted an order of injunction. Reliance was placed by Sri Rath on Section 14(3)(c)(ii) of the Specific Relief Act and it was contended that loss, if any, to the respondent can be compensated and therefore the learned District Judge could not have granted injunction in favour of the respondent. In order to substantiate the grounds, Sri Rath submitted that if an agreement is executed between the parties contravening any statutory provision of law, the same is determinable and therefore Section 14 has full application to the facts of the case. According to Sri Rath, agreement executed between the parties violates or contravenes Rule 37 of the Rules and therefore it is determinable without referring to any of the clause of the agreement. It was also contended by Sri Rath that even accepting for sake of argument that due to termination of the contract the respondent sustained any loss, the same can be compensated and therefore no order of injunction could have been passed in favour of the respondent.

Shri Parija, learned counsel appearing for the respondent, on the other hand,

submitted that Rule 37 of the Rules has no application to the facts of the case and the agreement is determinable only on fulfilment of certain conditions and the occasion for the same never arose and as such the agreement is not determinable. It was also contended by Sri Parija that loss that may be sustained by the respondent, if the order of injunction is not granted, cannot be compensated and in this connection Sri Parija also drew attention of the Court to certain terms and conditions of the agreement.

9. I have already dealt with applicability of Rule 37 of the Rules and I am, prima facie, of the view that in the facts and circumstances of the present case said rule has no application. Only the clause under which the contract can be determined is Clause 8.2. Clause 8.1 of the agreement provides that initial term of the agreement shall be for a period of 10 years from the date the agreement is executed. It is further provided that the agreement may be renewed on such terms and conditions as may be mutually agreed to by the parties. Clause 8.2 deals with termination of agreement and runs as follows :

"In the event any of the terms and conditions of this Agreement are not complied with by any of the parties, the other party may terminate this Agreement by giving 90 days notice to remedy the breach to the defaulting party."

Referring to this clause Shri Parija, learned counsel appearing for the respondent contended that occasion for termination of the agreement never arose as no notice as required under the said clause to remedy breach, if any, had been given to the respondent at any point of time. Learned counsel for the appellant also does not dispute the said position. Said clause clearly provides that before termination of the agreement either party to the agreement may give 90 days notice to remedy the breach. Admittedly, neither party specifically the appellant has given any notice in terms of the said clause to remedy any breach and therefore as rightly submitted by Sri Parija, learned counsel appearing for the respondent, occasion for application of Clause 8.2 never arose. There is no other term in the agreement under which the same can be terminated. I have already held that prima facie Section 37 of the Rules has no application to the facts of the case and as is evident from Clause 8.2, the agreement is not determinable unless the condition therein is fulfilled. I am, therefore of the view that Section 14(1) (c) has also no application to the facts of the present case.

Though Sri Rath, learned counsel appearing for the appellant in this connection has produced Xerox copies of several judgments before the trial Court, at the time of hearing of this appeal before this Court he also relied on a decision of this Court in the case of Bhumihway DDB Ltd. (JV) v. National Highway Authority of India in ARBA No. 5 of 2004 disposed of on 2-11-2004. Relying on the said decisions it was contended by Sri Rath that if the agreement can be determined at the instance by either party, such agreement cannot be enforced u/s 14(1)(c) of the Specific Relief Act. In the case of Bhumihway DDB Ltd. (JV) v. National Highway Authority of India, agreement was executed between the parties and Clause 75 of the said agreement provided that the employer shall be entitled to

terminate contract at any time for the employer's convenience after giving 56 days" prior notice to the contractor with a copy to the engineer. Bare perusal of the said clause clearly indicates that termination of the contract did not depend happening of any event and the employer was entitled to terminate contract at any time for its convenience after giving 56 days notice. In view of such nature of agreement the Court was of the view that the contract was determinable. So far as the present case is concerned, as discussed earlier, Clause 8.2 provides that only in the event any terms and conditions of the agreement are not complied with by any of the parties, either party may terminate the agreement by giving 90 days" notice to remedy the breach of the defaulting party. Therefore, it is clear that in the event any terms and conditions of the agreement are violated by any of the parties to the agreement, it will be open for either party to give 90 days" notice to remedy the breach, only in the event either party fails to remedy the breach, the agreement can be terminated. Therefore, it cannot be said that the agreement is determinable at the instance of either party. In perusal of the other decisions cited it is found that either the facts of those cases are different or are more or less similar to the case of Bumihiway DDB Ltd. (JV) v. National Highway Authority of India (supra).

10. Shri Rath, teamed counsel appearing for the appellant also challenged the order of injunction passed by the trial Court on the ground that the loss, if any, the respondent may sustain can be compensated in terms of money and therefore no order of injunction could be passed in view of Section 14(3)(c) of the Specific Relief Act. It was contended by Sri Rath referring to Annexure-A of the agreement that the respondent is entitled to Rs. 3800/- per M.T. against the best grade of manganese ore and therefore even if it is accepted that the respondent could extract and remove best grade manganese ore from the beginning till end, loss if any, could be calculated in terms of money and compensated. Sri Parija, learned counsel for the respondent, on the other hand, submitted that the mining operation had just started and it is not possible to know as to the grade of manganese ore that may be extracted at different levels and different rates having been prescribed for different grades, it will be an impossible task to calculate the exact loss the respondent may sustain if it is not allowed to operate the mines as per the terms of contract.

11. Clause 4(d) of the agreement provides that minimum quantity of manganese ore to be extracted by the respondent each year for a period of ten years. Annexure-A to the agreement provides the rates at which the respondent is to be paid depending on grade of manganese ore extracted. True it is that under Clause 4(d) of the agreement the minimum quantities have been prescribed and if calculation is made at the rate agreed for best quality of manganese ore, the minimum quantity of ore if extracted by the respondent in each year can be calculated in terms of money.

Apart from the above, as is evident from the application filed u/s 9 of the Act it is clear that the respondent has been able to quantify the amount of loss sustained

by it for a particular period. Para 29 of the application u/s 9 of the Act runs as follows :

"That as a consequence of the aforesaid illegal and arbitrary termination of the agreement dated 14-5-2003, the petitioner-company has been visited with the following evil and civil consequences :

- a) Appointed about 300 labourers and about 40 staff on permanent basis costing about Rs. 3 lakhs/months.
- b) Purchased equipments and heavy Earth moving machineries were Rs. 2.5 crores.
- c) Undertook massive development of mines in scientific manner to expose large quantities of manganese ore 4,45,000 cubic meter of over burden removed at a cost of Rs. 1.8 crores.
- d) Purchases of tools, tackles, drill, rods, spares, lubricants and other consumables were Rs. 1.00 crores.
- e) Only 3375 MT of manganese ore produced in 7 months, valued at about Rs. 30 lakhs only whereas most of the expenditure for development to expose the manganese ore roughly Rs. 40 crores due to development and same is ready to be raised and dispatched."

It is clear that from the aforesaid that the respondent has been able to quantify the loss sustained by it till the application was filed before the learned District Judge, Sundargarh. It is, therefore, difficult to accept the contention of Sri Parija that loss, if any, that may be sustained by the respondent cannot be calculated in terms of money. In view of the above, Section 14(3)(c) of the Specific Relief Act stands on the way of the respondent in getting an order of injunction.

12. From the discussions made above, I am of the view that the respondent has a prima facie case against termination of the contract on the ground that it contravenes Rule 37 of the Rules. Balance of convenience also lies in favour of the respondent since it has already taken possession of the mines and has put its machineries, workmen for operation of the mines. So far as irreparable loss is concerned, it appears that the respondent has not been able to prove that the loss that may be sustained by it due to termination of the agreement cannot be compensated in terms of money. I am, therefore, of the view that the respondent having failed to prove one of the essential ingredients for grant of injunction, the order passed by the trial Court is liable to be set aside. Apart from the above, much reliance was placed by the learned counsel for the appellant on Section 73 of the Indian Contract Act to show that when a contract is broken the party who suffers breach is entitled to receive, from the party who has broken the contract, compensation of any loss or damage caused to him. In view of the above provision there cannot be any dispute that for any breach of contract, the respondent who claims to have suffered is entitled to receive from the appellant compensation for any loss or damage and such loss or damage can be decided

by the Arbitrator in view of the arbitration clause.

13. So far as fourth ground taken by Sri Rath, learned counsel appearing for the appellant is concerned, it loses its relevance and importance in view of the finding arrived at above.

14. In view of the discussions above, the appeal is allowed and the impugned order is set aside. In the circumstances, there shall be no order as to, costs.