
(2009) 07 GAU CK 0022

In the Gauhati High Court

Case No : Regular First Appeal No. 5 of 2008

State of Mizoram and Others

APPELLANT

Vs

Bhagheeratha Engineering Ltd.

RESPONDENT

Date of Decision : 30-07-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Civil Procedure Code, 1908 (CPC) — Section 11

Citation : (2010) 1 GLD 155 : (2009) 5 GLT 475

Hon'ble Judges : H. Baruah, J

Bench : Single Bench

Final Decision : Allowed

Judgement

H. Baruah, J.—In challenge is the order dated 7.7.2008 passed by District Judge, Aizawl in connection with post Arbitration Case No. 7 of 2007 whereby and whereunder the petitioner had been allowed to utilize and dispose of the plant and machineries as they wish.

2. Bhagheeratha Engineering Ltd., the respondent herein in joint venture with Ashoka Buildcon Ltd., Nasik signed contract agreement with Engineering-in-chief, PWD, Government of Mizoram on 28.3.2002 for improvement and up-gradation of Aizawl-Thenzawl-Lunglei Road, Phase-I. According to joint venture agreement, the joint venture members are jointly and severally responsible and liable to the employer for the performance of the contract. The employer terminated the contract under Clause 63.1 of the agreement on June 15, 2005 due to slow progress and also unauthorized sub-contracting of major portion of the works in violation of Clause 4.1. The employer, State of Mizoram, the appellant herein invoked contractor's bank guarantees for performance security.

3. Aggrieved thereby the contractor filed WP(C) No. 71 of 2005 before this Court with a prayer for suspension of employer termination notice. This Court by its judgment dated 22.7.2005 directed the parties to refer the dispute to the Dispute Review Board (for short DRB) as contemplated in the relevant provision

of GCC and COPA and further directed the parties to maintain status quo with regard to plants and machinery equipments etc. at the site. The dispute was referred to DRB on 22.8.2005. It disposed of the matter and submitted recommendations in favour of the employer on 17.10.2005. In the meantime, the respondent approached the Court of Deputy Commissioner, Aizawl in the month of October, 2005 and filed an application u/s 9 of the Arbitration and Conciliation Act, 1996 which was registered as Misc. Arbitration Case No. 47 of 2005. The learned ADM0) by his order dated 28.2.2006 directed the parties to maintain status quo with regard to plant and machineries and the amount of bank guarantees invoked till entire dispute is adjudicated by the arbitrators. Respondent referred the dispute to arbitration in March, 2006 which still awaits a decision from the arbitrators. After referring the dispute to arbitration the respondent again filed another application u/s 9 of the Arbitration and Conciliation Act, 1996 before the District Judge, Aizawl. On filing of this application the District Judge vide impugned order in derogation of the earlier order dated 28.2.2006 allowed the petition with a liberty to the petitioner to utilize and dispose of the plants and machineries at their sweet will which prompted the present appellant to prefer this appeal seeking setting aside of the impugned order dated 7.7.2008.

4. We have heard Mr. A.K. Roy, learned Counsel for the appellants and Mr. Ricky Gurung, learned Counsel for the respondent.

5. Mr. A.K. Roy, learned Counsel for the petitioner has challenged this impugned order only on three points (1) that impugned order is hit by principle of res judicata, (2) that it is hit by estoppel and waiver and (3) that it is violative of principle of Comity of Courts. In regard to the first point it was argued by Mr. A.K. Roy that impugned order is hit by principle of res judicata inasmuch as the issue raised in the application u/s 9 of the Arbitration and Conciliation Act, 1996 which warranted the impugned order was finally decided between the parties by another order passed in connection with an application u/s 9 of the Arbitration and Conciliation Act 1996. The learned District Judge while passing the impugned order failed to appreciate that the subsequent application u/s 9 of the Arbitration and Conciliation Act, 1996 is barred by principle of res judicata. The order dated 28.2.2006 passed on the basis of an application u/s 9 of the Arbitration and Conciliation Act 1996 filed by the respondent had become final and binding on the parties and on this ground alone the subsequent petition filed by the respondent under the same provisions of the law against the appellant should have been dismissed by the learned District Judge. By the order dated 28.2.2006 the parties are directed to maintain status quo in respect of the plants and machineries. No appeal was preferred and the order attained finality. In the previous and the present proceeding the parties are same and the issue is also same. The issue having been decided by a Court finally in between the same parties, the same issue cannot be decided again by a Court of competent jurisdiction in between the same parties. Mr. A.K. Roy, learned Counsel for the appellant, therefore, urged this Court to set aside the impugned order on the

ground that the same is hit by principle of res judicata. Mr. A.K. Roy in support of his contention relied in the ratio laid down in the following cases:

1. Swamy Atmananda and Others Vs. Sri Ramakrishna Tapovanam and Others,
2. Ganpat Singh (Dead) by Lrs. Vs. Kailash Shankar and Others,
3. Narayana Prabhu Venkateswara Prabhu Vs. Narayana Prabhu Krishna Prabhu (Dead) by L. Rs.,

In the case between Swami Atmananda and Ors. v. Ramkrishna Tapovanam and Ors. (supra) their Lordship's of the Hon"ble Supreme Court in paragraph 26, 27 and 28 of the judgment observed as under:

26. The object and purport of the principle of res judicata as contended in Section 11 of the CPC is to uphold the rule of conclusiveness of judgment, as to the points decided earlier of fact, or of law, or of fact and law, in every subsequent suit between the same parties. Once the matter which was the subject-matter of lis stood determined by a competent Court, no party thereafter can be permitted to reopen it in a subsequent litigation. Such a rule was brought into the statute-book with a view to bring the litigation to an end so that the other side may not be put to harassment.

27. The principle of res judicata envisages that a judgment of a Court of concurrent jurisdiction directly upon a point would create a bar as regards a plea, between the same parties in some other matter in another Court, where the said plea seeks to raise afresh the very point that was determined in the earlier judgment.

28. The doctrine of res judicata is conceived not only in larger public interest which requires that all litigation must, sooner than later, come to an end but is also founded on equity, justice and good conscience.

Again in the case between Narayan Prabhu Venkateswara Prabhu v. Narayan Prabhu Krishna Prabhu, (supra) their Lordships" of the Hon"ble Supreme Court in paragraph 20 of the judgment observed as under:

20. We think that the submission made by the learned Counsel for the respondents is sound. In a partition suit each party claiming that the property is joint, asserts a right and litigates under a title which is common to others who make identical claims. If that very issue is litigated in another suit and decided we do not see why the others making the same claim cannot be held to be claiming a right "in common for themselves and others". Each of them can be deemed, by reason of Explanation VI, to represent all those nature of whose claims and interests are common or identical. If we were to hold otherwise, it would necessarily mean that there would be two inconsistent decrees. One of the tests in deciding whether the doctrine of res judicata applies to a particular case or not is to determine whether two inconsistent decrees will come into existence if it is not applied. We think this will be the case here.

In the aforesaid judgments rendered in the cases (supra) their Lordships" of the Supreme Court clearly indicated the object and purport of the principle of res judicata as contained in Section 11 of the CPC. The Parliament by incorporating Section 11 in the Code intended to uphold the rule of conclusiveness and issue decided in a suit between same parties which attains finality cannot be decided in a subsequent suit between the same parties. The respondent herein having been filed an application u/s 9 of the Arbitration and Conciliation Act, 1996 urged the Court to pass appropriate order in respect of plant and machineries in view of the facts in their favour by the Court by an order dated 28.2.2006 directed the parties to maintain status quo in respect of the plants and machineries. The respondent and the appellants were the parties to the said proceeding. The respondent again approached the Court of District Judge, Aizawl with an application u/s 9 of the Arbitration and Conciliation Act, 1996 for the same subject-matter after the referral of the dispute to the arbitrators. The District Judge by impugned order allowed the petitioner to utilize and dispose of the plants and machineries at the petitioners' sweet will which caused dissatisfaction to the present appellant. It is also found from the records that against the order dated 28.2.2006, no appeal was filed, therefore the order dated 28.2.2006 passed by the learned ADM(J) becomes final and in view of that the subsequent proceeding u/s 9 of the Arbitration and Conciliation Act, 1996 between the same parties in respect of the same subject-matter is certainly hit by principle of res judicata. This Court finds force in the argument advanced by Mr. AK. Roy, learned Counsel for the appellants.

6. Mr. Ricky Gurung, learned Counsel for the respondent, however, failed to place any case law in support of his contention. The argument put forward basing on a letter is remained out side the scope of consideration of this Court in view of attainment of the finality of the order dated 28.2.2006.

7. Mr. A.K. Roy, learned Counsel for the appellant also argued that the impugned order was passed in derogation of the order dated 28.2.2006 in Arbitration Case No. 47 of 2005. When the said order attained finality, the subsequent order passed by the District Judge, Aizawl allowing the respondents to utilize and dispose of the plants and machineries are in conflicting nature and the same cannot be harmonized in any way. The respondent in law is estopped from filing the subsequent application u/s 9 of the Arbitration and Conciliation Act, 1996 since they had waived their right to challenge the said order. Mr. A.K. Roy in support of his contention relied in the case between Bhanu Kumar Jain Vs. Archana Kumar and Another, and Hope Plantations Ltd. Vs. Taluk Land Board, Peermade and Another,

8. Lastly, Mr. A.K. Roy, learned Counsel for the appellants criticized the subsequent application filed by the respondent u/s 9 of the Arbitration and Conciliation Act, 1996 contending that such an application is an abuse of the process of law and the impugned order passed on the application is liable to be set aside and quashed in view of attainment of the finality of the order dated

28.2.2006. The learned District Judge ignored that aspect rather rejected the points raised by the appellants before him. Mr. Roy in support of his argument relied in the ratio laid down by the Apex Court in the case between Mamleshwar Prasad and Another Vs. Kanhaiya Lal (Dead) through L. Rs., and Tamilnad Mercantile Bank Share Holders Welfare Association Vs. S.C. Sekar and Others,

9. In view of the facts and circumstances of the case appearing in the face of the record and the law laid down by the Apex Court in the cases (supra), I am of the considered view that the impugned order dated 7.7.2008 is barred by principle of res judicata as well as waiver and estoppel. The impugned order, therefore, cannot legally stand. It is accordingly set aside and quashed.

10. Appeal is allowed. No order as to cost.