

HIGH COURT OF CHHATTISGARH, BILASPUR

Arbitration Appeal No.29 of 2017

M/s. Shivam Infrastructure, a partnership firm registered under the Indian Partnerships Act, 1935, Having its office at Sharda Sadan, Behind Gayatri Mandir, Vinoba Nagar, Talapara Road, Bilaspur (C.G.), Through its Partner Shri Shailesh Agrawal, S/o Shri Madanlal Agrawal, aged about 47 years.

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Versus

1. South East Central Railway (SECR), through its General Manager, GM/ SECR's Officer Complex, Bilaspur (C.G.)
2. Divisional Railway Manager, Bilaspur Division, South East Central Railway, Bilaspur (C.G.)
3. Additional Divisional Railway Manager, Bilaspur Division, South East Central Railway, Bilaspur (C.G.)
4. Sr. Divisional Engineer (Co-ordination) Titli Chowk, Railway, Settlement, Bilaspur (C.G.)
5. Sr. Divisional Engineer (Central), Office of Sr. Divisional Engineer (Co-ordination) Titli Chowk, Railway, Settlement, Bilaspur (C.G.)
6. Additional Divisional Engineer (ADEN), South East Central Railway, Pendra Road, Pin – 495 117 District Bilaspur (C.G.)
7. Haque Timber & Furniture House, Railway Contractor, Village Thokrichak, P.O. Garhara – 85112, District Begusrai (Bihar)

---- Respondents

For Appellant: Mr. Harsh Wardhan, Advocate.

For Respondents No.1 to 6: -

Mr. Abhishek Sinha, Advocate.

For Respondent No.7: Mr. Ram Kumar Tiwari, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

21/06/2017

1. The work of constructing Railway Under Bridge by casting and insertion of RCC Box by pushing technique, retaining wall,

approach road, drain and heavy duty height gage and miscellaneous work was awarded to the appellant herein. The target date for completion of work fixed as 5-8-2014 was extended till 31-3-2015, but the work could not be completed within the extended time and no application for extension of time was sought. On inspection, the work was found to be substandard and resultantly, the appellant's contract came to be terminated with effect from 31-3-2015 by the respondent SECR.

2. Since the contract agreement provided for arbitration clause, Arbitral Tribunal was constituted on 23-12-2015 and arbitration proceeding before the Arbitral Tribunal commenced in which the appellant herein filed statement of claim claiming the amount due on account of construction of RCC Boxes, cost of back filling of retaining walls with moorum, cost of supply of sand bags, cost of fixing of rail cluster, refund of forfeited amount and loss of overhead due to prolongation of contract. In the meanwhile, defence statement of claim along with counter claim has also been filed by the respondent SECR before the Arbitral Tribunal and the matter is pending consideration before that Tribunal. In the meanwhile, balance work of contract was re-tendered vide NIT dated 6-7-2016 and tender was awarded to respondent No.7 herein on 22-11-2016, who commenced the work and it was directed to be completed by 9-11-2017. Thereafter, the appellant filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act, 1996') claiming interim direction. The appellant filed application for grant of interim direction and also filed repeated

applications on 14-12-2016, 16-1-2017 and 15-2-2017. It is the case of the appellant that since no effective orders were passed by the Arbitral Tribunal, he filed application under Section 9 of the Act, 1996, for interim direction claiming that the work awarded to the new contractor be stayed till the arbitration proceedings are finally concluded and award is passed, and the new contractor would also be restrained from performing the allotted work to him and the amount of ₹ 26,16,665/-, which is admitted claim, be paid to the appellant. The learned District Judge by its impugned order rejected the application finding no merit leading to filing of this appeal under Section 37 of the Act, 1996 questioning that order.

3. Mr. Harsh Wardhan, learned counsel appearing for the appellant, with his usual vehemence, would submit that the learned District Judge is absolutely unjustified in rejecting the application under Section 9 of the Act, 1996, merely on the ground that status quo ante cannot be granted and work in question already awarded to the new contractor cannot be stayed and public project cannot be stayed pending arbitration proceeding as by that act, the public exchequer would suffer, therefore, the impugned order deserves to be set-aside.
4. Mr. Abhishek Sinha, learned counsel appearing for respondents No.1 to 6, would submit that the petitioner had the remedy in which he invoked and no such application has been claimed before the Arbitral Tribunal in his statement of claim filed and even in the application under Section 17 of the Act, 1996, no such relief has

been claimed, as such, the relief claimed in Section 9 of the Act, 1996 is over and above the relief claimed in the application under Section 17 as well as in the statement of claim, therefore, such relief would not be grantable and rather would be barred by Section 9 (3) of the Act, 1996. He would further submit that the appellant has not crossed the hurdle of Section 9 (3) as he has not established on record how the remedy of invoking the jurisdiction of Arbitral Tribunal under Section 17 is not efficacious and therefore the learned District Judge is absolutely justified in rejecting the application filed under Section 9 (1) of the Act, as the learned District Judge has rightly concluded that there are no three ingredients available for grant of interim direction in favour of the appellant.

5. I have heard learned counsel for the parties and considered the rival submissions and also gone through the record with utmost circumspection.
6. It is not in dispute that the subject work awarded to the appellant herein was terminated on 31-3-2015 and the Arbitral Tribunal was constituted on 23-12-2015. In the statement of claim, the appellant claimed pecuniary damage compensation in terms of damage and did not claim any other main relief and thereafter, filed an application before the Arbitral Tribunal on 14-12-2016 in which at page 275 of the appeal (paper book), the appellant claimed following two reliefs and the same were repeated in all other subsequent applications.

“(iv) Hon'ble Tribunal is requested for instruction regarding execution/pushing of our constructed RCC Box till clearance of arbitration proceedings/order by the Hon'ble Tribunal. Regarding fresh tender we have brought to the notice of Hon'ble Tribunal vide our letter dated 11.08.16 but no communication received so far. Railway authority also not communicated anything till date and giving undue cooperation for pushing the same.

(vi) It is requested to Hon'ble Tribunal that pushing work and others works to be stopped till arrangement of payment of our dues along with other claims please. On failure of payment necessary permission may please be given to appeal to the Hon'ble court of law for suitable step.”

7. Whereas, the appellant claimed following interim directions in the application under Section 9 of the Act, 1996: -

“3.1 To restrain the respondents from taking any step towards execution of the remaining work in respect of the contract executed with the applicant, till the proceedings of the arbitration are finally concluded and an award is passed.

3.2 To restrain the respondents from undertaking any step, work and from executing the Tender No. DRM-ENGG-T-09-16-17 issued in respect of the remaining work awarded to the respondent no. 7, during the pendency of the arbitration proceedings.

3.3 To direct the respondents to refund amount Rs. 1,23,945/- (which has been recovered in excess), amount of rebate of Rs. 1,10,000/- (wrongly withhold) and also payment of Rs. 26,16,665/- (Final Bill) with applicable Price Valuation Escalation, without prejudice

to the rights and claims of the applicant, without any delay.

3.4 To grant any other relief which this Court deems fit and proper in the facts and circumstances of the present case.”

8. A careful perusal of the aforesaid provisions would show that the reliefs claimed in the application under Section 9 of the Act, 1996 were neither claimed in the main reliefs claimed before the Arbitral Tribunal nor claimed in the application under Section 17 of the Act, 1996 and it is rather over and above the reliefs claimed in the main relief as well as in the application under Section 17 of the Act.

9. It is well settled law that interim order is granted in the aid and assistance of final relief and if final relief is not available to the person seeking interim relief, then ordinarily, no interim relief can be granted in his favour.

10. The law on the point is well settled and that may be noticed herein profitably and gainfully. The Constitution Bench judgment of the Supreme Court in the matter of **State of Orissa v. Madan Gopal Rungta**¹ spelt out the scope and ambit of interim relief and held as under:-

“6. ... An interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the party on final determination of his rights in a suit or proceeding.”

11. Following the above-stated Constitution Bench decision, Their Lordships of the Supreme Court in the matter of **Cotton**

1 AIR 1952 SC 12

Corporation of India v. United Industrial Bank² reiterated the position of law in the following manner:-

“10. ... It is indisputable that temporary injunction is granted during the pendency of the proceeding so that while granting final relief the court is not faced with a situation that the relief becomes infructuous or that during the pendency of the proceeding an unfair advantage is not taken by the party in default or against whom temporary injunction is sought. But power to grant temporary injunction was conferred in aid or as auxiliary to the final relief that may be granted. If the final relief cannot be granted in terms as prayed for, temporary relief in the same terms can hardly if ever be granted. ...”

12. In the matter of **Ashok Kumar Lingala v. State of Karnataka and others**³ the Supreme Court has reiterated the above-stated legal provision and held as under:-

“23. The power to make an interim order is, except where it is specifically taken away by the statute, implicit in the power to make a final order. It is exercised by the authority who has to make the final order or an authority exercising appellate or revisional jurisdiction, against an order granting or refusing an interim order. The exercise of the power implies that the authority seized of the proceedings in which such an order is made will eventually pass a final order; the interim order serving only as a step in aid of such final order. ...”

13. Similarly, in a Constitution Bench decision of the Supreme Court in the matter of **Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.**⁴, the Supreme Court while noticing the above-stated Constitution Bench decision and dealing with the matters of the Arbitration and Conciliation Act, 1996 has followed the earlier decisions of **Madan Gopal Rungta's** case (supra),

2 (1983) 4 SCC 625

3 (2012) 1 SCC 321

4 (2012) 9 SCC 552

Cotton Corporation of India (supra) and **Ashok Kumar Lingala**

(supra) with approval and the principles laid down therein have been held to be applicable in a proceeding before the Arbitral Tribunal also, and held that interim relief of injunction can be granted only during the pendency of civil suit claimed upon the subject in dispute and interim relief itself must be a part of the substantive relief to which the plaintiff's cause of action entitled him. The Constitution Bench further held that no interim relief can be granted unless it is in aid of and ancillary to main relief that may be available to party on final determination of rights in the suit which must be based on a cause of action.

14. Thus, in the instant case, the reliefs claimed by the appellant in the application under Section 9 of the Act, 1996 are over and above the final relief claimed before the Arbitral Tribunal, therefore, the said reliefs are not grantable to the appellant in shape of interim direction under Section 9 of the Act, 1996.

15. This would bring me to the next argument of learned counsel for respondents No.1 to 6 that Section 9 (3) of the Act, 1996 would bar the application under Section 9 (1) of the said Act. Section 9 (3) of the Act, 1996 came into force in the statute book with effect from 23-10-2015. It states as under: -

“(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.”

16. It is not in dispute that in the present case, the Arbitral Tribunal

came into effect with effect from 23-12-2015. Therefore, Section 9 (3) of the Act, 1996 would be applicable. Thus, by virtue of the provisions contained in Section 9 (3) of the Act, 1996, once the Arbitral Tribunal has been constituted, the Court shall not entertain the application under sub-section (1) of Section 9 and thereby the application under Section 17 of the Act, 1996 for grant of interim direction would be maintainable before the Arbitral Tribunal unless the court hearing application under Section 9 (1) finds that circumstances exist which may not render the remedy available efficacious.

17. In the application under Section 9 (1) of the Act, 1996, though the appellant has clearly mentioned that he filed several applications for grant of stay, but no action has been taken till date by the Arbitral Tribunal. The reliefs claimed in those applications as noted herein-above and the reliefs claimed in the application under Section 9 of the Act, 1996 are quite different and not matching with each other. Therefore, it cannot be held that the remedy seeking interim direction available to the appellant has not been considered by the Arbitral Tribunal in its proper perspective and such a remedy is inefficacious. The appellant has even not filed the copies of the order sheets to establish the fact that no action has been taken by the Arbitral Tribunal on its application for interim direction, no such copies of order sheets have been brought on record to hold that after the constitution of Arbitral Tribunal from 23-12-2015 hearing has not taken place or the Arbitral Tribunal has not paid any heed to such application. In view of that, it cannot be held that remedy

under Section 17 of the Act, 1996 is inefficacious.

18. As a fallout and consequence of aforesaid discussion, it is held that the learned District Judge is absolutely justified in rejecting the application filed by the appellant under Section 9 (1) of the Act, 1996. However, this will not bar the appellant herein to invoke the jurisdiction of the Arbitral Tribunal under Section 17 of the Act, 1996, as these reliefs were not claimed before the Arbitral Tribunal and if such relief is claimed, the Arbitral Tribunal shall decide the same strictly in accordance with law.
19. Learned counsel for the appellants states that the Arbitral Tribunal is not meeting in regular intervals.
20. In view of above, it is directed that the Arbitral Tribunal will sit in regular intervals and if such application for interim direction is filed, same would be considered on its own merit, promptly and expeditiously, in accordance with law.
21. With the aforesaid observations and directions, the appeal stands finally disposed of leaving the parties to bear their own costs.

Sd/-
(Sanjay K. Agrawal)
Judge