
(2006) 02 AP CK 0058
In the Andhra Pradesh High Court
Case No : C.M.A.NO. 1195 of 2005

Sai Priya Construction Company

APPELLANT

Vs

K. Anantha Kumari Satya Raju and Another

RESPONDENT

Date of Decision : 08-02-2006

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 14, 14(1), 14(2), 15

Citation : (2006) 2 ALT 70 : (2006) 1 ARBLR 569

Hon'ble Judges : D.S.R. Varma, J;B. Seshasayana Reddy, J

Bench : Division Bench

Advocate : K. Ananda Rao, for the Appellant; C. Ramachandra Raju and C. Balagopal, for the Respondent

Judgement

D.S.R. Varma, J.—Heard both sides.

2. Though the matter is listed under the caption "Interlocutory", with the consent of both the learned Counsel, the Civil Miscellaneous Appeal itself is disposed of by this judgment.

3. The present Civil Miscellaneous Appeal, u/s 37 of the Arbitration and Conciliation Act, 1996 (for brevity "the Act"), is directed against the order, dt. 11-7-2005, passed by the XII Additional Chief Judge, City Civil Court, Hyderabad (Fast Track Court), dismissing the Arbitration O.P.No. 1031 of 2003 as not maintainable.

4. The appellant is the builder and the respondents are the owners of disputed property.

5. For the sake of convenience, in this judgment, the appellant and the respondents will be referred to as "the builder" and "the owners" respectively.

6. The backdrop, in brief, appears to be that there was an agreement between the builder and the owners to develop the land of the owners bearing Plot Nos.5 and 6, situated at Chikoti Gardens, Hyderabad. The said agreement is dated

25-1-12001. Later, the owners cancelled the agreement on 18-7-2002, and the builder was informed of the same by way of a notice on 27-7-2002. Aggrieved thereby, the builder invoked the arbitration clause incorporated under the agreement and nominated an arbitrator on 26-4-2003. The owners also nominated an arbitrator of their choice on 27-5-2003. Subsequently, when the property under dispute was likely to be alienated to third parties, the builder filed the said O.P., u/s 9 of the Act and obtained ad interim injunction on 1 -5-2003, which was eventually dismissed on 1 -7-2005 through the impugned order. Hence, the present Civil Miscellaneous Appeal.

7. A perusal of the impugned order reveals that the said O.P., was dismissed on the ground that the same is not maintainable. In order to arrive at this conclusion, the Court below relied on some judgments of other High Courts as well as the apex Court.

8. Learned Counsel for the builder contends that the Court below was in error in holding that the said O.P., was not maintainable, following the judgment relied on by the owners.

9. On the other hand, it is the contention of the learned Counsel for the owners that the builder did not take steps within reasonable time. It is his further contention that when the arbitrators were appointed by both parties in the year 2003 and when no umpire was appointed by the said arbitrators, no steps have been taken by the builder within reasonable time, as contemplated under law. It is his further contention that having obtained ad interim injunction on 1-5-2003, no steps at least have been taken by the builder after 1-5-2003 i.e., the date on which the Court below granted ad interim injunction. Therefore, it is the contention of the learned Counsel for the owners that reasonable time cannot be extended too long.

10. In the light of the above contentions, the only question that falls for consideration is as to whether the Court below was justified in dismissing the said O.P., as not maintainable?

11. The Court below dismissed the said O.P., mainly on two grounds firstly the said O.P., was not maintainable in the light of the judgment of the Gauhati High Court in Archcon and Others Vs. Sewda Const. Co. and Others, , and secondly the builder did not take any steps to have the umpire appointed by the nominated arbitrators when they failed to do so.

12. In this regard, as could be seen from the very opening words of Section 9 of the Act, it is obvious that Section 9 of the Act was intended to have interim measures etc by the Court. The very expression "interim measures" denotes that they cannot and shall not, be treated as permanent measures.

13. In other words, in an application filed u/s 9 of the Act, no orders of permanent nature can be passed. Further, it is clear that the aggrieved party may invoke the jurisdiction of the Court u/s 9 of the Act before orduring arbitral

proceedings or at any time after making of the arbitral award, but before it is enforced. In addition to the language, referred to supra, u/s 9 of the Act, a Division Bench of this Court in INCOMM Tele Limited (Formerly ARM Limited) Vs. Bharat Sanchar Nigam Limited and Others, held that an application u/s 9 of the Act before commencement of the arbitral proceedings is maintainable. Therefore, the reasoning recorded by the Court below that the said O.P., filed by the builder u/s 9 of the Act is not maintainable is, in our considered view, not a right decision and, accordingly, cannot be sustained.

14. Coming to the other aspect, i.e., the observations and consequential findings recorded by the Court below that no steps have been taken by the builder to have the umpire appointed under the law is concerned, it is represented by the learned Counsel appearing for the builder that very recently steps have been taken by way of making an application before this Court u/s 11(6) of the Act, which is admittedly yet to be registered. Further, as per Section 43 of the Act, which deals with limitation, the Limitation Act, 1963 (Act 36 of 1963) shall apply to the arbitration proceedings. It is further indicated in the above provision that the arbitration proceedings are deemed to have commenced, as referred to in Section 21 of the Act. Hence, it is necessary to refer to Section 21 of the Act, which is extracted hereunder, for ready reference:-

21. Commencement of arbitral proceedings:

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

15. It is obvious from the provision of Section 21 of the Act that the arbitral proceedings must be deemed to have commenced from the date on which a request for the dispute to refer to arbitration is received by the owners.

16. Sub-section (3) of Section 43 of the Act further makes it clear that even in cases where limitation had expired, if it is felt by the Court that it is just in the facts and circumstances of the case and if interests of justice so require, the Court may extend the time as it thinks proper.

17. The fact on record, which is not in dispute, is that when disputes cropped up, the builder wanted the owners to have an Arbitrator appointed, as contemplated under the arbitration clause of the Agreement. While asking so, an Arbitrator was nominated by the builder. Therefore, from both sides, Arbitrators were appointed, as envisaged under the arbitration clause of the Agreement. The said appointments of the Arbitrators, by both sides, had taken place on 26-4-2003 and 27-5-2003, respectively. But, both the Arbitrators did not proceed further.

18. Such a contingency would fall within the ambit of Sub-section (1) of Section 14 of the Act. For convenience, Section 14 of the Act is extracted, to the extent relevant, which runs thus:

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) ...

19. From the provisions of Section 14 of the Act, it is abundantly clear that the mandate of an Arbitrator or Arbitrators shall terminate in two situations. Firstly when he or they failed to perform his or their functions, or for other reasons failed to act without undue delay, secondly when the Arbitrator or Arbitrators withdraw from the office. The present situation, as already pointed out, falls within the four corners of Clause (a) of Sub-section (1) of Section 14 of the Act, inasmuch as the Arbitrators failed to perform their duties without undue delay. As already noticed, the Arbitrators were appointed in the months of April and May, 2003.

20. In that event, what should follow- is the question. The answer is, available in Sub-section (2) of Section 14 of the Act, which makes it clear that, in the event aforementioned, either of the party may apply to the Court to decide on the termination of the mandate and, consequently, the mandate of an Arbitrator or Arbitrators may get terminated, and substitute Arbitrator or Arbitrator may be appointed, as envisaged u/s 15 of the Act.

21. That a part, the Court below had made a reference of the decision rendered by the apex Court in Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., . In the said decision, Their Lordships of the apex Court, while dealing with the scope of Section 9 of the Act, held that the expression "interim relief" that is sought for by a party, or granted by the Court, shall fall within the meaning of the expression "an interim measure of protection." Their Lordships clarified that there is clear distinction between "permanent protection" and "interim protection."

22. Their Lordships of the apex Court further observed:

...the party invoking Section 9 may not have actually commenced the arbitral proceedings but must be able to satisfy the Court that the arbitral proceedings are actually contemplated or manifestly intended and are positively going to commence within a reasonable time. What is a reasonable time will depend on the facts and circumstances of each case and the nature of interim relief sought for would itself give an indication thereof. The distance of time must not be such as would destroy the proximity of relationship of the two events between which it

exists and elapses.

23. It was further observed by Their Lordships, with caution:

If arbitral proceedings are not commenced within a reasonable time of an order u/s 9, the relationship between the order u/s 9 and the arbitral proceedings would stand snapped and the relief allowed to the party shall cease to be an order made "before" i.e., in contemplation of arbitral proceedings.

24. From the above, it is abundantly clear that the relief, which was granted, as an interim protection, shall remain as an interim measure only but shall not be allowed to continue to an unreasonable extent and as such, the arbitral proceedings shall commence within a reasonable period from the date of the order passed u/s 9 of the Act. It is further obvious that if the said arbitral proceedings, as contemplated under the agreement, did not commence within a reasonable period from the date of the interim order passed u/s 9 of the Act, the relationship between the order passed u/s 9 of the Act and the actual arbitral proceedings would cease and the order can no longer be treated as the one passed "before" the arbitral proceedings. What is the reasonable period for the commencement of arbitral proceedings from the date of passing of interim order u/s 9 of the Act would depend upon the facts and circumstances of each case.

25. In other words, the orders passed u/s 9 of the Act being temporary in nature would remain as temporary and wither away by lapse of time, if it is unreasonable.

26. In this regard, Their Lordships of the apex Court further observed as under:

What is a reasonable time will depend on the facts and circumstances of each case and the nature of interim relief sought for would itself give an indication thereof. The distance of time must not be such as would destroy the proximity of relationship of the two events between which it exists and elapses.

27. Their Lordships of the apex Court further observed:

The Court may also while passing an order u/s 9 put the party on terms and may recall the order if the party commits breach of the terms.

28. Eventually, Their Lordships of the apex Court, having regard to the facts and circumstances of that particular case, since the High Court of Madhya Pradesh was convinced of the need for appointment of a Receiver, modified the order passed by the High Court of Madhya Pradesh, by directing the applicant therein to take steps u/s 9 of the Act for appointment of arbitrator/s without any further loss of time.

29. In the present case, it is needless to say that the parties are not satisfied with the performance of the arbitrators, in which case they may take steps as contemplated under law and as indicated in the earlier paragraphs.

30. Therefore, we are of the considered view that the reasoning assigned by the

Court below is erroneous.

31. Further, the decision rendered by a learned single Judge of Gauhati High Court in Archcon's case (1 supra) also, with great respect, cannot be made applicable to this case, in view of the judgment rendered by a Division Bench of this Court in Incomm Tele Ltd.'s case (2 supra) as also the decision rendered by the apex Court in Firm Ashok Traders' case (3 supra).

32. For the foregoing reasons, and having regard to the peculiar facts and circumstances of this case, as referred to above, the reasoning given by the Court below, in our considered view, is erroneous and the same is liable to be set aside and accordingly set aside. Original Petition No. 1031 of 2003 is restored to the file of the Court below to its original number, with a direction to dispose of the same in accordance with law, uninfluenced by any observations made by this Court in this judgment. We further make it explicitly clear that we have not expressed any opinion on the merits of the matter.

33. With the above observations and directions, the Civil Miscellaneous Appeal is disposed of. However, there shall be no order as to costs. The Court below shall dispose of O.P.No. 1031 of 2003, with utmost expedition, in any event within four weeks from the date of receipt a copy of this judgment.

34. In the mean while, status quo, obtaining as on today, for all purposes, and in all respects shall be maintained by both parties.

35. Both parties are directed to be present along with their respective counsel before the Court below on 18-2-2006, on which date, the Court below shall fix a date to proceed with the matter, as directed by this Court.