

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL (L) NO.638 OF 2015
IN
ARBITRATION PETITION NO.1510 OF 2015
ALONGWITH
NOTICE OF MOTION (L) NO.2294 OF 2015
IN
APPEAL (L) NO.638 OF 2015
IN
ARBITRATION PETITION NO.1510 OF 2015**

AMS Concrete ((India) Pvt. Ltd.

..... Appellant.
(Original Respondent)

V/s

ITD Cementation India Ltd.

..... Respondent
(Original Petitioner)

Mr. A. Patnaik alongwith Mr. M.S. Rizvi i/b Naveen Chomal for
the Appellant.

None for the Respondent.

**CORAM: V. M. KANADE &
DR. SHALINI PHANSALKAR-JOSHI, JJ.**

DATE: 25th August, 2015

P.C.:- (Per V.M. Kanade, J.)

1. Appellant is challenging the order passed by the learned
Single Judge dated 07/08/2015 in a Petition filed by the
Respondent herein under Section 9 of the Arbitration and

Conciliation Act 1996 (hereinafter referred to as “the said Act”) By the said order, the learned Single Judge granted interim relief in terms of prayer clause (a) which reads as under:-

“a. that this Hon'ble Court be pleased to order and direct the Respondent to remove the plant, machinery and equipment as described in “Exhibit JJ” hereto from the site and ITD Cementation India Ltd, Opp. ITC Sonar Hotel, EM Bypass, Near Jai Hind (Dhappa) Water Treatment Plant, Kolkata - 700105 within a period of 15 days from the date hereof:”

The learned Single Judge, therefore, directed the original Respondent who is the Appellant herein to remove all plant, machinery and equipments as described in Exhibit-JJ within 15 days from the date of the order. It has been further provided that if the Appellant does not remove the plant, machinery and equipments, the Court Receiver should remove the same and hand it over to the Appellant herein.

2. Being aggrieved by the said order, the Appellant has filed this Letters Patent Appeal.

3. Firstly, it is submitted that the impugned order could not have been passed by the learned Single Judge while exercising jurisdiction under Section 9 of the said Act. It is

submitted that the order for removal of the plant, machinery and equipments could not have been passed as an interim measure under Section 9 of the said Act. It is submitted that under section 9(ii)(a), this Court can pass an order as an interim measure to preserve any of the items which are subject matter of the arbitration agreement. It is submitted that the Appellant has a good case on merits and if the claim for specific performance which has been made by the Appellant is allowed, it would be difficult for the Appellant to remobilise all such plant, machinery and equipments at the site. It is further submitted that the Appellant herein (original Respondent) was ready and willing to proceed with the work awarded by the Respondent herein (original Petitioner) and was ready to provide all co-operation to the original Petitioner i.e. Respondent herein.

4. We have perused the impugned order. In our view, there is no infirmity or illegality committed by the learned Single Judge while giving direction under section 9 of the said Act.

5. Brief facts are that a work order was issued in favour of original Petitioner – Company i.e. Respondent herein, appointing it as Contractor by the Rail Vikas Nigam Limited, Government of India Enterprise (For short “RVNL”) by way of contract dated 05/03/2014 for construction of seven stations

including related works from “Kavi Subhash (New Garia) to Ritwik Ghatak, in New Garia-Airport Corridor of Kolkata Metro Railway Line” Under the said contract, original Petitioner i.e. Respondent herein was to construct seven stations and the work was to be completed on/or before 04/2/2017. Appellant herein was appointed as a Subcontractor and, accordingly, work order was issued in favour of the Appellant herein by the Respondent dated 01/10/2014. By the said Subcontract, which was termed as work order, the said work was purely in the nature of a purchase order for production and supply of RMC at site, in terms of technical specifications given by RVNL in the main contract. Clause 28 of the Work Order clearly stated that if the Contractor does not find either the mobilisation of resources by Subcontractor or the performance of Subcontractor as satisfactory to complete the work within the specified time, he could terminate the Subcontract by giving seven days' notice without paying any compensation to the Subcontractor and get the work done through another Subcontractor. Clause 30 has provided that in the event of any disputes, the same would be referred to the Arbitrator. The Subcontract which was awarded to the Appellant was terminated by Termination Notice dated 30/04/2015.

6. Appellant, despite termination of the work, did not remove its plant, machinery and equipments at the site of

the Respondent herein. Respondent herein therefore was constrained to file a Petition under Section 9 of the Arbitration and Conciliation Act, 1996.

7. In our view, submission made by the learned Counsel appearing on behalf of the Appellant is without any substance. The Apex Court in *Wander Ltd and Another vs. Antox India P. Ltd.*¹ has observed in para 14 as under:-

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial

1 1990(Supp) SCC 727

manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in *Printers (Mysore) Private Ltd vs. Pothan Joseph* (1960) 3 SCR 713 : AIR 1960 SC 1156 : (SCR 721).

“..... These principles are well established, but as has been observed by Viscount Simon in *Charles Osenton & Co. v. Jhanaton* [1942 AC 130] '....the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case.”

The appellate judgment does not seem to defer to this principle.”

8. In our view, there is no infirmity or illegality committed by the learned Single Judge while passing the order under Section 9 of the said Act. The learned Single Judge has considered the submissions of the Appellant and has given a clear and cogent reasons for not accepting the submissions made by the Appellant's Counsel. It has to be noted that the work which was allotted to the Appellant was in the nature of completion of infrastructural work in which time was an essence of the contract and the entire work was to be

completed by 04/02/2017. The Respondent herein had awarded Subcontract to the Appellant herein and according to the Respondent, the Appellant herein had not adhered to the time schedule which was fixed and agreed between the parties. Respondent herein was, therefore, constrained to terminate the contract by Termination Notice dated 30/04/2015. In spite of the termination of the contract, Appellant did not remove the plant, machinery and equipments at the site. The Respondent/original Petitioner therefore could not carry out the work by appointing another Subcontractor. The Appellant herein who is a Respondent in the Petition under Section 9, did not take any steps for referring the matter to arbitration. Even after the termination notice was issued, the Appellant had not removed its plant, machinery and equipments and was further delaying the completion of the said infrastructural work and therefore the Respondent/original Petitioner was constrained to approach this Court. The learned Single Judge has observed that the Appellant herein had also quantified its claim for damages in reply to the Termination Notice. The learned Single Judge has also observed that in the event the Appellant succeeds in arbitration, it can always install the said plant, machinery and equipments and, therefore, no prejudice would be caused to the Appellant/original Respondent.

9. We agree with the reasons given by the learned Single Judge in the impugned order and we do not feel that the said order is perverse. We, therefore, are not inclined to interfere with the said order in Appeal. Appeal is dismissed in limine. Interim order, if any, stands vacated.

10. Since Appeal is disposed of, Notice of Motion taken out therein does not survive and the same is also disposed of.

(DR. SHALINI PHANSALKAR-JOSHI, J.)

(V.M. KANADE, J.)