Executive Engineer and anr. Vs. Bichitrananda Behera and anr.

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SooperKanoon Citation : sooperkanoon.com/536758

Court : Orissa

Decided On : Sep-21-2007

Reported in : AIR2008Ori44; 2008(2)ARBLR23(Orissa)

Judge : L. Mohapatra, J.

Appellant : Executive Engineer and anr.

Respondent : Bichitrananda Behera and anr.

Disposition : Appeal allowed

Judgement :

L. Mohapatra, J.

1. This appeal is directed against the judgment dated 28-1-2005 passed by the learned District Judge, Koraput at Jeypore in Arbitration Petition No. 2 of 2004 restraining the appellants from terminating the work order issued in favour of the respondents and also restraining the respondent No. 2 from tampering with the structure made, in an application under Section 9 of the Arbitration and Conciliation Act, 1996.

2. The facts leading to filing of the application under Section 9 of the Act are that the respondent No. 1 had been awarded the work of construction of a cement structure of 30 feet height near the Sabari Lake complex at Damanjodi and the

structure was to be of a Dinosaur. According to the said respondent No. 1 the officer-in-charge of the work changed the proposed structure with regard to its height and directed the respondent No. 1 to increase height of the structure up to 58 feet on the assurance that the respondent No. 1 shall be paid escalation for the additional work. In terms of the work order, the respondent No. 1 was paid Rs. 27,375/-. After construction of 2/3rd of the structure, since no sanction was made for supply of iron rod and cement, the respondent No. 1 was forced to stop the work and submitted an application for approval of additional payment of Rs. 37,000/-. Though the appellants assured the respondent No. 1 that payment would be made after completion of the work, suddenly on 8-7-2004 the work was terminated and balance work was given to the respondent No. 2 for completion. According to the respondent No. 1 he is to get Rs. 45,000/- from the appellants and without payment of the said amount and finalising the bills, the work has been illegally terminated. On the basis of such allegation, an application under Section 9 of the Act was filed for the relief stated earlier and the Court also restrained the appellants from terminating the contract and/or allowing the respondent No. 2 from completing the balance work.

3. Miss Ratho, learned Counsel appearing for the appellants challenges the impugned order on the ground that the basic requirements for grant of injunction having not been fulfilled, the Court below could not have allowed the application of the respondent No. 1. According to the learned Counsel the contract was for completion of the structure within a specified time. Respondent No. 1 failed to complete the structure in time and as a matter of fact delayed the construction unnecessarily even though running bills had already been paid to him. In view of the conduct of the respondent No. 1, the appellants had no other option except terminating the contract and handing over balance work to the respondent No. 2. Learned Counsel further submitted that the claim of the respondent No. 1 as disclosed in the application under Section 9 of the Act is Rs. 45,000/-. If the respondent No. 1 invokes arbitration clause and raises its claims, same can be decided in the arbitral proceeding by an Arbitrator. For non-payment of any amount as alleged, no injunction order can be passed thereby prohibiting the appellants from completing the work. It was further contended by the learned Counsel that though an order of injunction was passed in January, 2005, till now

the respondent No. 1 has not invoked arbitration clause for initiation of arbitral proceeding. Learned Counsel relied upon some decisions in support of her contention.

Learned counsel appearing for the respondent No. 1 submitted that if the balance work is allowed to be completed, it will be difficult to find out to what extent the respondent No. 1 had worked and accordingly even if the respondent No. 1 invokes arbitration clause, the Arbitrator shall never been in a position to known the extent of work done by the respondent No. 1 and accordingly it will be difficult on the part of the Arbitrator to pass an award.

4. Having heard learned Counsel for the parties, it is clear that the respondent No. 1 had been entrusted with the work of construction of a Dinosaur by use of steel and cement. Initially the structure was directed to be of 30 feet. Allegation of the respondent No. 1 is that in course of execution of work he was directed to increase height of the structure to 58 feet, but no sanction order was passed for supply of steel or cement and, therefore, he was forced to stop the work. This is a dispute which is to be gone in the arbitral proceeding and in an application under Section 9 of Arbitration Act, the Court is called upon to see as to whether necessary ingredients for grant of injunction are satisfied or not. Even if the respondent No. is found to have a prima facie case, unless balance of convenience lies in his favour and unless damage that may be caused cannot be compensated in terms of money, no order of injunction should be passed. The respondent No. 1 has quantified the claim at Rs. 45,000/-. This claim is for the completed portion of the work done by him. Therefore, even if the structure is allowed to be completed by another agency, respondent No. 1 cannot have a further claim. Reference may be made to a decision of this Court in the case of Mishra and Co. v. Hindustan Aeronautics Limited reported in : AIR1986 Ori22 . In the said case, the petitioner was a contractor who had entered into an agreement with the HAL to make some construction. While he was executing the work a notice was issued to him by HAL terminating the contract and dispute arising out of the said action was referred to Arbitrator in terms of the arbitration clause contained in the agreement. The petitioner therein filed an application in the Court of the learned Civil Judge, Jeypore for injunction and the petition having been rejected by the trial court, the

contractor approached this Court in a Civil revision. In the aforesaid decision, this Court held that even if the contractor suffers any injury, same can be compensated and, therefore no order of injunction could be passed. In the case of M/s. Kalinga Mining Corporation v. Arbind Construction Co. Pvt. Ltd. reported in 2007 (1) OLR 256 : AIR 2007 NOC 1335, the same view was taken in a case where an application under Section 9 of the Arbitration and Conciliation Act, 1996 had been allowed by the learned District Judge, Cuttack by directing the parties to maintain status quo. This Court on facts held that the applicant had no prima facie case or balance of convenience in his favour and is not likely to suffer irreparable injury. In the case of Kiran Mohanty v. Woodburn Developers and Builders (P) Ltd. reported in : AIR2006 Ori31 , interpreting Sections 37 and 9 of the Act this Court held that bounden duty of trial Court is to see that three pre-conditions for grant of injunction are satisfied. The Court is also to be satisfied that in order to protect the party from apprehended injury, which may be irreparable in nature, interference of the Court may be necessary. It was also observed that though the Court is required to be satisfied that the comparative mischief or the inconvenience which may likely to result by withholding the injunction will be greater than that may arise by granting it.

5. I have not referred to other decisions cited by the learned Counsel for the parties since they express the same view. If the present case is examined in the light of the aforesaid decisions, it will be found that the respondent No. 1 has quantified the claim against the appellant. Therefore, even if balance work is allowed to be completed by another agency, no prejudice could be caused to the respondent No. 1. Apart from the above, there is no dispute that though the order of injunction was passed in January, 2005, till now the respondent No. 1 has not invoked arbitration clause for appointment of an Arbitrator. On consideration of all these factors, I am of the view that the respondent No. 1 may have a prima facie case so far as termination of contract is concerned, but balance of convenience lies in favour of the appellant. So far as irreparable loss is concerned, damage if any, already caused to the respondent No. 1 can be compensated in terms of money. The respondent No. 1 having failed to satisfy all the three ingredients for grant of injunction, learned District Judge committed an error of law by allowing the application.

6. I, accordingly, allow this appeal, set aside the impugned order. Under the circumstances, there shall be no order as to costs.