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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL (L) NO.716 OF 2015
IN
ARBITRATION PETITION NO.62 OF 2014
ALONGWITH
NOTICE OF MOTION (L) NO.2589 OF 2015

Patel Engineering Ltd.,)
a Company incorporated under)
Indian Companies Act, 1956)
having its Registered Office and)
Mumbai Office at Patel Estate,)
Patel Estate Road, Jogeshwari (w))
Mumbai – 400 102.) ….. Appellant
(Original Respondent)

V/s

Acron Developers Pvt. Ltd.,)
a Company registered under the)
Indian Companies Act, 1956)
having its Registered Office at)
Acron Plaza, Opp. Shah Industrial)
Deonar, Mumbai – 400 088.) ….. Respondent
(Original Petitioner)

Mr. Mustafa Doctor, Senior Counsel with Mr. Rohan Kama i/b Bachubhai Munim & Co. for the Appellant.

Mr. Shailesh Shah alongwith Mr. Nitin Raut, Mr. G.P. Vas, Ms. Sunita Serao i/b P. Vas and Co for the Respondent.

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

DATE: 29th October, 2015

<u>JUDGMENT:</u> ***(Per V.M. Kanade, J.)***

1. The Appellant being aggrieved by the Order passed by the learned Single Judge in Petition filed under Section 9 of the Arbitration & Conciliation Act, 1986 (for short "Arbitration Act") has filed this appeal. The learned Single Judge by the impugned order was pleased to direct the Appellant/original Respondent to furnish security in the sum of Rs 11 crores in favour of the Respondent/original Petitioner by depositing the said amount with the Prothonotary & Senior Master or to furnish a bank guarantee of like amount of a nationalized bank in the name of the Prothonotary & Senior Master within four weeks.

2. Brief facts which are relevant for the purpose of deciding this appeal are as under:-

3. The Appellant is a Company incorporated under the Companies Act, 1956 and carries on business in Engineering and other allied activities. The Respondent is also a Company which carries on business of construction and real estate development. Sometime in June, 2010, the Respondent/original Petitioner was awarded two contracts for the work of civil, structural, architectural finishing works for 7 towers at Bangalore. The said work was to be

completed on or before 22/10/2011.

4. The Respondent/original Petitioner submitted 26 running account bills for the period from June, 2010 till December, 2013 amounting to Rs 15,45,13,401/-. According to the Respondent/original Petitioner, they constructed additional area of 40,000 sq. ft and according to the Respondent, the Appellant herein agreed to pay to the Respondent/original Petitioner for actual built up area. However, the Appellant/original Respondent terminated the agreement by notice dated 22/10/2011 and threatened to encash bank guarantees furnished by the Respondent herein/original Petitioner. A Deed of Settlement was thereafter executed dated 31/10/2011 which revived the original Agreement dated 11/11/2010. It is the case of Respondent herein that though the Appellant had assured to clear the running account bills, no payment was made by the Appellant.

5. On the other hand, the Appellant encashed bank guarantees which were given by the Respondent herein. The Respondent/original Petitioner filed a Petition under section 9 of the Arbitration Act in this Court which was allowed.

6. Mr. Doctor, the learned Senior Counsel appearing on behalf of the Appellant submitted that the order directing

deposit of amount of Rs 11 crores with the Prothonotary & Senior Master or giving of bank guarantee in the like amount could not have been passed even though the financial condition of the Appellant was strained. He submitted that the prayer of the Respondent for deposit was in the nature of attachment before judgment under Order XXXVIII Rule 5 of the Civil Procedure Code. He also submitted that the claim of the Respondent/original Petitioner was, in any event, unsecured claim and could not be allowed to be converted into secured claim. Reliance was placed on the judgment of the Apex Court in *Raman Tech & Process Engg. Co. & Anr. vs. Solanki Traders*[1] and on the judgment of this Court in *Saraswat Co-operative Bank Ltd. vs. Chandrakant Maganlal Shah & Ors.*[2]. He submitted that the learned Single Judge has erred in holding that the Appellant had sold 1161 flats in the Project Townsville. It was submitted that a stray observation was made in para 28 that the total assets for the year ending 31/03/2013 of the Appellant/original Respondent were to the tune of Rs. 55618,44 million and liabilities to the tune of Rs 41036.51 million. He submitted that no comment has been made that assets were in excess of the liabilities and this fact was not taken into consideration in the entire judgment. He submitted that since the Appellant was in the business of real estate development, selling of flats

1 (2008) 2 SCC 302
2 AIR 2002 Bombay 203

was part of their business and could not be taken as a step for disposal of the property. It was submitted that the plot admeasuring 6 acres was available with the Appellant at Bangalore and market value of the said property was much above the amount claimed by the Respondent/original Petitioner. He submitted that in the affidavit which was filed, it was inadvertently mentioned that the property in Andhra Pradesh had not been sold, though, in fact, it was sold before the affidavit was filed. He submitted that this fact was immediately brought to the notice of the Court.

7. On the other hand, Mr. Shah, the learned Counsel appearing on behalf of Respondent/original Petitioner, submitted that the Appellant-Company was facing financial crisis and it was necessary to secure the amount by directing the Appellant to deposit the same in this Court. He submitted that the Appellant was delaying the arbitral proceedings and that the Respondent had a good chance of succeeding in the arbitral proceedings. He submitted that the Respondent had made a claim for the work done in respect of which running bills were submitted by the Respondent/original Petitioner to the Appellant-Company which had agreed to pay the said amount and had not disputed the correctness of the said bills. He submitted that though it was alleged that value of the property was much more than the claim of the Respondent/original Petitioner,

valuation which was done by the Respondent herein showed that the value of the property was much less and could not secure the claim of the Respondent herein.

8. In our view, submissions made by the learned Senior Counsel appearing on behalf of the Appellant cannot be accepted. The learned Single Judge has taken into consideration the settled position of law in respect of exercise of power under Order XXXVIII Rule 5 of the Civil Procedure Code. It is well settled that two conditions have to be fulfilled before any order can be passed under the said provision. It has to be shown that the conduct of the defendant was such that he was about to alienate his property or remove it from the jurisdiction of the Court and, secondly, intention of the defendant was to obstruct or delay the execution proceedings that may be passed against him and, therefore, in such cases interim measure of protection could be granted to secure the amount in dispute under arbitration under section 9(ii)(b). The learned Single Judge has relied on the judgment of the Apex Court in *Adhunik Steel Limited vs. Orissa Manganese & Minerals (P) Limited*[1] and on the Division Bench Judgment of this Court in *Nimbus Communications Limited vs. Board of Control for Cricket in India*[2]. The learned Single Judge has given cogent reasons

1 (2007) 7 SCC 125
2 2012(5) Bom.C.R. 114

while coming to the conclusion that it was necessary to secure the claim of the Respondent/original Petitioner by directing the Appellant/original Respondent to deposit an amount of Rs 11 crores or give bank guarantee of the said amount. Though it is true that business of the Appellant is to buy and sell the properties and to develop the properties and sell the flats, at the same time, it cannot be overlooked that despite having agreed to pay 26 running account bills, the Appellant had refused to honour the said commitment, though there was little dispute about the correctness of the said amount as observed by the learned Single Judge. Secondly, though the Affidavit was filed by the Appellant, stating therein that there was a property in Andhra Pradesh belonging to the Appellant and its one of the Directors, in fact, the said property had already been sold before the affidavit was filed. The explanation given by the Appellant that this has happened inadvertently appears to be doubtful. The financial condition of the Appellant was strained which could be seen from its Accounts. The Court has also observed that certain statutory dues to the tune of Rs 22.39 crores were not cleared and this position was admitted in the minutes of the Annual General Meeting of the Appellant/original Respondent held on 26/09/2013. We are therefore of the view that the learned Single Judge has given cogent reasons in directing the Appellant to either deposit Rs 11 crores or funish bank guarantee of like amount.

9. It is quite well settled in the judgment in *Wander Ltd and Another vs. Antox India P. Ltd.*[1] that unless the order of the learned Single Judge is patently illegal or perverse, the Appeal Court should not interfere with the said order. The Apex Court in the said judgment 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 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

1 1990(Supp) SCC 727

> Joseph (1960) 3 SCR 713 : AIR 1960 SC 1156 : (SCR 721).
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> > "...... 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."
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> The appellate judgment does not seem to defer to this principle."

10. In view of this, we are not inclined to interfere with the impugned order. Appeal is therefore dismissed.

11. At this stage, the learned Senior Counsel appearing on behalf of the Appellant, seeks four weeks time for depositing the said amount of Rs 11 crores. Time to deposit the amount is extended by four weeks.

12. Appeal is accordingly disposed of. Since appeal itself is disposed of, Notice of Motion (L) No.2589 of 2015 taken out therein does not survive and it is accordingly disposed of.

(DR. SHALINI PHANSALKAR-JOSHI, J.) **(V.M. KANADE, J.)**