(2015) 03 KAR CK 0153

In the Karnataka High Court

Case No : M.F.A. No. 102793/2014 (A and C)

Tiffins Barytes Asbestos and Paints Ltd. APPELLANT

Vs

P. and D. Enterprises RESPONDENT

Date of Decision : 06-03-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 9
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Specific Relief Act, 1963 — Section 14, 14(1)(c), 14(c), 41, 42

Citation : (2015) 03 KAR CK 0153

Hon'ble Judges : P.D. Waingankar, J.;A.S. Bopanna, J.

Bench : Division Bench

Advocate : Jayakumar S. Patil, Senior Counsel for N.L. Batakurki, for the Appellant; A.R.L. Sundaresan, Sr. Counsel for K.L. Patil, Advocates for the Respondent

Final Decision : Dismissed

Judgement

A.S. Bopanna, J.—The appellant who was the respondent in Arbitration Application No. 7/2014 is before this Court assailing the order dated 25.09.2014 passed therein. In the said application filed by the respondent herein under Section 9 of the Arbitration and Conciliation Act (''A and C Act'' for short) seeking for interim measure pending resolution of dispute in the pending arbitration proceedings, the Court below has restrained the appellant herein from bringing or hiring any new machinery, from entering with any other individual or concern for mining, lifting of the iron ore, red oxide or any other mines from the schedule property pending adjudication of the dispute by the Arbitral Tribunal.

2. The appellant is holding the mining lease bearing ML No. 2293 granted by the Government of Karnataka in respect of the land measuring 472.32 acres situate in Sy. No. 311 of Haraginadona village, Bellary Taluk. The lease is presently valid upto 04.01.2021. In that regard, the appellant and the respondent have entered into an agreement of Hiring Machinery and Equipment on Rental Basis dated

11.12.2012 to excavate the iron ore and red oxide in the leased land. The terms and conditions with regard to the manner in which the work is to be carried out and the payment thereof has been agreed therein. Certain disputes have arisen between the parties which resulted in the respondent herein invoking the Arbitration Clause contained in the agreement. A petition was filed under Section 11(6) of the Arbitration and Conciliation Act and Mr. Justice K. Venkatraman, Former Judge, Madras High Court has been appointed as the Arbitrator. It is in that direction, pending consecration of the matter, the respondent herein sought for interim measure. The Court below after making a detailed consideration has granted the interim order. The appellant herein is claiming to be aggrieved by the same.

3. Heard Sri Jayakumar S. Patil, learned Senior Counsel for Sri N.L. Batakurki, learned counsel on behalf of the appellant and Sri A.R.L. Sundaresan, learned Senior Counsel for Sri K.L. Patil, on behalf of the respondent and perused the appeal papers.

4. The fact that there are certain disputes between the parties relating to the agreement entered into between them is the undisputed position since an Arbitrator has already entered upon reference. In such situation, keeping in view the terms agreed, whether an injunction in the manner as granted by the Court below is justified or whether the respondent herein can be compensated in terms of money by way of damages and therefore is the injunction liable to be vacated, is the question.

5. Learned senior counsel for the appellant while assailing the order of the Court below, apart from contending that the decision in the case of Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd., has been wrongly relied upon has in support of his contention relied upon the following decisions:

(i) The case of Gemini Communications Ltd., Vs. Chief General Manager [LAWS (MAD)-2012-12-112] wherein, it is held that while considering the question of interlocutory injunction in a matter involving a contract, necessarily it has to be seen as to whether the Court would be in a position to enforce specific performance of contract entered into between the parties. Sections 14 and 41 of Specific Relief Act are referred with regard to the circumstance when injunction cannot be granted. However, the facts arising therein is noticed in relation to the contract between the parties therein which was a composite contract of highly technical nature which cannot be specifically enforced by Court. In that view, the prohibition to grant injunction in such case was taken note.

(ii) The case of Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others, wherein, in respect of a distributorship agreement dated 01.04.1976 between the parties the provision contained in Section 14(1)(c) of the Specific Relief Act was kept in view. However, in the said case keeping in view the nature of the agreement, the relief granted was considered in the background of Clause 28 whereby the agreement was terminable by either party and in that view, it was held that the only relief that could be granted was award of compensation for loss of earning for the period of notice and not restoration of distributorship.

(iii) The case of Percept D''Mark (India) Pvt. Ltd. Vs. Zaheer Khan and Another, wherein, the negative covenant in the agreement was kept in view and in that light, the grant of injunction to enforce it at the interim stage was considered. In that regard, the bar as contemplated under Section 14 of the Specific Relief Act was adverted to and the consideration of principles for grant of injunction was enunciated in the facts arising therein.

(iv) The case of M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and others, wherein, the principles to be followed in the matter of grant of injunction was considered keeping in view the provisions contained in Sections 41 and 42 of the Specific Relief Act with reference to the contract comprising an affirmative agreement coupled with a negative agreement. In that context, it was held that the grant of interlocutory injunction during the pendency of the legal proceedings is a matter requiring the exercise of discretion. While exercising discretion, the test with regard to prima facie case, balance of convenience and irreparable injury is to be considered.

6. The learned senior counsel for the respondent on the other hand relied on the following decisions:

i) The case of Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd., wherein, the Hon''ble Supreme Court keeping in view the agreement between the parties to secure arbitration of their disputes and in that light, while considering the issue relating to grant of injunction had taken into consideration that a notice had been issued by OMM Private Limited terminating the arrangement entered into between itself and Adhunik Steels. Thus in terms of Order XXXIX Rule 2 of CPC it was held that an interim injunction could be granted restraining the breach of a contract and to that extent, prima facie case was made against preventing it from carrying on its work in terms of the contract. Though it was noticed that it cannot be said that it will not be possible to assess the compensation that might be payable in case the claim is upheld by the Arbitrator, it was held that if OMM Private Limited is permitted to enter into agreements with others for the same purpose, it would be unjust. Though the cancellation of the agreement because it was hit by Rule 37 of the Mineral Concession Rules, 1960, was noticed, it was directed that they shall not enter into a contract for mining and lifting of minerals with any other entity until conclusion of the arbitral proceedings.

ii) The case of Suresh Dhanuka Vs. Sunita Mohapatra, wherein, while considering the issue relating to interim measure under Section 9 of A and C Act, the provision contained in Section 42 of the Specific Relief Act to enforce the negative covenant was kept in view and the nature of injunction sought was taken into consideration. In that context, the injunction granted restraining the respondents from selling her products by herself or by any other person, save and except through the appellant was upheld since it would protect the interest of both the parties pending decision by the Arbitral Tribunal.

iii) The case of Board of Acting Governor of the La Martienere and Others Vs. National Engineering Industries Ltd. and Others, wherein, the provision of Section 41 of the Specific Relief Act was taken into consideration to consider whether the prayer for injunction should be refused since the petitioner can obtain the relief of forfeiture of the lease and eviction of the respondents. In that light, Section 42 of the Specific Relief Act where contract comprises an affirmative covenant coupled with a negative covenant was noticed and held that the fact Court cannot enforce the affirmative covenant shall not preclude the Court from granting an injunction to enforce the performance of the negative covenant. Therefore, in a case where there is a contract containing restrictive covenants, the Court shall restrain the breach of the restrictive covenants. If injunction is refused only because ultimately the petitioner may evict the respondents, then the principle of granting injunction will virtually become a dead letter. Normally, when the parses are seeking the relief of injunction on the basis of bargain between the parties, the Court should try to preserve the bargain struck between the parties.

7. Having taken note of the proposition of law cumulatively from the decisions cited by either side, it could be deduced that ultimately what would be relevant for consideration is the nature of the contract entered into between the parties with reference to the covenants therein and in that circumstance, even while considering the grant or otherwise of interim measure under Section 9 of the A and C Act, the principles applicable for grant of injunction under Order XXXIX Rule 1 of the Civil Procedure Code would have to be kept in view so as to balance and preserve the bargain struck between the parties. In that light, what would ultimately be necessary to be considered in the background of the transaction entered into between the parties is as to whether the party seeking for interim measure has made out a prima facie case, whether the balance of convenience is in favour of such party and whether the non-grant of interim order would cause irreparable injury or even otherwise would it be fair to refuse injunction merely because compensation can be ultimately awarded. Hence, it would be appropriate to refer to the agreement entered into between the parties so as to determine the mutual rights arising thereunder and to ascertain the protection if any, that is required to be granted.

8. The appellant and the respondent have entered into an agreement dated 11.12.2012 for hiring of machinery and equipments on rental basis for excavation of ore. The appellant herein is described as the ''first party'' while the respondent is the ''second party'' to the agreement. The hiring of machinery and equipments for the work to be undertaken by the second party under the instructions and directions of the first party is in respect of the mining lease bearing M.L. No. 2293 held by the appellant. The period of the same is indicated as valid upto 04.01.2021. The services of the second party has been engaged on

a long term basis until the expiry of the licence period and any further renewals granted by the State Government of Karnataka, whichever is later. The terms and conditions of the agreement has thereafter been agreed. While seeking injunction, the respondent herein has pressed into service Clause 6 thereto, wherein the first party has agreed not to permit any other party/parties/persons to enter upon or carryon the mining operations by use of any other mining machinery or equipments. The appellant on the other hand has sought to press into service Clause 7 and 8 to the said agreement which provides a right to the appellant/first party to cancel the agreement. It is their case that in such circumstance, when the right of termination is provided under the agreement, grant of injunction would amount to specific performance of the agreement, which is not permissible. The respondent would however point out that the right of termination is not absolute, but it is only in the circumstances as stated in the agreement and that too on mutual consent and such situation had not arisen at all so as to warrant termination.

9. In background, the facts arising herein would disclose that as on the date a dispute arose between the parties, the same was only with regard to the allegation made by the appellant against the respondent with regard to submission of inflated bills which according to them was inappropriate and required auditing and reconciliation. The respondent on the other hand had invoked the arbitration clause subsisting in the said agreement and filed the petition under Section 9 of the A and C Act in A.A. No. 7/2014 on the allegation that the appellant was making attempts to entrust the work to third parties which is contrary to the undertaking contained in Clause 6 of the agreement.

10. A perusal of the appeal papers will disclose, as on 05.05.2014 when the petition under Section 9 of A and C Act was filed by the respondent herein, the agreement had not been terminated by the appellant. Further, as seen from Annexure-R20, the ad-interim ex parte order directing the parties to maintain status-quo in respect of the agreement dated 11.12.2012 was granted by the Court below on 14.05.2014. It is only thereafter the notice of termination was made on 19.05.2014 (Annexure-R4) and issued on 21.05.2014 (Annexure-R5). In that regard, it would be relevant to notice the communication dated 04.04.2014 (Annexure-R18) which is a bill submitted by the respondent in respect of the work undertaken. The appellant replied to the same on 05.04.2014 (Annexure-R19) wherein all that has been stated is, the bills are slightly on the higher side and that they have asked the Auditors to scrutinize the same. They have in fact requested the respondent to manage the contractors till the matter is resolved. Therefore, the said correspondence would indicate that even as on the said date, the issue essentially between the parties requiring reconciliation was with regard to the bills that had been raised and the fact the appellant had asked the respondent to manage the contractors will show that they intended continuing the agreement and they had no grievance of the nature warranting termination of the agreement.

11. Despite that being the position, the appellant has thereafter in the notice of termination as also the objections filed before the Court below and in the arguments addressed before this Court raised certain issues with regard to the work performed by the respondent and about adequate machineries not being deployed by the respondent. The learned senior counsel for the appellant has infact referred to the communication dated 10.07.2014 (available at Annexure-R15) to indicate that the Department of Mines has ordered suspension of mining operations and the violations pointed out in that regard refers to the work not being performed in a systematic manner and the machineries not being deployed. The learned senior counsel for the respondent would however point out from the very same document that the comments in the said letter itself would disclose that the machinery approved itself is adequate enough which should have been utilised for rectification. Be that as it may, though there are certain issues with regard to the manner in which the work has been performed, it had not been raised as an issue at a point when the bill had been submitted regarding which there were certain issues. As on the date when the respondent had alleged that they are being prevented from carrying out the work and a third party is sought to be brought in, the termination had not been made and in that circumstance the injunction had been sought pending consideration of all aspects in the arbitration proceedings.

12. In the objection statement filed before the trial Court, the contention urged to justify the action of the appellant is that the bills were inflated which required auditing and that even if there is breach it can be compensated. The further contention is that it involves long duration and therefore the Court cannot supervise the working if injunction is granted. It is also contended that the mining lease is to be saved. If that be the position, at that stage, when the issue was mainly with regard to the alleged inflated bill that had been submitted, it was an issue which could be resolved by arbitration and that alone was not sufficient for the purpose of terminating the agreement keeping in view the scope of Clause 7 and 8 of the agreement. In any event, at present, it is stated that the issue relating to the termination has also been raised as a dispute before the Arbitrator. Though the agreement indicates that it is for hiring of machinery and equipment on rental basis, the work of mining will have to be performed by the respondent on instructions of the appellant and as such quantifying the amount of the work that may be done by some other persons if permitted, for the purpose of determining the compensation would be a difficult proposition, if the respondent is not permitted to do the work.

13. The contention on behalf of the appellant that it would be hit by Section 14(c) and (d) also cannot be accepted. As noticed, the right to determine the agreement as contained in the agreement also has conditions attached to it and these are all aspects which would be decided in the arbitration though we have prima facie noticed it for the present purpose. Further, the question of performance of the contract involving a continuous duty and the difficulty in supervising the same by Court as contended by the learned senior counsel for

the appellant also would not arise. That is because the injunction granted by way of interim measure would neither be in the nature of granting specific performance nor would the Court have to supervise the same until the completion of the lease period. All that is sought to be done at this stage is to protect the interest of the parties till the matter is concluded in arbitration. In that regard, as rightly pointed out by the learned senior counsel for the respondent and as seen from the document at Annexure-R14, the arbitration proceedings has been started in all earnestness and a time schedule has been fixed by the Arbitrator. From the time schedule as seen, the period for filing of the draft issues was indicated as 21.01.2015 which has already gone by. Though such time frame has been fixed, the allegation is that the appellants themselves have delayed the proceedings by not filing their reply before the Arbitrator. In any event, when the Arbitrator seeks to conclude the proceedings in a time bound manner, the interim measure would operate only till the proceedings are concluded before the Arbitrator.

14. If all the above aspects are kept in view and also the provision contained in Section 42 of the Specific Relief Act is taken note, keeping in view Clause 6 contained in the agreement between the parties herein, the attempt made by the appellant to shutout the respondent even before the procedure as indicated in Clause 7 and 8 of the agreement for termination was followed would certainly entitle the respondent for grant of interim measure to protect their right pending the arbitration proceedings. The terms of the agreement and in that regard, the sequence that was followed would indicate that the respondent has made out not only a prima facie case, but the balance of convenience is also in their favour. Though the appellant has contended that the mining lease is sought to be cancelled if the rectification is not made, rectification if any can happen if the respondent is instructed by the appellant to carry-out such rectification work. Therefore, in that circumstance, if the appellant is permitted to prevent the respondent from working and as an alternative, the appellant secure any other party to carry-out the work, it will cause irreparable injury to the respondent.

15. In the light of the above, a perusal of the order passed by the Court below which is impugned herein would indicate that the Court below in fact has made a detailed consideration of all aspects of the matter relating to grant of interim measure pending consideration of the dispute by the Arbitrator and the decision relied upon by the Court below to arrive at such conclusion is also appropriate. Hence, the order impugned does not call for interference.

For all the aforestated reasons, the appeal being devoid of merit stands dismissed. Parties to bear their own costs.