
(2009) 12 OHC CK 0019
In the Orissa High Court

Presidency Exports and Industries Ltd. APPELLANT
Vs
E. Shipping Private Ltd. and Others RESPONDENT

Date of Decision : 22-12-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9

Citation : (2010) 1 OLR 867

Hon'ble Judges : R.N. Biswal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

R.N. Biswal, J.—In this appeal, the appellant challenged the order dated 11.11.2009 passed by the District Judge-in-Charge, Cuttack in ARBP No. 207 of 2009, wherein he ordered that status quo in respect of the cargo as on the date of the order, be maintained by both the parties till appearance of the opp.parties.

2. Opp party No. 1 herein was the petitioner, appellant was the opp.party No. 2, respondent No. 2 was the opp.party No. 1 and respondent No. 3 was the opp.party No. 3 in the Court below. The petitioner is a private limited company registered in Singapore and is engaged in the business in shipping, ship chartering and ship brokering. It filed a petition u/s 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 1996 Act) giving rise to the aforesaid case before the District Judge, Cuttack with prayer to injunct the opposite parties from removing 17,532 M.T. of iron ore fines stored at site "site for N/S. I.O.C.L. Outlet" a specified location at Paradip Port in order to secure its dues and claims against opp.party No. 1.

3. As per the case of the petitioner in November, 2007, through its parent company, M/s. Acemark Ventures INC, it Chartered, a 1984 built bulk carrier, later renamed as MV SAHAR from its owners, Bridge Navigation Limited, Republic of Malta and was engaged in shipping of prescribed bulk cargo to different parts of the world as a despondent owner of the vessel. On 28.7.2009, vide a Fixture

Note signed between the petitioner and opp.party No. 1, i.e., Voyage Charterer, the petitioner sub-chartered the bulk carrier to perform a single Voyage. According to Fixture Note, MV Sahar was to load bulk iron ore from Haldia and Visakapatnam or Paradip and was to discharge the said cargo at any of the designated ports in China. According to the stowage plan of the vessel, she was to load 17532 of M.T. of iron ore fines at Haldia Port by contracted shipper, opp.party No. 2 and was to top up the vessel with additional cargo at Paradip Port by different shippers to take the total load up to 40,000 M.T. iron ore fines. The vessel, reached at Haldia Port on 11th August, 2009 and the loading of 17532 M.T. of iron ore fines on it was completed on 10.9.2009. Thereafter, the Master of the vessel was given a certificate of analysis of cargo loaded on behalf of Charterer and shipper, the 1st and 2nd opp.parties. The certificate was issued by the Cargo Superintendents and Surveyors of opp.party Nos. 1 and 2, M/s. Therapeutics Chemical Research Corporation (TCRC), Haldia and represented that the moisture content of the cargo loaded was on average 7.04%. On 10.9.2009 itself, the vessel MV SAHAR sailed from Haldia and arrived at Paradip Anchorage on the next date. It was berthed at Paradip Port on 16.9.2009. Then, loading of additional cargo for another shipper commenced. In course of loading, the Chief of M.V. SAHAR observed puddles of free water on the Haldia cargo and as such sought the assistance of J.B. Boda Surveyors. On observing water on the top of the cargo and its liquefied state, further loading was stopped. Unfortunately, by the time the condition of the cargo was known, about 700 M.T. of cargo of another shipper, M/s. Orecast India Private Limited had already been loaded on top of the Haldia cargo. On analysis it was found that Haldia cargo had moisture content in excess of the flow of the moisture point of the cargo, which was unfit for shipment. The dangerous condition of the cargo loaded at Haldia was reported by the Master of the ship to the petitioner, Voyage Charterer and shipper. On request opp.party No. 3 vide its letter dated 9.10.2009 directed the Additional Traffic Manager to allot 2000 square meters of storage land to opp.party No. 2 for temporary storage of the Haldia cargo. Accordingly, on allotment being made, the cargo was stored there. It is the case of the petitioner that due to the mishandling, negligence and malicious act of opp.party Nos. 1 and 2 in loading the dangerous iron ore fines on the vessel at Haldia Port, it was held up at Paradip Port for nearly two months causing huge losses to the petitioner.

4. As per Clause-22 of the Fixture Note, the present claim is to be covered in the arbitration proceeding to be instituted at Singapore International Arbitration Centre as per English laws, but the jurisdiction of the Courts of India having neither been expressly or impliedly excluded the provision of Part-1 of 1996 Act shall apply to such International Commercial Arbitration.

5. Apprehending that opp.party Nos. 1 and 2 would remove the Haldia Cargo weighing 17532 M.T. of iron ore fines without paying its dues the petitioner filed the proceeding u/s 9 of 1996 Act with the following prayers:

(i) Injunct the opp.parties from removing/re-shipping the subjected cargo of 17532 MT of Iron ore fines, presently stored at Paradip Port at "Site for N/S. I.O.C.L. Outlet"; and /or

(ii) Direct re-storage of the aforesaid cargo at a safe and convenient location at Paradip Port, if necessary, at the cost of the petitioner; and/or

(iii) Pass any further appropriate order/directions as this Hon"ble Court thinks fit and proper for the ends of justice;

6. After hearing learned Counsel for the parties and considering the urgency of the matter, in absence of the District Judge, the District Judge-in-Charge before issuing notice to the opp.parties therein passed the order of status quo as stated above. Being aggrieved with the said order, opp.party No. 1 in the Court below preferred the present appeal.

7. Mr. Rath, learned Senior counsel appearing for the appellant submitted that the District Judge-in-Charge, Cuttack was not competent to entertain the application u/s 9 of 1996 Act. It is only the principal Court of the District, who can entertain such a petition. He further submitted that there was no contract/arbitration agreement between the appellant and respondents as defined u/s 7 of 1996 Act. In absence of an arbitration agreement between the parties, application u/s 9 of 1996 Act was not maintainable. In support of his last submission he relied on several decision including the decisions in the case of S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, ; Sandeep Kumar and Others Vs. Master Ritesh and Others, and Atul Singh and Others Vs. Sunil Kumar Singh and Others, . He further submitted that since the parties to the agreement were foreign companies and as per the agreement Arbitration proceedings were to be held at Singapore, that too in accordance with English laws, the jurisdiction of the Indian Courts was ousted. In support of his submission, he relied on the decision in the case of Aurohill Global Commodities Ltd. Vs. M.S.T.C. Ltd., . At last learned Counsel for the appellant submitted that on the request made by the appellant, the Traffic Department of respondent No. 3 permitted it to discharge the cargo at Paradip for further transshipment and allowed a plot of 2000 square meters for temporary storage. Respondent No. 3 instructed the appellant through M/s. Roy and Chatterjee (P) Ltd. to take immediate step for deposit of Port charges such as Wharfage, Port rent etc. Accordingly, the appellant deposited the port dues to the tune of Rs. 13,92,435/-. If the appellant is not allowed to remove the cargo, he would be saddled with Wharfage, Port charge etc. for an unlimited period. On all those grounds learned Counsel for the appellant prayed to allow the appeal.

8. At the out set Mr. Bijan Ray, learned senior counsel appearing for respondent No. 1 submitted that the impugned order being an ad interim one, appeal could not lie against it. According to him as per Section 37 of 1996 Act, appeal can lie only against the final order passed under the said Act. At this stage it would be prudent to quote Section 37 (1) of 1996 Act, which reads as follows:

37. Appealable order - (1) An appeal shall lie from the following orders (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order, namely:

(a) granting or refusing to grant any measure u/s 9;

(b) setting aside or refusing to set aside an arbitral award u/s 34.

(2) An appeal shall also lie to a Court from an order of the arbitral tribunal:

(a) accepting the plea referred to in Sub-section (2) or Sub-section (3) of Section 16; or

(b) granting or refusing to grant an interim measure u/s 17.

(3) No second appeal shall lie from an order passed in appeal under this Section, but nothing in this Section shall affect or take away any right to appeal to the Supreme Court.

This Section stipulates that appeal can lie against granting or refusing to grant any measure u/s 9. It would be profitable to quote Section 9 of the 1996 Act which reads as follows:

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.

In the present case, the prayer of the petitioner in the Court below was to injunct the opposite parties from removing/re-shipping the cargo in question stored at Paradip Port. In the impugned order and ad-interim order of status quo in respect of the said cargo was passed. The provisions quoted above do not envisage that appeal can lie only against the final order passed u/s 9 of the Act. Accordingly, it is held that the appeal is maintainable.

9. Mr. Bijan Roy, learned senior counsel for respondent No. 1, next contended that Section 7 of the Orissa Civil Courts Act, 1994 enjoined that an Addl. District Judge can be kept in charge of the District Judge under the circumstances mentioned in that section. Sub-Section 2 of Section 7 lays down that while in charge of the office of District Judge, the Addl. District Judge may subject to any Rules, which the High Court may make in that behalf, exercise any of the powers of the District Judge. So, it cannot be said that the Addl. District Judge in charge of District Judge, Cuttack had no power to pass the order under challenge. He next contended that as found from the documents like Bill of Lading, Mate Receipt etc. the appellant volunteered to be bound by the arbitration clause. So, it cannot be said that it was not a party to the arbitration agreement. According to him respondent No. 1 being the disponet owner of the cargo can claim lien over the cargo till it gets its dues. At last, learned Counsel for the respondent submitted that Sub-section 2 of Section 2 of 1996 Act did not restrict application of the said statute to the International Commercial Arbitration. Hence he prayed to dismiss the appeal.

10. As per Section 9 of 1996 act, a party can apply for interim relief to any Court. As defined u/s (2) (e) of the said Act, "Court" means the principal Civil Court of original jurisdiction in a District. Again as per Section 2(2) the Orissa Civil Courts Act, the Court of the District Judge is the principal Court of the original civil jurisdiction of the District. As per the explanation "District Judge" shall include Additional District Judge. Section 7 of Orissa Civil Courts Act, 1984 reads as follows:

7. Temporary charge of District Courts:

(1) In the event of the death, resignation, removal or transfer of a District Judge, or of his being incapacitated by illness or otherwise for the performance of his duties, or of his absence from the place at which his Court is held and unless any other arrangement has been made by the High Court, the Addl. District Judge or if an Additional District Judge is not present at that place, the senior most judicial officer exercising civil power present and available there at, shall, without relinquishing his ordinary duties, assume charge of the office of the District Judge and shall continue in charge thereof until the office is resumed by the District Judge, or assumed by an officer appointed thereto.

(2) While in charge of the office of the District Judge, the Additional District Judge or the senior most judicial officer exercising civil powers, as the case may

be, may, subject to any rules which the High Court may make in this behalf, exercise any of the powers of the District Judge.

So, as per this provision, an Additional District Judge in charge of District Judge can exercise any of the powers of the District Judge subject to any Rules made by the High Court. In this context, it would be prudent to quote Rule 553 of G.R. & C.O. (Civil) Volume-1, which reads as follows

553. Passing interim judicial orders in urgent matters by the Officer in-charge of District Judge- Whenever an Additional District Judge or a Senior most Judicial Officer exercising civil powers assumes charge of the office of the District Judge under Sub-section(2) of Section 7 of the Orissa Civil Courts Act, 1984 (Act of 1984) he may while in-charge of such office, pass interim judicial orders in any urgent civil matter arising out of or relating to the case on the file of the District Judge:

Provided that such powers shall not be exercised in matters relating to the exclusive jurisdiction of district Judge under special enactments:

Provided further that while passing such order, the Additional District Judge or the Senior most judicial officer exercising civil powers as the case may be, shall direct that the same shall be put up for final order before the District Judge, immediately on the letter's resuming or assuming charge of the office and the District Judge may thereupon pass such orders as he may consider necessary.

11. The 1996 Act is a special enactment. The District Judge has exclusive jurisdiction to deal with the case under that Act. So, the Addl. District Judge, even though he was in-charge of the District Judge, Cuttack can not exercise power in respect of 1996 Act. Accordingly, the impugned order passed by learned Additional District Judge, as District Judge-in-charge of Cuttack cannot stand. It would not be wise to give findings in the other points raised by learned Counsel for the parties, lest the same may influence the District Judge, Cuttack if a similar petition is filed before it or the Arbitrator to be appointed or already appointed.

Accordingly, the appeal is allowed and the impugned order is set aside. No costs.