

*IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH*

CMA.No.251 of 2017

Between:

M/s Royal Mindz Infra Pvt Ltd.,
Hyderabad, reple by its Managing
Director-Satya Venkata Srinivas Borusu

... Appellant

And

M/s Coastal Ceramics & Clay Works
Pvt Ltd., Rajahmundry.

...Respondent

JUDGMENT PRONOUNCED ON 27.7.2017

HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY
AND

HON'BLE MS JUSTICE J.UMA DEVI

1. Whether Reporters of Local newspapers : Yes/No
may be allowed to see the Judgment?
2. Whether the copies of judgment may be
marked to Law Reporters/Journals? : Yes/No
3. Whether Their Lordships wish to
see the fair copy of the Judgment? : Yes/No

JUSTICE C.V.NAGARJUNA REDDY

JUSTICE J.UMA DEVI

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> Head Note:

! Counsel for the appellant: Mr. N.Subba Rao

^ Counsel for the Respondent: Mr. N.Vijay

? Cases Referred:

1. 2010(1) ALD 453 (DB)
2. AIR 2010 Rajasthan 80
3. 1987 (1) SCC 667
4. (2013) 15 SCC 414
5. (2006) 1 SCC 275
6. (2003) 6 SCC 697

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Counsel for the appellant: Mr. N.Subba Rao

Counsel for the respondent: Mr. N.Vijay

The Court made the following:

JUDGMENT: *(per Hon'ble Sri Justice C.V.Nagarjuna Reddy)*

This Civil Miscellaneous Appeal is filed against order, dated 09.3.2017, in I.A.No.1 of 2017 in A.R.C.No.156 of 2014 on the file of the Arbitral Tribunal at Rajamahendravaram.

By the afore-mentioned order, the Arbitral Tribunal has allowed the said I.A. by directing the appellant to handover the share of the respondent as per the Joint Development Agreement, dated 16.12.2011, and the Ancillary Agreement, dated 21.11.2012, under acknowledgment.

We have heard the appeal on merits at length. After the case was reserved "for Judgment" and the same was, accordingly, posted for "Pronouncement of Judgment", Mr. N.Vijay, the learned counsel for the respondent, raised an objection as to the maintainability of this Civil Miscellaneous Appeal. Therefore, we have heard the learned counsel for both parties on this aspect.

Mr. N.Vijay, the learned counsel for the respondent, argued that against an order passed by the Arbitral Tribunal granting or refusing to grant interim measures under Section-17 of the Arbitration and Conciliation Act, 1996 (for short 'the Act'), an appeal shall lie to "Court", which is Principal Court of Original Civil jurisdiction as defined under Section-2(e) thereof. The learned counsel further argued that this Court does not

have the original civil jurisdiction to decide the questions forming the subject matter of the arbitration, if the same had been the subject matter of a suit, and such jurisdiction is conferred only on the District Court, which answers the description of the Principal Civil Court of original jurisdiction, for challenging the impugned order of the Arbitral Tribunal.

Mr. N.Subba Rao, the learned counsel for the appellant, submitted that as this Court has jurisdiction to entertain an appeal against an order granting or refusing to grant interim measures under Section-9 of the Act by the Principal Civil Court of original jurisdiction and the Arbitral Tribunal having granted the interim measure under Section-17 of the Act, which is equivalent to Section-9 of the Act, this Court also has jurisdiction to entertain an appeal against any order of the Arbitral Tribunal granting interim measure. He has, however, submitted that in the instant case, as the Arbitral Tribunal has not granted interim measure under Section-17 of the Act, Section-37(2) of the Act is not attracted and that, as this Court has appointed the Arbitrator, this appeal lies under Section-42 of the Act. Learned counsel for the appellant further argued that even if an appeal is not maintainable under Section-37(2) (b) of the Act, the present appeal may be treated as an appeal filed under Section-42 of the Act and this Court having

appointed an Arbitrator, has jurisdiction to set aside the impugned order of the Arbitral Tribunal if the same is contrary to the provisions of the Act.

In support of his submissions, the learned counsel placed reliance on a judgment of a Division Bench of this Court in *SPA Agencies (India) Private Ltd. Chennai Vs. Harish Rawtani*¹ and the judgment of a learned single Judge of the Rajasthan High Court in *Mohan Das (deceased by L.Rs) Vs. Addl. District Judge No.3, Jodhpur*².

We have carefully considered the respective submissions of the learned counsel for both parties and perused the record.

A glance at the impugned order of the Arbitral Tribunal would show that the same was passed in an interlocutory application filed by the respondent purportedly under Section-151 of the Code of Civil Procedure.

While examining the validity of order of any Court or Tribunal, we need to look into the substance rather than the form. The law is well settled that mere quoting of a wrong provision is not determinative of the true nature of the proceeding.

¹ 2010(1) ALD 453 (DB)

² AIR 2010 Rajasthan 80

In *Borpukhurie Tea Estate Vs. The Presiding Officer, Industrial Tribunal, Assam and another*³, the Supreme Court held at paras 7 and 8 as under :

“ The courts charged with the duty of administering justice have to remember that it is not the form but the substance of the matter that has to be looked to and the parties cannot be penalised for inadvertent errors committed by them in the conduct of their cases. The following observation made by this Court in *Western India Match Company Ltd. Vs. Their Workmen* (AIR 1964 SC 472) are apposite in this connection :

“Again, as in most questions which come before the Courts, it is the substance which matters and not the form and every fact and circumstance relevant to the ascertainment of the substance deserve careful attention.”

Indeed, Section-19 of the Act ordains that the Arbitral Tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. The Arbitral Tribunal while passing the impugned order has referred to and relied upon Section-17 of the Act. Under this provision, the interim measures which are envisaged under Section-9 of the Act that could be granted by the civil Court are included and the Arbitral Tribunal is conferred with the jurisdiction to grant such interim measures. The only difference between the two provisions is that

³ (1987(1) SCC 667

the jurisdiction under Section-17 of the Act could be exercised by the Arbitral Tribunal only during the pendency of the arbitration proceedings unlike by the Court which can exercise its jurisdiction under Section-9 of the Act either before or at any time after the making of the arbitral award, but before it is enforced in accordance with Section-36 of the Act.

Section-37 of the Act provided for a remedy of an appeal to an aggrieved party, both in respect of the interim measures ordered by the Court under Section-9 of the Act and also by the Arbitral Tribunal under Section-17 of the Act. If a party is aggrieved by an order passed by the Court under Section-9, he can file an appeal to the Court authorised by law to hear appeals from original decrees of the Court passing the order, whereas against an order granting or refusing to grant interim measures under Section-17 of the Act by the Arbitral Tribunal, an appeal shall lie to "Court". The word 'Court' is defined under Section-2(e) of the Act, which reads as under:

"in case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any civil court of a

grade inferior to such principal civil Court or any Court of Small Causes.”

The difference in phraseology between Sub-section-(1) of Section-37 and Sub-section-(2) of Section-37 is clearly noticeable as regards the jurisdiction to entertain an appeal.

As observed above, under Sub-section-(1), an appeal shall lie to the Court authorised by law to hear appeals from the original decrees which is empowered to entertain an appeal; whereas under Sub-section-(2), an appeal shall lie to a ‘Court’, which necessarily means the “Court” defined under Section-2(e) of the Act. Had the law makers intended to confer jurisdiction of entertaining an appeal under Sub-section-(2) of Section-37 of the Act also on the same Court on which jurisdiction is conferred under Sub-section-(1) thereof, they would have repeated the same language as deployed in Sub-section-(1) thereof while describing the ‘Court’.

In other words, in respect of the orders passed either under Section-8 or Section-9 of the Act by the Court, the appellate power is conferred on the Court to which an appeal shall lie from the original decrees of the Court, while the Principal Civil Court of original jurisdiction is conferred with the appellate power in respect of the orders passed by the

Arbitral Tribunal, which are referred to in Sub-section-(2) of Section-37 of the Act.

The scheme underlying Section-37 of the Act being what as explained above, we are unable to accept the submission of the learned counsel for the appellant that this Court has jurisdiction to entertain this Civil Miscellaneous Appeal against the impugned order passed by the Arbitral Tribunal which is traceable to Sub-section-(2) of Section-37 of the Act.

The arbitral Tribunal is not vested with inherent power as vested in a Court under the Code of Civil Procedure. Therefore, the order under appeal is not traceable to Section-151 C.P.C.

Even assuming that the impugned order of the Arbitral Tribunal is referable to Section-151 of C.P.C., in the absence of a specific provision conferring the appellate jurisdiction on this Court to examine the correctness or otherwise of the impugned order passed by the Arbitral Tribunal, no appeal shall lie to this Court.

Coming to the decision cited by the learned counsel for the appellant in *SPA Agencies (India) Private Ltd. Chennai* (1 supra), in the said case, the Arbitral Tribunal has passed an order under Section-17 of the Act at the instance of one of the parties. The said order was not carried in appeal. However, the other party to the arbitration proceedings filed an application under

Section-9 of the Act before the Civil Court, which granted certain directions. Assailing the said order, the party at whose instance the Arbitral Tribunal has passed an order has filed an appeal before this Court under Section-37(2) of the Act. While dealing with the said appeal, the following points were framed by the Division Bench:

“Whether the power vested in Civil Court under Section-9 of A&C Act is barred when the arbitrator exercises power under Section-17 and/or 30 of A&C Act before passing final award?” and Whether the Court of III Additional Chief Judge, City Civil Court, Hyderabad was justified in passing the impugned order?”

After referring to some case law, on the first point, the Division Bench has held that despite the fact that the Arbitral Tribunal exercised its power under Section-17 of the Act, the civil Court still has jurisdiction to entertain an application under Section-9 of the Act for granting any of the reliefs envisaged under the said provision. On the second point, the Division Bench has held that the civil Court was justified in passing the impugned order and accordingly, dismissed the said appeal. However, in the course of discussion, the Division Bench has pointed out the distinction between the scope of Section-9 of the Act and that of Section-17 of the Act and made the following observations:

“The conspectus of the case law discussed hereinabove, would lead to the following: Section-9 of A&C Act provides an independent remedy to a party to arbitration. The remedy is to seek an interim order from the Principal Civil Court as defined in Section-2(e) of A&C Act. The interim orders can be any as described in Section-9(ii)(a) to (d) or can be any order which appears to the Court as just and convenient. As the Court has same powers as it has for the purpose of other proceedings before it, all the normal rules governing the grant of interim order would apply. But, the difference is that the remedy under Section-9 is not by way of an appeal against an interlocutory order passed by the arbitrator under Section-17 of A&C Act because under Section-37(2)(b) of A&C Act, grant or refusal of interim order by the arbitrator is appealable before High Court. In a given case, the remedy provided under Section-9 is not barred even if the party moving a petition thereunder has already obtained the relief partly or wholly from the arbitrator and in such an event, the petition for an interim order would be independent and different from the interim order already obtained under Section-17 of A&C Act.” (emphasis added)

With due respect, we may observe that in the aforesaid judgment of the Division Bench the issue as to whether an appeal lies to this Court against an order granting any of the interim measures under Section-37 of the Act by the Arbitral Tribunal neither fell for consideration nor any discussion in that regard was undertaken. Therefore, the observation made by the

Court on an aspect which did not directly or substantially arise before it, does not constitute a ratio.

In *Arasmeta Captive Power Co. (P) Ltd. Vs. Lafarge India*

*(P) Ltd.*⁴, the Supreme Court held as under:

“The ratio of any decision must be understood in the background of the facts of that case. The case is only an authority for what it actually decides, and not what logically follows from it. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or Judge-made, and a minor premise consisting of the material facts of the case under immediate consideration. It is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case. If more reasons than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi.”

In *State of Orissa Vs. Mohd. Illiyas*⁵, the Supreme Court held at para-12 as under:

“ According to the well-settled theory of precedents, every decision contains three basic postulates: (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the

⁴ (2013) 15 SCC 414

⁵ (2006) 1 SCC 275

facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment.”

In Islamia Academy of Education Vs. State of Karnataka⁶,

the Supreme Court held at para-2 as under:

“ The ratio decidendi of a judgment has to be found only on reading of the entire judgment. In fact, the ratio of the judgment is what is set out in the judgment itself. The answer to the question would necessarily have to be read in the context of what is set out in the judgment and not in isolation. *In case of any doubt as regards any observations, reasons and principles, the other part of the judgment has to be looked into. By reading a line here and there from the judgment, one cannot find out the entire ratio decidendi of the judgment.*”

(Emphasis is original)

In the light of the law on the ratio decidendi as discussed above, the stray observation of the Division Bench in ***SPA Agencies (India) Private Ltd. Chennai*** (1 supra) does not come to the help of the appellant.

The judgment in ***Mohan Das (deceased by L.Rs)*** (2 supra) is also of no avail to the appellant. That was a case where the issue that fell for consideration was whether an order passed by

⁶ (2003) 6 SCC 697

the Arbitral Tribunal was in the nature of an interim award or not, and consequently, whether an application under Section-34 of the Act was maintainable or not. The Rajasthan High Court having considered the nature of the order passed by the Arbitral Tribunal held that it was only an order granting an interim measure, but not an arbitral award, either interim or final, and hence, an application under Section-34 of the Act was not maintainable and consequently, the appeal to the High Court under Section-37 of the Act was held not maintainable.

Let us consider the submissions of the learned counsel based on Section-42 of the Act.

Section-42 of the Act reads as under:

“Jurisdiction: Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force where with respect to an arbitration agreement any application under this Part has been made in a court that court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of the agreement and the arbitral proceedings shall be made in that Court and in no other court.”

The above reproduced provision refers to the word “Court”, which is again referable to Section-2(e) of the Act.

The definition “Court” was reproduced in the earlier part of this judgment. As per this definition, the principal Court of original civil jurisdiction answers the description of the ‘Court’

in a district, which also includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration, if the same had been the subject matter of the suit. It is not the pleaded case of the appellant that this Court has the original civil jurisdiction to adjudicate the subject matter if the party has filed a civil suit. Therefore, this Court falls outside the scope of Section 2(e) of the Act. Though an application under Section 11 which falls in Part I of the Act was filed before this Court for appointment of an Arbitrator, that by itself would not confer jurisdiction on this Court to entertain all subsequent applications, as Section 42 of the Act has used the expression “a court” while referring to filing of any application, and not “any court”. Only if the latter expression has been used in Section 42, this Court would have had the jurisdiction to entertain the subsequent applications. The Act used the expressions “Court”, “High Court” and “Supreme Court” in different contexts. Even if the High Court or the Supreme Court entertains an application under Part-I, such as the one under Section 11 of the Act, they do not fall within the expression “a Court” under Section 42 of the Act, unless the subject matter would fall within their original civil jurisdiction had a civil suit been filed. If the interpretation of Section 42 of the Act as put forth by the

counsel for the appellant is accepted, in all cases where the High Court or Supreme Court appoints an Arbitrator under Section 11(5) of the Act, the aggrieved party can challenge the award under Section 34 of the Act before either of the two Courts, as the case may be. In such an event, the High Courts and the Supreme Court, would be flooded with litigation, which we are sure is not the legislative intent.

In the light of the above discussion, we are of the opinion that the present Civil Miscellaneous Appeal against the order, dated 09.3.2017, passed by the Arbitral Tribunal at Rajamahendravaram in I.A.No.1 of 2017 in A.R.C.No.156 of 2014 is not maintainable before this Court.

Accordingly, the Civil Miscellaneous Appeal is dismissed. However, the appellant is entitled to challenge the impugned order of the Arbitral Tribunal before the Principal Civil Court of original jurisdiction and is also entitled to seek condonation of delay under Section-14 of the Limitation Act, if it chooses to file such appeal.

The Registry is directed to return the copies and original documents, if any, filed by the appellant on an application being made by it.

As a sequel to dismissal of the Civil Miscellaneous Appeal, interim order, dated 30.3.2017, in CMAMP.No.429 of 2017 is

vacated and CMAMP.Nos.429 and 586 of 2017 are dismissed as infructuous.

JUSTICE C.V.NAGARJUNA REDDY

JUSTICE J.UMA DEVI

27th July 2017

Note:

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