

(1984) 10 MP CK 0008

In the Madhya Pradesh High Court

Case No : Civil Miscellaneous No. 866 of 1982

Taj Builders, Indore

APPELLANT

Vs

Indore Development Authority, Indore and Another

RESPONDENT

Date of Decision : 19-10-1984

Acts Referred:

Arbitration Act, 1940 — Section 41

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : AIR 1985 MP 146

Hon'ble Judges : V.D. Gyani, J

Bench : Single Bench

Advocate : S.M. Sanyal and G.M. Chafekar, for the Appellant; S.C. Bagadiya, for the Respondent

Final Decision : Allowed

Judgement

V.D. Gyani, J.—This revision petition arises out of an order dt. 9-8-1984, passed by the VI Additional Judge to the court of the District Judge, Indore thereby disposing of an application u/s 41 of the Indian Arbitration Act (hereinafter referred to as the Act), read with Order 39, Rules 1 and 2, C.P.C.

2. Facts necessary" for disposal of this revision petition, stated in brief, are that the petitioner-firm is a registered contractor. The firm had entered into a contract for construction of inner roads and service roads in the Indira Complex, Naulakha, Indore. Initially this work was to be carried out by the Indore Municipal Corporation, but it appears that eventually the work was entrusted to the Indore Development Authority, Indore, under the directions of the State Government.

3. The petitioner's grievance is that the Indore Municipal Corporation having paid the first running bill, amounting to Rs. 3,97,945.80 paise, refused to pay the second running bill, amounting to Rs. 1,95,580.86p as submitted by it and the petitioner firm was asked to stop the work, which was to be resumed only on obtaining order from the higher authorities. The petitioner contends that it

approached several times through letters expressing its intent to complete the work, but it was not allowed to complete the same. In the meanwhile the stipulated time for completion of work of the contract expired and the Indore Municipal Corporation acting unilaterally, without affording any opportunity to the petitioner terminated the contract on 23-11-1982. The petitioner thereafter served a notice, calling upon the Indore Municipal Corporation to come to arbitration in view of Clause 47 of the contract. The work, as has been stated above, was entrusted to the Indore Development Authority under orders of the State Government about four months after the notice dt. 1-1-1983, served by the petitioner on the administrator of the Indore Municipal Corporation. By this notice the petitioner made it clear that the notice be treated under the arbitration clause for appointment of an Arbitrator. In pursuance to this notice two Arbitrators were appointed, vide letter dt. 14-6-1983. The petitioner by its reply dt. 2-7-1983 agreed to the appointment of the Arbitrators and craved for a fair opportunity to put forth its case before the Arbitrators.

4. In the meantime the Indore Development Authority issued a notice, calling for fresh tenders in respect of the work, which was to be completed by the petitioner. The tenders were to be received till 25-5-1984, but the petitioner on 24-5-1984 moved the lower court with an application u/s 41 of the Act, read with Order 39, Rules 1 and 2, C.P.C. and the lower court holding that the petitioner was entitled to an ex parte injunction, passed an order restraining the respondents from opening and accepting any tender in respect of the work, which was the subject-matter of the petitioner's contract.

5. On 1-6-1984 the respondents made their appearance and submitted reply to the aforesaid application preferred by the petitioner. This reply is signed by the attorney, Shri Manoharlal Mootha, who has also sworn an affidavit in support of the reply. It appears from the record that on 9-7-1984 an application under Order 19, Rule 2, C.P.C. was preferred by the petitioner for permission to cross-examine the deponent Manoharlal Mootha on his affidavit, but this application was rejected by the trial court. The petitioner had also submitted a rejoinder to the reply Filed by the respondents. It was allowed to be taken on record. The trial Court after hearing the learned counsel for the parties, dismissed the application as not maintainable u/s 41 of the Act. It is against this order that the petitioner has come up in revision before this court.

6. Shri Chaphekar, learned counsel for the petitioner, appearing with Shri Sanyal has contended that the trial court has misconstrued the scope of Section 41 of the Act. He further contends that a contract cannot be put to an end in an unilateral manner, as was done by the Indore Municipal Corporation, According to him there is still subsisting valid contract and a unilateral termination of the same is illegal. Such unilateral termination of contract cannot be accorded any legal sanction, as has been erroneously done by the trial court. He has pointedly referred to paras 5 and 7 of the trial courts' order and submitted that the trial court has palpably gone wrong in interpreting Section 41 of the Act. His further

contention is that it was not open to the trial court at that stage to go into the merits of the case and decide the validity of the agreement. In fact, these were questions, which pre-eminently fell within the scope of arbitration, to be decided by the Arbitrators. According to the learned counsel, the trial court in going into such questions has virtually usurped the function of the Arbitrators. The learned counsel has referred to para 4 of the respondents' reply, filed before the trial court. According to him in fact there was no dispute about acceptance of the arbitration Clause. Naturally, as a result of a gesture of good-will or otherwise in any event even according to the respondents an arbitration was contemplated, provided for and in fact offered to the petitioner, who accepted the same.

7. Shri Bagadia, learned counsel appearing for the respondents, has contended firstly, that there is no valid subsisting contract between the petitioner and the respondents; secondly, if the letter dt. 14-6-1983 is held to have constituted an arbitration agreement, even then the extent and scope of the dispute between the parties is not such as to entitle the petitioner to a relief of an ad interim injunction, and lastly, he submits that the dispute, if any, is essentially between the contractor-petitioner and the Indore Municipal Corporation, and the respondent-Indore Development Authority does not figure at any stage anywhere. His other submissions, which are of a technical nature, are that the cause suffers from non-joinder of parties and the petitioner is guilty of delay in approaching the court, which by itself is sufficient to disentitle him from seeking an equitable relief of injunction.

8. The first question, which falls for consideration, in the light of the argument advanced by the learned counsel for the respondents is whether there is an arbitration agreement. The material available on record is a letter dt. 14-6-1983, with a copy endorsed to the present applicant and the reply dt. 2-7-1983, in which the applicant made a categorical statement accepting the arbitration of the Arbitrators. The "arbitration agreement" has been defined in Section 2(a) of the Act, thus :

"Section 2(a).-- "arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."

A mere perusal of the letter, referred to above, and the reply thereto by the applicant is sufficient to establish the existence of an arbitration agreement. It cannot be interpreted in a manner to annul the effect of the letter and its acceptance. In fact the Supreme Court in *The Union of India (UOI) Vs. D.N. Revri and Co. and Others*, has propounded the interpretation in such a manner as to give efficacy to the contract rather than to invalidate it. The narrow technical approach is not proper and the interpretation sought to be put by the respondents is technical and narrow. At one stage of the arguments it was submitted by the learned counsel for the respondents that at best this letter can be construed as the respondents' gesture of good-will. Even assuming it to be so far the sake of argument, the legal effect of the letter cannot be avoided or

escaped by the respondents. It is, therefore, held that the letter dt. 14-6-1983 and its categorical acceptance by the applicant by its reply dt. 2-7-1983 results in an arbitration agreement, even if the term "arbitration agreement" is strictly construed.

9. The next submission made on behalf of the respondents is with regard to the scope of the dispute and in this behalf it is submitted that the dispute, if any, essentially lies between the applicant and the Municipal Corporation, Indore, which has not been joined as a party. Shri Chaphekar, learned counsel for the applicant on the other hand has submitted that the actual scope of dispute is a matter which falls essentially within the domain of functioning of the Arbitrators and at this stage it cannot be gone into. So far as the respondents' technical objection about the non-joinder of the Municipal Corporation, Indore, as a party is concerned Shri Chaphekar's reply is that as no relief is sought against the Municipal Corporation, Indore, it is not necessary to implead the Municipal Corporation as a party. There is substance in Shri Chaphekar's argument. Once the valid arbitration agreement comes into existence, the differences which exist between the parties can be resorted to by reference to the arbitration, which in fact has been proposed by the respondents themselves.

10. There is yet another objection of delay in approaching the court. The applicant had been corresponding with the Corporation authorities and the respondents and (during) the time lost after the acceptance conveyed by the applicant, at no point of time was it indicated by the applicant that the respondents are not prepared for arbitration, as was proposed by them. Therefore, the delay, if any, is of no consequence. In fact the proposed Arbitrators are the Government Officers of the respondents' choice and having obtained the acceptance of the applicant, if the matters have not moved any further, the applicant cannot be blamed for the time lapsed in between. While inviting tenders, in all fairness it would be legitimately expected of the respondents, a statutory body, to have taken into consideration the steps which it was required to take in pursuance of the letter proposing appointment of Arbitrators and its acceptance by the applicant. In this view of the matter it is submitted on behalf of the applicant by Shri Chaphekar that the situation is self created one by the respondents. Therefore, on mere ground of delay the applicant cannot be denied the relief which he had sought.

11. Relying on the case of Ranjit Chandra Mitter Vs. Union of India (UOI), , it is submitted on behalf of the respondents that the applicant is not entitled to any interim relief u/s 41 of the Act, inasmuch as there is no valid arbitration agreement or arbitration proceeding subsisting between the parties. Shri Chaphekar on the other hand submits that a unilateral termination of contract cannot be recognised in law. There is, according to him, a subsisting valid agreement and the Indore Development Authority because of the intervention of the State Government has stepped into the shoes of the Indore Municipal Corporation. With reference to paras 4, 5 and 7 of the impugned order he has

tried to point out that the work is already done by the applicant prior to 23-11-1982, when the Corporation unilaterally terminated the contract; yet the contract exists and the dispute relating to the work already done still exists, as is clear from the letter dt. 14-6-1983 proposing appointment of Arbitrators. It is clear that as a result of this subsisting dispute even the respondent Authority was also finding it difficult to make further progress in the work. As a result of the recommendation of an advisory Committee, appointed to advise in the matter of Indira complex, it was decided by the respondents to resolve this dispute by resort to the arbitration, proposing the Collector and the Superintending Engineer as the two Arbitrators. This statement contained in the letter clearly goes to show that the dispute existed between the parties, which required to be resolved and was proposed to be resolved by appointment of Arbitrators and in fact two Arbitrators were proposed by the respondents.

12. The trial court has negated the existence of a prima facie case in favour of the applicant mainly basing its reasoning on the case of Ranjit Chandra Mitter Vs. Union of India (UOI), . Shri Chaphekar, learned counsel for the applicant, has vehemently assailed this finding. His contention is that the trial court has erroneously read "pending arbitration proceedings" although Section 41(b) of the Act provides merely "arbitration proceedings". His submission is that it cannot be read as a "pending arbitration proceeding". Shri Chaphekar's contention deserves to be upheld. The provisions of Section 41(b) of the Act came up for consideration before the Supreme Court in Union of India (UOI) Vs. Raman Iron Foundry, and the Supreme Court held that the Court has power to issue interim injunction but such interim injunction can only be for the purpose of and in relation to arbitration proceedings. This court is constrained to observe that the trial court has ignored the decisions of this court and the Supreme Court while adhering to the aforesaid Calcutta view in the case of Ranjit Chandra Mitter (supra), while in subsequent decisions of the same High Court in Debendra Nath Singha and Others Vs. Dwijendra Nath Singha and Others, and Maheswari and Co. Pvt. Ltd. and Another Vs. The Corporation of Calcutta, , a different view has been taken. This Court in Daulat Ram Phoolchand Vs. Shriram and Others, has held that the arbitration proceedings contemplated by Section 41(b) of the Act are not confined to cases in which arbitration proceedings are pending before the court and the power can be exercised in other arbitration proceedings started out of the court. In this connection it would not be out of place to trace and refer to the Legislative intent, which is clear from the fact that expression "arbitration proceedings" has been substituted in Section 41(b) of the Act for the words "reference" in order to cover the various kinds of proceedings, which the Act contemplates. Surely enough the intention of the Legislature by effecting this amendment was to include within the scope of Clause (b) of Section 41, all those proceedings, which are held in pursuance of an arbitration agreement, whether with or without intervention of the Court. Thus, the order under revision cannot be allowed to stand as it has basically proceeded on an erroneous approach on the part of the trial court without applying its mind to the numerous authorities

of this court and the Supreme Court, interpreting Section 41(b) of the Act.

13. The trial court has refused leave to the applicant-petitioner mainly on the ground that it has no prima facie case, which is as has been held here to before not the correct position emerging from the facts of the case. This court has held that a party having a prima facie case is entitled to an ad interim relief of injunction unless the facts otherwise warrant. No material is placed on record so as to disentitle the applicant from claiming the relief in substance.

14. For the reasons aforesaid, this revision petition succeeds and is accordingly allowed with costs throughout. The order dt. 9-8-1984, passed by the trial court is quashed and the respondents are restrained from proceeding with the work in any manner, which is the subject-matter of the arbitration agreement. Counsel's fee shall be Rs. 250/-, if certified. In the circumstances this court can only hope that the parties concerned shall co-operate in expeditious disposal of the arbitration.