Orissa Manganese and Minerals Limited Vs Synergy Ispat Private Limited

Court: Calcutta High Court

Date of Decision: May 9, 2012

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 9

Citation: (2013) 2 ARBLR 309 : (2012) 4 CALLT 52

Hon'ble Judges: Kalyan Jyoti Sengupta, J; Asim Kumar Mondal, J

Bench: Division Bench

Judgement

K.J. Sengupta, J.
By consent of the parties the appeal and application have been taken up for hearing together dispensing with all the

formalities for the sake of speedy disposal of the entire matter before us. Therefore, we need to admit the appeal. There will be order in terms of

prayer (a) of the Notice of Motion, however all undertakings are discharged.

2. This appeal is against the impugned judgment and order dated 29th March, 2012 passed by the learned Single Judge by which His Lordship

passed an order of injunction restraining the appellant from selling any part of the extract from mine in question in Jharkhand or to deal with in any

manner whatsoever without first offering the entire extract to the petitioner (respondent herein) in terms of the agreement. The learned Trial Judge

after granting aforesaid ad interim relief has been pleased to keep the interlocutory application pending for final hearing on affidavits.

3. The short fact leading to taking action u/s 9 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the said Act) followed by

preferring instant appeal is as follows:-

On 20th September, 1996 the appellant had obtained a mining lease from the then Government of Bihar (before bifurcation of the State). for

extracting iron ore in Ghatkuri Reserve Forest. The respondent, and one Metsil Exports Private Limited (METSIL) represented the appellant that

the appellant and the respondent would set up sponge iron plant value addition to the iron ore to be extracted from mine. METSIL was to

excavate the iron ore from the mine which was then to be sold to the respondent. In view of this the appellant, the respondent and the said

METSIL entered into two contracts both dated 22nd February 2005, one between the petitioner and METSIL, and, another between the

appellant and the respondent, for the purpose of raising of iron ore and for selling of the same respectively. In terms of the agreement all parties

acted bona fide that the said agreement with respondent is enforceable under law. Accordingly the appellant from time to time received an

aggregate sum of Rs. 1,67,50,000/- from the respondent. According to the appellant it was discovered later on that the said agreement dated

22nd February, 2005 between appellant and the petitioner is not a valid one as the same was in violation of Rule 37 of the Mineral Concession

Rules, 1960. In view of aforesaid invalidity, agreement with respondent was terminated by a latter dated 22nd June 2007. Consequently, the said

sum of Rs. 1,67.50,000/ - was returned by the appellant with a covered letter dated 1st August, 2008 to the respondent. The said letter dated

22nd June, 2007 was despatched by the petitioner on 23rd June, 2007 from Bhubaneswar and it was received by the respondent in Delhi on 25th

June, 2007, and it would appear from the acknowledgement due card which was returned to the appellant on 28th of June, 2007. In view of the

termination of the said two agreements obviously the appellant did not pursue the matter nor did respondent make any claim on the basis of the

said agreement dated 22nd April 2005 (since terminated). Thereafter the appellant all of a sudden received a letter dated 27th December 2009 of

the respondent complaining breach of contract on the part of the petitioner alleging the appellant started selling of iron ore to the others. The said

letter dated 23rd December, 2009 was replied to by the appellant by letter dated 11th January 2010 pleading the agreement of 22nd April, 2005

could not be performed as it was void ab initio as being violative of Rule 37 and recording of making correspondences made on this subject

previously. However the receipt of the said letter was disputed by the respondent. After the aforesaid correspondences which were exchanged

between the parties till 15th February 2010 there was no move on the part of the respondent until 22nd August, 2011, when by a letter of the

same date it called upon the appellant to refer the matter to Arbitration for adjudication of the dispute between the parties. On 24th November,

2011 an interlocutory application u/s 9 of the said Act being A.P. No. 922 of 2011 was filed for order of injunction restraining the appellant herein

from selling any iron ore of the said mine to the any third party in any manner save and except the respondent herein; and for furnishing accounts of

the iron ore raised from the mines since commencement of the mining operation and also for appointment of Receiver. The said application was

contested and the same was finally disposed of by an order dated 14th March, 2012 without granting any interlocutory relief. Thereafter the

aforesaid fresh application was filed for the same reliefs. On 28th of March, 2012 the learned Trial Judge heard the matter and adjourned for

further hearing on 29th of March, 2012 when the impugned judgment and order was passed.

4. Learned Senior Counsel Mr. Jayanta Kumar Mitra with Mr. Debol Banerjee Senior Advocate appearing for the appellant contends that the

learned Trial Judge ought not to have granted interlocutory relief particularly when almost on the same prima facie case the learned Trial Judge

refused to grant interim relief on earlier occasion. It is true that there was no decision then on merit of the prima facie case but the respondent was

not aggrieved by the order passed on previous application refusing to pass interim relief even though it was within the knowledge of the respondent

that mining operation had been continuing for temporary period. According to the learned Counsels for the appellant that the effect of the impugned

judgment and order is literally passing an award of specific performance without deciding the question of enforceability of the agreement on

account of the same being void, and contrary to law and further the question of limitation as regard the claim sought to be made by the respondent.

The learned trial Judge has totally ignored the aspect of balance of convenience which is substantial if not sole, factor to grant or to refuse interim

relief in a case of this nature. Extracting the iron ore from the mine is part and parcel of the iron and steel industries of the country which has the

contributory effect to the nation''s economy. This injunction ought not to have been granted virtually stopping mining operation.

5. According to Mr. Mitra impugned order, though apparently not affecting mining operation but in real sense restrained the appellant from

extracting or mining by reason of the fact that by the impugned order no portion of the extract would be sold to any one in the open market, except

the respondent who is not entitled to get as of its own right in any sense. If the impugned judgment is read carefully it would appear that the award

for specific performance that might be granted in arbitration proceedings, has been passed by Court in interlocutory action, hence it is without

jurisdiction with regard to subject-matter. In support of their contention they have relied on the decision that was rendered in case of Adhunik

Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd., .

6. Mr. S.N. Mukherjee, learned Senior Counsel appearing for the respondent contends that on earlier occasion because of the fraudulent

representation made before the Court on fact the Court did not pass any order as the Court was informed that there had been no mining operation.

After getting the earlier application disposed of without any restraint order against them and taking advantage of the same all of a sudden they

started mining operation. His client has paid in terms of the said agreement a substantial amount, and is ready and willing to perform its part of the

agreement. The agreement contains the negative covenant. The alleged plea of illegality is afterthought as since beginning the appellant was well

aware of legal position, now this plea has desperately been taken in order to frustrate the contract. The letter of termination of the agreement was

never received by his client and this plea of termination taken before the learned Trial Judge, has been falsified by their own affidavit. The learned

Trial Judge has refused to believe the story even on the prima facie value of the document produced by the respondent. When the agreement is

valid and subsisting and agreement for sale and supply of iron ore with negative covenant in favour of the respondent order of mandatory nature is

justified. Such an agreement can be directed to be specifically performed as it has been held by our Court in case of Vijay Minerals Pvt. Ltd. Vs.

Bikash Chandra Deb, and as affirmed by the appeal Court by its judgment reported in Bikash Chandra Deb Vs. Vijaya Minerals Pvt. Ltd., .

Under such circumstances as an interim measure aforesaid order was passed. It is incorrect to allege that there has been order of injunction

restraining totally extracting iron ore from the mine. Mining operation has been allowed completely but with rider that entire extract has to be sold

to the respondent and it is justified so.

7. Mr. Mukherjee on instruction submits that his client is agreeable to purchase the iron ore to be extracted from the concerned mines now owned

by the appellant at present market value provided the difference of the price between market one and agreed one is adequately secured. The

learned Trial Judge has correctly left controversy regarding validity, illegality plea of limitation for decision in the Arbitration. The balance of

convenience is appropriately weighed by the learned Trial Judge in the context of situation that if entire extract is not sold to the respondent and it is

subsequently held that agreement can be specifically performed then respondent would suffer serious prejudice. On the other hand the appellant

does not stand to lose at all as it would get price in any event either at the agreed rate or market rate. Therefore the impugned order passed by the

learned Trial Judge is not required to be interfered with by this Court.

8. We have heard the learned counsel for the parties and we have examined the material placed before us and lastly the impugned judgment and

order passed by the learned Trial Judge. On plain reading of the judgment and order it appears to us that the learned Trial Judge while granting ad

interim relief in favour of the respondent has indeed decided the entire dispute by himself, and nothing is left for decision to be taken by the learned

Arbitrator. Of course, some time it is not impermissible for the Court to come to prima facie finding for granting relief which may result in the final

decision in Arbitration or suit, or substantive proceeding.

9. Such measure should not or cannot be taken ordinarily by the Court in interlocutory action u/s 9 of the Arbitration & Conciliation Act, 1996. In

extreme case where the prima facie case is so strong and further without interim protection there would be irreparable loss and injury to the party

asking, interlocutory relief that may have effect of finality, may be granted pending disposal of the Arbitration proceedings.

10. It appears to us that it is not such an extraordinary case as rightly contended by Mr. Jayanta Mitra, learned Senior Advocate appearing with

Mr. Banerjee, for the simple reason that on earlier occasion this Court refused to grant any relief for any reason after affidavits having been filed.

This ad interim order has been passed in the second action u/s 9 allegedly on the subsequent development. But all the factors including the delay

and acquiescence remains the same as it was in earlier occasion when ad interim order was refused on the ground of delay by the learned Trial

Judge himself.

11. It is not understood why delay factor in the second action for same relief did not strike in the mind of the learned Trial Judge. It appears further

that learned Trial Judge seems to have taken note of the statement and averment in the affidavits filed by the respective parties in earlier application.

12. Even if pleadings filed in earlier proceedings, are required to be considered as material in the subsequent proceedings then a chance should

have been given to the adversary namely the appellant herein, to explain. We think that without giving any opportunity to the appellant to explain,

the learned Trial Judge while passing impugned order has taken into consideration of earlier affidavit and document and thereby denied opportunity

of being heard. On that ground we minded once to set aside the ad interim order keeping the portion thereof for hearing the matter on affidavits. In

that event there would occasion further delay.

13. But in a commercial deal which is here, litigant can hardly brook delay so this Court is to see whether any ad interim relief can be granted or

not. While deeply examining the argument and stand taken by the parties it appears to us prima facie that there was no dispute that the agreement

dated 27th February, 2005 was entered into by and between the parties whereby the appellant had agreed to sell the entire extract to be

unearthed from the mine obtained by lease from the then Bihar Government, and the respondent agreed to purchase the same at the price

mentioned in the schedule of the agreement. Another party was engaged for raising iron ore from the mine. The respondent has paid a substantial

amount as and by way of part performance of the said agreement.

14. The appellant has taken plea that agreement is void as being violative of Rule 37 of the relevant mining Rules. It was also alleged that the said

agreement was terminated by the appellant however this factum of termination itself is disputed. It is also alleged by the appellant that there has

been lack of willingness on the part of the respondent who has denied the same. In view of the aforesaid controversies and disputes raised by the

parties we do not think any relief of mandatory nature as has been granted by the learned Trial Judge should be granted relying on the said

agreement at this stage.

15. As appropriately urged by Mr. Mitra and Mr. Banerjee the learned Trial Judge unjustly ignored question of voidability and enforceability of the

said agreement and left it for the decision of Arbitration on one hand, and on the other, other factors including negative covenant of the self same

agreement apparently favourable to the respondent, have been taken into consideration to pass such mandatory order. We find force in their

submission that learned Trial Judge ought to have decided prima facie the plea of voidability and enforceability of the agreement first, as it is sine

qua non to grant interim relief in the nature it is granted. It appears in a decision of the Supreme Court this point has been seriously taken note of in

the case reported in Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd., on almost identical facts. In our view overruling the

contention of Mr. Mukherjee, the learned Trial Judge ought not to have kept aside this plea for the Arbitrator, while granting virtually final relief.

16. We are of the opinion that exercise undertaken by the learned Trial Judge going into the fact findings with regard to despatch, receipt of

various correspondences and then concluding the agreement being valid and subsisting, is not warranted u/s 9 of the Act. This is a task of the

learned Arbitrator for which the parties have already agreed, and indeed have gone to an arbitration, and factum of appointment of Arbitrator has

been recorded by this Court by order dated 17th April, 2012. At the same time we think that we also cannot decide enforceability and voidability

of the agreement in view of the fact that such disputes as have been recorded summarily above, are required to be decided by the learned

Arbitrator or after completion of filing of affidavits.

17. All that we can record at this stage as rightly contended by Mr. Mukherjee that serious dispute as regard method and mode of termination of

the agreement has been raised. It is also urged that by virtue of pronouncement of this Court agreement of this nature can be specifically

performed. However specific performance can be granted only when it is found that the agreement is legally enforceable on finding fact and law.

To put it differently it has to be established that the agreement has not been terminated lawfully. The Court while deciding the matter cannot do at

ad interim stage in the guise of passing interlocutory order that results in redundancy of arbitration proceedings. At the same time the Court cannot

pre-judge the agreement being unenforceable.

18. Interlocutory relief is granted when it is found that prima facie case has been made out and balance of convenience is assessed keeping in view

that neither party is irreparably affected and prejudiced. We do not think the respondent has been able to make out such strong case that warrants

interim relief what has been granted by the learned Trial Judge.

19. In this case commercial interest of the respective parties cannot be ignored. The learned Trial Judge in our view has taken note of this essential

element and this is why perhaps mining operation has been allowed but in such form that would become impossible for the appellant to run in the

event it does not sell entire extract to the respondent whose legal right is yet to be established.

20. Under these circumstances we think that following interim measure will protect interest of both the parties. The appellant shall sell mining

extract to the respondent in the event it opts for purchase of any quantity at the price that will be prevailing in the market at the time of purchase,

and in that case the amount that is lying with the appellant, shall be adjusted against such price, and the balance price if required, must be paid by

the respondent. This arrangement would be without prejudice to its rights and contention of the parties. In the event the respondent is not willing to

purchase the extract of mines, amount lying with the appellant shall be returned to the respondent who will take back the same without prejudice to

its rights and contentions which might be raised before the learned Arbitral Tribunal. Above factum of payment of difference of price if so advised,

may be placed before the learned Arbitrator as part of the dispute. This sale and purchase if materializes. will abide by the result of the arbitration

proceedings.

21. The aforesaid measure in our view will subserve the interest of both the parties as in the event it is found that the respondent succeeds in the

award and gets relief for specific performance later on then obviously with the delivery of this extract of mines shall be in terms of the agreement on

one hand, and on the other hand if the respondent fails, sale so to be effected by the appellant before us. shall not be treated in terms of the

agreement but as a buyer in open market.

22. We, therefore, substantially modify the order passed by the learned Trial Judge as above, and this will continue till the decision of the learned

Arbitrator or until further order which might be passed by learned Trial Judge at the final hearing of the interlocutory application whichever is

earlier. The findings and observation of the learned Trial Judge so also ours shall be regarded as being tentative, and it will not be binding effect

either at the time of hearing of the arbitration agreement or at the time of final hearing of the interlocutory application pending before learned Trial

Judge.

There will be no order as to costs.

Asim Kumar Mondal, J.

I agree.

After delivery of judgment:

23. It is submitted that in view of pendency of the appeal, no affidavit-in-opposition could be filed by Mr. Banerjee''s client. Therefore, we grant

extension of time to file affidavit-in-opposition till the following day of reopening after summer vacation. Reply, if any, be filed within a week

thereafter.

24. In case of filing of affidavit-in-opposition, the matter would be dealt with in absence of affidavit-in-opposition, and obviously the matter has to

be heard after completion of filing of affidavits or time to file affidavits expires whichever is earlier.

25. We make it clear that if any interim relief is felt to be needed by any of the parties, it would be open to them to approach either the learned

Arbitrator or the appropriate forum for appropriate interim relief.

26. After judgment is delivered, Mr. Deepak Agarwal, learned Advocate for the respondent, prays for stay of operation of this judgment and

order. Mr. Banerjee opposes to such prayer.

27. We have considered the respective contentions on this issue. In our view, if stay is granted, the entire mining operation will literally be stopped,

hence we decline to grant stay.

28. All the parties concerned shall act on a signed copy minutes of the operative part of the judgment on the usual undertaking.

Asim Kumar Mondal, J.

I agree.