

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

C.M.A.Nos.818, 820 and 821 of 2015

Between:

M/s.Felguera Gruas India Private Ltd.,
Visakhapatnam, rep. by its Director.

... Petitioner.

and

M/s.R.V.R.Projects Private Ltd., Hyderabad.

... Respondent

JUDGMENT PRONOUNCED ON : 04.12.2015

HON'BLE SRI JUSTICE : R. SUBHASH REDDY

AND

HON'BLE SRI JUSTICE : A. SHANKAR NARAYANA

1. Whether Reporters of : Yes/No

Local newspapers

may be allowed to see

the Judgment ?

2. Whether the copies of : Yes/No

judgment may be
marked to

Law Reporters/Journals ?

3. Whether Their Ladyship/ : Yes/No

Lordship wish to see the
fair copy of the judgment ?

HON'BLE SRI JUSTICE R. SUBHASH REDDY

AND

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

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... Respondent

For petitioner : Sri D.Prakash Reddy, Senior Counsel &
Sri S.Niranjana Reddy, Advocate.

For Respondent : Sri V.Ravinder Rao, Advocate.

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> Head Note:

? CITATIONS:

1. 2015(5) ALD 446
2. C.M.A.No.489 of 2015, , dated 10.08.2015.
3. AIR 1982 AP 443
4. (2009) 6 SCC 69
5. AIR 1974 SC 1126
6. AIR 1988 SC 2010
7. 2008 (104) DRJ 59 (DB)
8. 1994 Law Suit (Del) 840
9. AIR 2007 SC 2563

C/15

HON'BLE SRI JUSTICE R. SUBHASH REDDY

And

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

CIVIL MISCELLANEOUS APPEAL Nos.

818, 820 and 821 of 2015

COMMON JUDGMENT : (Per Justice R.Subhash Reddy)

All these Civil Miscellaneous Appeals are filed under Section 37 of the Arbitration and Conciliation Act, 1996, aggrieved by the docket order, dated 27.10.2015, passed by the 24th Additional Chief Judge, City Civil Court, Hyderabad, in Arbitration O.P.No.2123 of 2015. As parties in these appeals are common and also common issue arises for consideration, all these appeals are heard together and are being disposed of by this common judgment.

2. The appellant is a Company engaged in the business of supply and erection of bulk handling equipments and caters to the energy and industrial sectors including ports, power plants, thermal plants etc. and is specialized in the management of such projects. The respondent is also a Company engaged in the business of constructing, erecting, building, paving, excavating, repairing, renovating etc. works in connection with the projects such as railways, tramways, docks, ports etc. The respondent Company is awarded works relating to coal handling facilities at Krishnapatnam Port site for Northern Power Plants. In relation to execution of such works, the respondent has entered into three contracts with the appellant herein, viz., contract for on-shore services for coal conveyor package and stacker cum reclaimer for Northern Coal Handling System (Services Contract), contract for on-shore supply of equipment and other components at site for coal conveyor package

and stacker cum reclaimer for Northern Coal Handling System (On-shore Supplies Contract) and contract for supply of certain imported equipments of the coal conveyor package and stacker cum reclaimer for Northern Coal Handling System (Imported Supplies Contract). All the said contracts were executed on 07.10.2013. In execution of such contracts, disputes arose between the parties and alleging that the appellant has not adhered to the time schedule, respondent has terminated the contracts and invoked bank guarantee. Under Clause 31 of the Services Contract, there is a provision for arbitration and similar such clauses are also there in other contracts. Pending resolution of dispute under Arbitration and Conciliation Act, the appellant herein has approached the Civil Court by way of petition under Section 9 of the said Act. In the said application, he prayed for the following reliefs :-

- “a) Pass *ex-parte ad-interim* injunction against the Respondent, its agents, officers, employees, etc., restraining them from alienating, using, dealing, divulging, releasing or revealing, in any manner whatsoever, (1) the Unpaid Material mentioned in Document P-18 as supplied to the Respondent under the Services Contract and (2) the Disclosed Information mentioned in Document P-19, i.e. the information, documents, photographs, technical information including computer programs that have come in Respondent's possession through the performance of the contract or for any other reason, pending final adjudication of the disputes/claims that have arisen between the parties by the Hon'ble Arbitral Tribunal.
- b. Pass *ex-parte ad-interim* directions directing the Respondent to deposit with the Registry of this Hon'ble Court the amount of Rs.3,90,00,000/- (Rupees Three Crores Ninety Lakhs only), being the principal amount of bank guarantees encashed, along with interest @ 18% p.a. from the date of encashment upto date of such retention by it. Such proceeds may be deposited in interest bearing security with nationalized bank, pending final adjudication of the

disputes/claims that have arisen between the parties by the Hon'ble Arbitral Tribunal.

- c. Pass *ex-parte ad-interim* directions directing the Respondent to deposit with the Registry of this Hon'ble Court the amount of Rs.4,57,10,566/- (Rupees Four Crores Fifty Seven Lakhs Ten Thousand Five Hundred and Sixty Six only) due under the work performed under the Contract, along with interest @ 18% p.a. from the date such amount was due upto the date of such retention by it. Such proceeds may be deposited in interest bearing security with a nationalized bank, pending final adjudication of the disputes/claims that have arisen between the parties by the Hon'ble Arbitral Tribunal.
- d. Grant the costs of this proceeding to the Petitioner ;
and
- e. Pass such other order or orders as this Hon'ble Court may deem fit in the circumstances of the case."

When the appellant has prayed for passing of ad-interim order pleading urgency, the Court below has passed the impugned docket order on 27.10.2015, which reads as under :

"Heard the counsel for petitioner. Issue urgent notice to respondent on payment of process. Call on 06.11.2015."

Aggrieved by issuance of such notice to the respondent to consider the matter further, these appeals are filed under Section 37 of the Act. This Court, while issuing notice before admission, initially by order, dated 05.11.2015, granted interim injunction for a period of ten days. Thereafter, the respondent has appeared and filed counter affidavit with supporting material.

3. In the counter affidavit filed by the Chief Executive Officer of the respondent-Company, while denying the various allegations made by the appellant, a preliminary objection is taken with regard to maintainability of appeals under Section 37 of the Act. It is stated that an order by the Court issuing notice to the respondent does not involve any adjudication of the rights of the parties, nor does it put an end to the proceedings and it is merely a step towards obtaining the final adjudication, as such, in view of the restrictive language under Section 37 of the Act, no appeal is maintainable. In view of such objection, we have heard in depth, the learned counsel appearing for the parties, at first instance, with regard to the maintainability of appeals.

4. Heard Sri D.Prakash Reddy, learned Senior Counsel and Sri S.Niranjan Reddy, learned counsel, appearing for appellant and Sri V.Ravinder Rao, learned counsel appearing for respondent.

5. In this appeal, it is contended by Sri D.Prakash Reddy, learned Senior Counsel appearing for appellant that under Section 37 of the Arbitration and Conciliation Act, an appeal shall lie to this Court against the order granting or refusing to grant any relief under Section 9 of the Act. It is submitted that such power conferred on the Court enables the Court to pass ad interim orders and in view of the urgency involved in the matter, the very issuance of notice amounts to refusal. The learned counsel has relied on a Full Bench judgment of this Court in **East India Udyog Limited v. Maytas Infra Limited & others** and also on a Division Bench judgment of this Court in **ICICI Bank Limited v. IVRCL Ltd. & others**. It is further contended by the learned Senior Counsel that as per the contracts entered, the respondent is not authorised to use unpaid material which includes number of drawings, designs, documents, as such, if the appellant is not granted urgent injunction orders, he will be put to irreparable loss and injury. It is contended that the very docket order issuing notice is

nothing but refusal, as such, appeal is maintainable. The learned counsel Sri S.Niranjan Reddy, also appearing for appellant, has further argued by drawing distinction between granting relief under Order 39 of the Civil Procedure Code and granting interim measures provided under Section 9 of the Arbitration and Conciliation Act. It is contended that for any urgent interim measures in connection with the disputes which are covered by the Arbitration and Conciliation Act, the parties are empowered to approach Civil Court, and in such an event, if any damage which is not retrievable, is caused due to non-grant of injunction, it would amount to refusal, as such, appeal is maintainable under Section 37 of the Arbitration and Conciliation Act.

6. On the other hand, it is argued by Sri V.Ravinder Rao, learned counsel appearing for the respondent-Company that under Section 37 of the Arbitration and Conciliation Act, appeal is provided only from the orders covered under Section 37(1)(a) and (b) alone (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the orders. It is contended that when a request is made for grant of injunction, if notice is issued, that does not involve any adjudication of the rights of the parties and it is merely a step towards final adjudication of the application, as such, it cannot be construed as refusal. It is contended by learned counsel that the word “refusal” used under Section 37 of the Act is declining the request by adjudication, and as such, mere issuance of notice does not amount to refusal. It is further contended that the appeal provided is a creature of statute, against the orders specified under Section 37(1)(a) and (b) but not against any other orders. Learned counsel has also referred to Section 5 of the Arbitration and Conciliation Act. He has placed reliance on the judgments in **Kunala Subbarao & others v. P.Nagaratnayamma**, in **Hindustan Copper Ltd. v. Nicco Corporation Ltd.**, in **Smt.Ganga Bai v. Vijay Kumar & others**, in **Vijay Prakash D.Mehta & Jawahar D.Mehta v. Collector of Customs (Preventive), Bombay**, in **Canbank Financial Services Ltd. V. Haryana Petrochemicals Ltd. & another**, in **Nisha Raj v. Pratap K Kaula** and in **Adhunik Steels Ltd. V. Orissa Manganese**

& Minerals Pvt. Ltd..

7. Having regard to the arguments advanced by the learned counsel on both sides, the only question which falls for consideration at this stage, is whether against the impugned docket order, dated 27.10.2015, appeal is maintainable under Section 37 of the Arbitration and Conciliation Act or not.

8. From a reading of the impugned docket order, dated 27.10.2015, it is clear that the Court below has merely ordered urgent notice to the respondent while giving further date for hearing. Under Section 37 of the Act, an appeal shall lie to the Court authorised by law to hear appeals from the original decrees of the Court passing the order. Such appeals are maintainable under Section 31(1)(a) against the order of the Court granting or refusing to grant any measure under Section 9. Under Section 37(1)(b), appeals are maintainable against an order setting aside or refusing to set aside an arbitral award under Section 34 of the Act. At this stage, it is also apt to refer to Section 5 of the Arbitration and Conciliation Act. Earlier to the present enactment on arbitration i.e. Arbitration and Conciliation Act of 1996, the law relating to arbitration was governed by Arbitration Act of 1940. To consolidate and amend the law relating to domestic arbitration and international commercial arbitration, enforcement of foreign arbitral awards and to minimise the supervisory role of Courts in arbitration process, the present Act is enacted and the same is evident from the objects and reasons of the Act. Section 5 of the Act deals with the extent of judicial intervention on the subject covered by the provisions under the Arbitration Act. A perusal of Section 5 makes it clear that the intervention of judicial authority is restricted except provided in the said part. So, having regard to the claim of the appellant, whether issuing notice will constitute refusal, is the main aspect, which falls for consideration. In ordinary sense, the refusal, if we take the Black's Law Dictionary 7th Edition page 1285, "refusal"

implies refuse to accept. It implies positive denial of application or a command or at least a mental determination not to accept. In the instant case, it is the case of appellant that certain technical information which is prepared by him, is with the respondent, which is provided in terms of the contract, and in view of the illegal termination of the contract, if the respondent is allowed to use such information, the appellant will sustain irreparable loss and injury. In that context, it is submitted that ordering notice implies refusal and hence, appeal is maintainable under Section 37 of the Act. Coming to the judgment relied on by the learned Senior Counsel Sri D.Prakash Reddy in **East India Udyog Ltd's** case (1 supra), the following questions fell for consideration :

- “a) Whether the Court as defined under Section 2(e) of the Act, is entitled to dispose of the application filed under Section 9 of the Act before initiation of the arbitral proceedings under section 21 of the Act, ex-parte without giving notice to the respondents, if the facts and circumstances so warrant ?
- b. Whether the Court as defined under Section 2(e) of the Act, is entitled to grant any interim order pending disposal of the interim measure application under Section 9 of the Act ?
- c. Whether further application pending disposal of the interim measure under Section 9 of the Act, is maintainable ?”

While ordering the reference, a Full Bench of this Court has answered that when an application under Section 9 of Arbitration and Conciliation Act is made, during pendency of such application, an exparte ad interim order becomes imperative, in the facts and circumstances of the case, it is open to the Court to pass an ad interim exparte order based on well recognised principles contemplated by the provisions of Order 39 Rules 1 and 2 of CPC. The question, which falls for consideration in these appeals, namely, whether issuance of notice will constitute “refusal” within the meaning

of Section 37(1)(a) of the Arbitration and Conciliation Act, was not considered in the judgment referred above. In the other judgment relied on by the learned Senior Counsel Sri D.Prakash Reddy in **ICICI Bank Ltd.**'s case (2 supra), a Division Bench of this Court has held that against grant or refusal of interim measure of protection by way of *ex parte* ad interim order under Section 9 of the Act, is an appealable order under Section 37 of the Act. Even in the said judgment, there was no occasion for the Division Bench to consider whether issuance of notice would constitute "refusal" or not. Both the said judgments would not render any assistance in support of the case of appellant.

9. On the other hand, in **Kunala Subbarao**'s case (3 supra), while considering the scope of Letters Patent (AP) Clause 15, it is held that mere ordering notice does not amount to judgment, as such, appeal against such ordering notice is not maintainable. When Clause 15 of the Letters Patent provided only appeals against the judgment and an appeal is filed against mere ordering notice, a Division Bench of this Court has held that ordering of notice does not trench upon merits or constitute adjudication, as such, no Letters Patent Appeal lies. Similarly, in the judgment in **Canbank Financial Services Ltd.**'s case (7 supra), it is held that the embargo on appeals under Section 37 of the Arbitration and Conciliation Act is absolute and categorical. In the said judgment, while noticing the words used under Section 37(1) i.e. "and from no others", coupled with the restrictive intervention of the judicial authority under Section 5 of the Act, a Division Bench of this Court has held that the appeal is not maintainable. In **Smt.Ganga Bai**'s case (5 supra), while considering the right to file a suit and right to file an appeal, the Hon'ble Supreme Court has drawn a basic distinction and in the said judgment, it is held that to file a suit for its maintainability requires no authority of law and it is enough to show that no statute bars the suit, whereas, the position with regard to appeals is quite opposite. In the said judgment, it is held that appeal must have clear authority of law and it

is a creature of statute. In **Nisha Raj's** case (8 supra), the Delhi High Court has drawn a clear distinction between the cases where there is absolutely no scope for retrieving the situation or no scope for restitution than other cases. In **Adhunik Steels'** case (9 supra), the Hon'ble Supreme Court has held that provision for interim measures under Section 9 of the Arbitration and Conciliation Act is not totally independent of well-known principles governing grant of injunction under Order 39 of the Code of Civil Procedure.

10. Having considered the above referred judgments relied on by the learned counsel for respondent, we are of the view that all the said judgments would support the case of respondent in the present case. In reply arguments, Sri D.Prakash Reddy, learned Senior Counsel appearing for appellant, taking clue from the judgment of Delhi High Court in **Nisha Raj's** case (8 supra), though contended that where there is no scope for retrieving the situation or no scope for restitution, the Delhi High Court has held that ordering notice constitutes refusal, it is the case of appellant that pursuant to contracts entered into, he has given certain information i.e. designs, technical information etc., to the respondent and the same cannot be used by the respondent in view of the illegal termination of contract. If the appellant has spent any amount for such documentation, designing etc., it is always open for him to claim suitable damages in the proceedings to be initiated for arbitration, as such, having regard to the claim of appellant, it cannot be said that there is no scope either for restitution or for retrieving the situation. As evident from the judgments relied on by the learned counsel for respondent, we are also of the considered view that ordering notice to the respondent by impugned docket order does not involve any adjudication of the rights of the parties nor put an end to the proceedings. It is only a step towards final adjudication after hearing the parties. Merely because ad interim order is not granted and notice is issued, it cannot be construed as refusal. As there is no positive denial of the request made by the appellant herein, it does not constitute "refusal" within the meaning of Section

37(1)(a) of the Act. Even if we go by ordinary dictionary meaning, unless there is a positive denial of interim relief, mere ordering notice in the application cannot be construed as refusal of relief. In any event, it is always considered that appeal is not a matter of right, but it is only a creature under statute. In view of the plain language under Section 37(1)(a) of the Act, we are of the considered view that no appeal is maintainable against the order issuing notice on the application for grant of injunction. As held by a Division Bench of this Court in **ICICI Bank Ltd.**'s case (2 supra), though an appeal is maintainable against ad interim order granting injunction, when notice is issued to the respondent in application for grant of injunction, it will not constitute refusal in the absence of positive denial by passing an order. In that view of the matter and having regard to the judgments relied on by the learned counsel for respondent and having regard to the objective of the Arbitration and Conciliation Act to minimise the intervention of Civil Courts, coupled with the provision under Section 5 of the Act, we are of the view that no appeal is maintainable under Section 37 of the Act against the docket order issuing notice to the respondent on the application for grant of injunction. On facts, we are also of the view that even the judgment in **Nisha Raj's** case (8 supra) also would not render any assistance to the case of appellant, as we are of the view that it cannot be said that having regard to the claim of the appellant, there is no scope for retrieving the situation or no scope for restitution. If the respondent uses the information supplied by the appellant, causing loss to him, it is always open for the appellant to claim appropriate relief in the arbitration proceedings, but it cannot be said that the same is to be construed as a refusal also.

11. For the aforesaid reasons, we are of the view that the appeals filed against the impugned interim order, are not maintainable and the same are accordingly dismissed.

12. We make it clear that this Court has not gone into merits of the matter and it is open to the civil Court to consider the application on its own merits and pass appropriate orders by considering the stand of the respondent. In view of the urgency expressed by the appellant, we further direct the Court below to dispose of the interim applications as expeditiously as possible, preferably within a period of six weeks from the date of receipt of this order.

As a sequel, pending miscellaneous applications, if any, shall stand closed. No order as to costs.

R. SUBHASH REDDY, J

A. SHANKAR NARAYANA, J

4th December 2015

N.B:

L.R.Copy be marked.

(b/o)

ajr