THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

CIVIL MISCELLANEOUS APPEAL NO.621 OF 2016

J U D G M E N T
(*Per* Hon'ble Sri Justice Sanjay Kumar)

This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for brevity, 'the Act of 1996') arises out of the order dated 28.04.2016 passed by the learned XXV Additional Chief Judge, City Civil Court, Hyderabad, in Arb.O.P.No.867 of 2016. This O.P. was filed by the first and second respondent companies herein (R1 and R2) under Section 9 of the Act of 1996 to restrain the appellant company, shown as the first respondent in the O.P., from selling/transferring/alienating/disposing any direct or indirect interests in Dichpally and Devanahalli projects to any person without their prior written consent. By the order under appeal, the Court below directed the respondents in the O.P. to maintain *status quo* obtaining as on that day with regard to selling/alienating/transferring their direct and indirect interests in Dichpally and Devanahalli projects to any person without prior written consent of the petitioners. Aggrieved thereby, the first respondent in the O.P. is before this Court.

Heard Sri J.Sudheer, learned counsel for the appellant company, and Sri S.Niranjan Reddy, learned senior counsel representing Ms.Rubaina S.Khatoon, learned counsel for the first and second respondent companies.

Facts, to the extent necessary for the disposal of this appeal, are as under: The appellant company is a multidisciplinary engineering and construction company which undertakes construction of pile foundations, diaphragm walls, marine structures, special foundations, industrial structures, roads, bridges and irrigation infrastructure on Engineering Procurement and Construction (EPC) and Build, Operate and Transfer (BOT) basis. While so, R1 and R2 companies herein invested Rs.200.00 Crore in the appellant company in the year 2006 and picked up a minority shareholding of 11.76% therein. Investment Agreement dated 19.10.2006 was executed by and between the appellant company and R1 and R2 companies setting out the details of their agreement and the relationship between them, in addition to the rights and obligations arising out of the investment made by R1 and R2 companies.

Clause 11 of the said Investment Agreement titled 'Reserved Matters' states to the effect that no action or decision relating to any of the reserved matters shall be taken by the appellant company unless R1 and R2 companies' consent is obtained for such action or decision. 'Reserved Matters' are detailed in Schedule-4 appended to the agreement. The fourth item in this Schedule states as under:

> '4. The participation, investment or subscription in, or transfer of assets to, any joint venture, consortium, partnership, company or other body corporate or the incorporation of any new subsidiary or affiliate, in excess of Rs.25,00,00,000/- (Rupees Twenty Five Crores Only) in the aggregate other than in the ordinary course of business.'

It is an admitted fact that the appellant company executed two road projects – one, at Dichpally in the present State of Telangana and the other, at Devanahalli in the State of Karnataka. These projects were implemented on BOT basis through special purpose vehicles incorporated for that purpose, viz., Navayuga Dichpally Tollway Private Limited and Navayuga Devanahalli Tollway Private Limited. Concession Agreement dated 05.08.2009 for the Dichpally road project and Concession Agreement dated 30.04.2010 for the Devanahalli road project were executed by and between the National Highways Authority of India (NHAI) and the respective special purpose vehicles setting out the terms and conditions whereunder the tollway projects were to be operated through them by the appellant company. Thereunder, the appellant company was entitled to operate and maintain the projects for a period of twenty years. However, provision was also made for substitution of the concessionaire, the appellant company's special purpose vehicle, by transfer of ownership to a nominated company with the prior approval of the NHAI. Both the concession agreements contain similar clauses. Further, the NHAI issued Circular dated 29.01.2014 in the context of the substitution of the existing concessionaire, detailing the procedure therefor.

Earlier to this *lis*, R1 and R2 companies asserted that there was violation of certain clauses of the Investment Agreement by the appellant company. The alleged violations were in relation to providing information in terms of Clause 10 of the said agreement and the impending violation of Clause 11 of the agreement relating to reserved matters. R1 and R2 companies thereupon filed Arb.O.P.No.2848 of 2014 before the learned XXV Additional Chief Judge, City Civil Court, Hyderabad, under Section 9 of the Act of 1996 with the prayer to pass an order:

> 'a) Restraining the Respondent No.1 Company from selling/ transferring/alienating/disposing and/or encumbering its direct and indirect interests (legal, beneficial and/or

economic) in any and all properties, whether located in India or abroad, other than in the ordinary course of business and specifically restraining the Respondent No.1 Company from selling/transferring/alienating/disposing any direct or indirect interests in Devanahalli and Dichpally to any person, without the prior written consent of the Petitioners;

b) Restraining the Respondents from passing, giving effect to or taking any action pursuant to any resolution contrary to Clause 11 of the Investment Agreement (i.e. the Petitioners Reserved Matter rights);

c) … … …

d) … … …

e) … … …'

This Arbitration OP was disposed of by order dated 02.07.2015, granting an injunction restraining the appellant company from alienating, selling, transferring its direct and indirect interests in any or all the properties without the consent of R1 and R2 companies, but permitting the appellant company to deal with the properties in the ordinary course of business. The appellant company and the other respondents in that O.P. were also restrained from passing or giving effect to or making any action pursuant to any resolution contrary to Clause 11 of the Investment Agreement and were directed to provide all information as required under Clause 10.1 of the said Agreement, subject to business usage and interest of appellant company.

No appeal was preferred against this order.

While so, Arb.O.P.No.867 of 2016 was filed by R1 and R2 companies referring to the aforestated order dated 02.07.2015 in Arb.O.P.No.2848 of 2014 and stating that it had come to their knowledge that the respondents in the O.P., being the appellant company and the very same respondents arrayed in the earlier

O.P., were again attempting to dispose of Dichpally and Devanahalli projects in a manner which was not in the ordinary course of business and without obtaining their consent. In the petition filed in support of the O.P., R1 and R2 companies asserted that the respondents in the O.P. were pursuing the NHAI to obtain its approval for transfer of their ownership of the Dichpally and Devanahalli projects, though there was no financial distress in relation thereto. They contended that any attempt to substitute the concessionaire in relation to these projects would not be in the ordinary course of business and would therefore be violative of the earlier order dated 02.07.2015. They further contended that their consent necessarily had to be obtained in terms of Clause 11 read with Item 4 of Schedule-4 of the Investment Agreement and that allowing such transfer of ownership would cause them irreparable loss and harm which could not be compensated thereafter.

Sri J.Sudheer, learned counsel, would point out that the prayer in this second petition under Section 9 of the Act of 1996 is nothing but a replication of the first prayer in the earlier O.P., which was not granted and contend that it is not open to R1 and R2 companies to seek such relief again, having allowed the order dated 02.07.2015 passed in the earlier O.P. to attain finality. Learned counsel would argue that the principle of *res judicata* would squarely apply and the Court below ought to have dismissed the present O.P. on this short ground *in limini*.

Per contra, Sri S.Niranjan Reddy, learned senior counsel, would contend that the principle of *res judicata* has no application to the case on hand as the order passed earlier on 02.07.2015 was only an interlocutory order and no finality could attach thereto. He would further contend that R1 and R2 companies were justified in filing the second Arb.O.P owing to the changed circumstances, which warranted interference by the Court below in exercise of its power under Section 9 of the Act of 1996.

The primary issue that falls for consideration before us is whether the earlier order dated 02.07.2015 in Arb.O.P.No. 2848 of 2014 would bar the institution of Arb.O.P.No.867 of 2016.

As pointed out by the Supreme Court in ***SATYADHYAN GHOSAL V/s. DEORAJIN DEBI***[1], the principle of *res judicata* is based on the need of giving finality to judicial decisions and would apply when a matter – whether on a question of fact or a question of law – has been decided between two parties in a suit or proceeding and the decision attains finality, either because no appeal lies or has been preferred or if filed, was dismissed. The Supreme Court further observed that this principle would apply even between two stages in the same litigation to the extent that a Court having, at an earlier stage decided a matter in one way, would not allow the parties to reagitate the matter again at a subsequent stage of the same proceeding.

The principle of *re judicata* is based on considerations of public policy that decisions pronounced by a Court of competent jurisdiction should be final, unless modified or reversed in appeal and one should not be made to face the same litigation twice over which would be contrary to considerations of fair play and justice. (***HOPEPLANTATIONS LIMITED V/s. TALUK LAND BOARD, PEERMADE***[2]).

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[1] AIR 1960 SC 941
[2] (1999) 5 SCC 590

As pointed in ***SATYADHYAN GHOSAL***[1], even if the principle of res judicata embodied in Section 11 CPC does not apply *stricto sensu,* it is applied by Courts for the purpose of achieving finality in litigation.

Sri S.Niranjan Reddy, learned senior counsel, would however place reliance on ***ARJUN SINGH V/s. MOHINDRA KUMAR***[3], wherein the Supreme Court observed as under:

> 'Interlocutory orders are of various kinds; some like orders of stay, injunction or receiver are designed to preserve the status quo pending the litigation and to ensure that the parties might not be prejudiced by the normal delay which the proceedings before the court usually take. They do not, in that sense, decide in any manner the merits of the controversy in issue in the suit and do not, of course, put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation the principle of *res judicata* does not apply to the findings on which these orders are based, though if applications were made for relief on the same basis after the same has once been disposed of, the court would be justified in rejecting the same as an abuse of the process of court. There are other orders which are also interlocutory, but would fall into a different category. The difference from the ones just now referred to lies in the fact that they are not directed to maintaining the *status quo*, or to preserve the property pending the final adjudication, but are designed to ensure the just, smooth, orderly and expeditious disposal of the suit. They are interlocutory in the sense that they do not decide any matter in issue arising in the suit, nor put an end to the litigation. .... Thus if an application for the adjournment of a suit is rejected, a subsequent application

[3] AIR 1964 SC 993

> for the same purpose even if based on the same facts, is not barred on the application of any rule of *res judicata,* but would be rejected for the same grounds on which the original application was refused. The principle underlying the distinction between the rule of *res judicata* and a rejection on the ground that no new facts have been adduced to justify a different order is vital. If the principle of *res judicata* is applicable to the decision on a particular issue of fact, even if fresh facts were placed before the Court, the bar would continue to operate and preclude a fresh investigation of the issue, whereas in the Other case, on proof of fresh facts, the court would be competent, nay would be bound to take those into account and make an order conformably to the facts freshly brought before the court.

He would also rely upon the decision of the Delhi High Court in ***SHRI RAKESH MADAN V/s. RAJASTHAN FINANCIAL CORPORATION***[4], in the context of the maintainability of a second application for the same interlocutory relief. The Delhi High Court observed therein that though the Code of Civil Procedure, 1908 does not contain any express bar to a second interlocutory application, Courts have held that the principles of Section 11 CPC would be applicable to successive stages of the same proceeding also. Reference was also made to Order 39 Rule 4 CPC which enables the Court to discharge or vary or set aside an earlier interim order on finding the same to be necessary by change in the circumstances or if the order is found to cause undue hardship. The Delhi High Court observed that even if the Court earlier found no reason to grant interim protection, on finding a change in the circumstances or undue hardship having been caused to the party who had been declined the interim relief earlier, the Court would

[4] I.A.NO.14090 OF 2008 IN CS(OS)NO.513 OF 2008 DECIDED ON 13.01.2009

be competent to entertain a second application and grant interim relief. The Delhi High Court however cautioned that this power is circumscribed by the parameters of a change in circumstances or undue hardship and without a change in circumstances or without a case of undue hardship having been made out, the Court would not be competent to grant an interim order which was declined earlier on the same facts. The Delhi High Court concluded that caution has to be exercised that such power does not lead to filing of applications before successive presiding officers, thereby attaching an element of wager to such applications.

In the light of the aforestated legal position, it cannot be doubted that a second application for the same interlocutory relief would be maintainable but, only if one of the two aforementioned factors is made out, viz., a change in circusmtances or undue hardship being established.

In the present case, the petition filed in support of Arb.O.P.No.867 of 2016 does not cite any change in circumstances. R1 and R2 companies asserted therein that they would be put to irreparable harm, which could not be compensated at a later stage, if interim relief was not granted. The apprehension of irreparable harm was occasioned by the purported attempts of the appellant company to transfer ownership by substitution of the concessionaire in respect of Dichpally and Devanahalli projects. According to R1 and R2 companies, these attempts would not qualify as transfers in the ordinary course of business and, therefore, Clause 11 of the Investment Agreement dated 19.10.2006 would stand attracted and their prior consent is essential.

It is however relevant to note that this very argument was advanced in Arb.O.P.No.2848 of 2014. Reference was made even at that stage to the NHAI Circular dated 29.01.2014, which stipulated the procedure for substitution of the concessionaire, and it was contended that the appellant company's attempts to transfer ownership of Dichpally and Devanahalli projects would not qualify as transactions in the ordinary course of business.

The order of the Court below dated 02.07.2015 in Arb.O.P.No.2848 of 2014 demonstrates that this issue was considered at length. Upon examination of the Investment Agreement, Concession Agreements and the NHAI Circular dated 29.01.2014, it was held that the appellant company could assign and transfer the concession granted to it to a nominated company with the approval and sanction of the NHAI and if such substitution is permitted by NHAI, the said transfer would amount to a transaction in the ordinary course of business of the appellant company.

Significantly, this clear finding was rendered in Arb.O.P.No.2848 of 2014 in the context of Dichpally and Devanahalli projects. It is an admitted fact that no appeal was preferred by R1 and R2 companies against the aforestated order dated 02.07.2015 passed in Arb.O.P.No.2848 of 2014. Having suffered this order and having allowed it to attain finality, it is not open to R1 and R2 companies to reagitate the issue as to whether transfer of ownership of these two projects would amount to a transaction in the ordinary course of business of the appellant company by way of a second application under Section 9 of the Act of 1996.

In effect, R1 and R2 companies were before the Court below by way of a second application on the very same set of facts as were pressed into service in the earlier petition. Thus, neither of the two conditions which are essential for maintaining a second petition for the very same interlocutory relief was established or made out. Arb.O.P.No.867 of 2016 was therefore not maintainable in the aforestated circusmtances. This aspect of the matter was not even looked into by the Court below while granting a peremptory *status quo* order. As rightly pointed out by Sri J.Sudheer, learned counsel, the Court below did not even bother to record any reasons as to why *status quo* obtaining as on that day was directed to be maintained. Be it viewed from any angle, the order under appeal is unsustainable and is accordingly set aside.

The Civil Miscellaneous Appeal is allowed. The Court below shall take note of the observations made hereinbefore as to the maintainability of the Arb.O.P and take steps accordingly. Pending miscellaneous petitions, if any, shall stand closed in the light of this final order. No order as to costs.

SANJAY KUMAR,J

U.DURGA PRASAD RAO,J

27th JANUARY, 2017

PGS