



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 31.10.2018

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THE HON'BLE MR.JUSTICE G.R.SWAMINATHAN

C.R.P (NPD) (MD) Nos.2429 to 2432 of 2018
and
CMP(MD) Nos.10833 to 10836 of 2018

1.NLC India Limited
Corporate Office,
Block No.1, Neyveli,
Represented by its Chief General Manager/Contracts,
First Floor, NO.8, Meyor Sathyamoorthy Road,
FSD, Egmore Complex of
Food Corporation of India,
Chetpet, Chennai.

2.NLC Tamilnadu Power Limited,
Registered office at First Floor,
No.8, Mayor Sathyamurthy Road,
FSD Egmore Complex of Food Corporation of India,
Chetpet, Chennai.

Represented by the Chief Executive Officer

... Petitioners/Respondents/Respondents
(In all the petitions)

-Vs-

M/sSICAL Logistics Limited,
South India House 73, Armenian Street,
Chennai TN 600001 IN

By Authorized Representative

Captain K.N.Ramessh

..Respondent/Petitioner/Petitioner

(In all the petitions)

Common Prayer: Civil Revision Petitions are filed under Article 227 of Constitution of India, against the Order in I.A.Nos.292, 293, 294 and 295 of 2018 in Ar. O.P.No.72 of 2018 on the file of the Principal District Judge (Full Additional Charge / Additional District Judge), Thoothukudi dated 11.10.2018.

In all the petitions:

For Petitioners : Mr.Isaac Mohanlal, Senior Counsel
for Mr.Godwin

<https://hcservices.courts.gov.in/hcservices/>

For Respondent : Mr.M.R.Venkatesh
for Mr.Prabhu Rajadurai

C O M M O N O R D E R

NLC India Limited and SICAL logistics Limited have a contractual arrangement with regard to transportation of coal. Disputes have arisen between them. Since the contract provides for resolving the dispute through arbitral process, the respondent herein has resorted to the same. In fact, the respondent has already nominated a former Judge of this Court as their Arbitrator. The respondent also filed Arbitration O.P.No.72 of 2018 under Section 9 of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as 'the Act') before the learned Principal District Judge, Tuticorin, on 04.10.2018. They also filed four interim applications in the said Arbitration O.P. Ex-parte interim orders were granted in all these four interim applications on 11.10.2018. They are challenged in these Civil Revision Petitions.

2.Shri.Isaac Mohanlal, the learned Senior Counsel appearing for the petitioners first contended that the orders impugned in these civil revision petitions are patently without jurisdiction. This was because they were passed not by the Principal District Judge but by the Additional District Judge who was only holding full additional charge as Principal District Judge. He drew the attention of this Court to Section 2(1)(e) of the Arbitration and Conciliation Act, 1996 which defines the expression "court". It is clear from the said definition that "court" would mean the principal Civil Court of original jurisdiction in a District and does not include any civil court of a grade inferior to such principal Civil Court. In the memorandum of grounds also it had been pointedly contended that the jurisdiction to grant interim relief under Section 9 of the Act vests only with the Principal District Judge and not with the Additional District Judge even if he is holding additional charge as the Principal District Judge. He placed reliance on the decision of the High Court of Calcutta reported in 2016 (1) ARBLR 50(Cal), Manu/WB/0651/2015 (National Highway Authority of India vs. B.Seenaiah & Company (Projects) Ltd).

3.I am however unable to agree with the aforesaid submission of the learned Senior Counsel appearing for the petitioners. As rightly pointed out by Shri.M.R.Venkatesh, the learned counsel appearing for the respondent, the aforesaid decision has been overruled by a Full Bench of the Calcutta High Court in the decision reported in 2016 (3) RCR (Civil) 859, Manu/WB/0424/2016 (West Bengal Housing Infrastructure Development Corporation and ors vs. Impression and Ors). The Hon'ble Full Bench of the Calcutta High Court held as follows :

"72.We are, therefore, of the view that the Court of the Additional District Judge is also the principal Civil Court in the District and accept the view taken by the Hon'ble Division Bench in West Bengal Housing Infrastructure Development Corporation Limited vs.



M/s.Impression. The view taken by National Highway Authority of India v. M/s.B.Seenaiah & Company (Projects) Limited would make the 'District Judge' a persona designata which has never been the intention of the legislature.

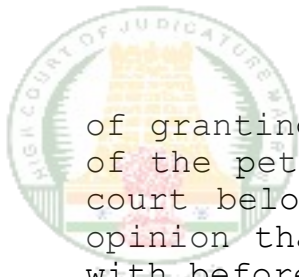
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73.The reference is disposed of by affirming the view in West Bengal Housing Infrastructure Development Corporation Limtied v. M/s.Impression."

4.Shri.M.R.Venkatesh, the learned counsel for the respondent also points out that the Full Bench of the Chattisgarh High Court in the decision reported in 2018 SCC Online Chh 617 (A Suo Moto Taken Writ Petition vs. State of Chhattisgarh) has also taken the same view. Respectfully following the aforesaid two Full Bench decisions, this Court also holds that the word "court" defined in Section 2(1)(e) also includes the court of Additional District Judge. Therefore, any application filed under any provision of the 1996 Act which can be heard and decided by the Principal District Judge can also be heard and decided by the court of Additional District Judge, upon being made over by the District Judge by a general or special order.

5.In the present case, the Principal District Judge was on leave. Therefore, the Additional District Judge was discharging the duties of the Principal District Judge in an in-charge capacity. In fact, he was holding full additional charge. Therefore, whatever power and jurisdiction that vested in the Principal District Judge could also be exercised by the Additional District Judge who was holding full additional charge. This Court takes notice of the fact that whenever a Judge is made in-charge of another court, an impression has gained ground that his function is merely to give dates and adjournments. It is not so. I therefore hold that the orders impugned in these civil revision petitions cannot be set aside on the ground of want of jurisdiction. I have no hesitation to reject the initial contention of the learned Senior Counsel for the petitioners.

6.The other contention of the learned Senior Counsel appearing for the petitioners is that the requirements set out in Order 39 Rule 3 CPC have not been satisfied in this case. As a matter of principle, he conceded that the court considering a petition under Section 9 of the 1996 Act will have the power to grant even exparte interim orders. But then, the court below must explicitly record the reasons as to why it is constrained to grant an exparte interim order. Order 39 Rule 3 CPC states that the court shall in all cases before granting an injunction direct notice of the application for the same to be given to the opposite party. But, where it appears that the object of granting the injunction would be defeated by delay, the requirement to issue notice to the opposite party will stand dispensed with. Where the court proposes to grant an injunction without giving notice of the application to the opposite party, it shall record the reasons for its opinion that the object



of granting injunction would be defeated by delay. The submission of the petitioners' Senior Counsel is that in the present case, the court below has not recorded its reasons as to why it was of the opinion that notice to the opposite party will have to be dispensed with before granting the interim relief.

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7.The response of the respondent's counsel was that the respondent had invoked the power of the court under Section 9 of the Arbitration and Conciliation Act, 1996 which being a special provision excluded the applicability of CPC. He vehemently resisted the attempt of the petitioners to import the requirements of Order 39 CPC into the present proceedings. According to the respondent's counsel, Section 9 of the 1996 Act is a standalone provision and that it cannot be read in conjunction with Order 39 CPC. He highlighted the practical difficulties that will crop up where there is a mechanical insistence of fulfilling the Order 39 CPC requirements, Section 9 of the Act is invoked when the parties require interim protection. If it is insisted that notice will have to be ordered before passing orders under Section 9 of the Act, the entire exercise will become infructuous. In the alternative, he contended that in any event a litigant should not suffer if there is any lapse on the part of the court in complying with the procedural requirements while passing an order.

8.The learned Senior Counsel for the petitioners rightly pointed out that the issue on hand is no longer res integra. The Hon'ble Supreme Court in two decisions namely, (2007) 7 SCC 125 (Adhunik Steels Ltd vs. Orissa Manganese and Minerals (P) Ltd) and (2007) 6 SCC 798 (Arvind Constructions Co.(P) Ltd., vs. Kalinga Mining Corporation and others) had already answered the question, though rather tentatively. In both these cases, an argument similar to the one advanced by the respondent herein was canvassed before the Hon'ble Supreme Court and it was rejected in categorical terms. In Arvind Constructions, the Hon'ble Supreme Court held as follows :

"15. The argument that the power under Section 9 of the Act is independent of the Specific Relief Act or that the restrictions placed by the Specific Relief Act cannot control the exercise of power under Section 9 of the Act cannot prima facie be accepted. The reliance placed on Firm Ashok Traders & Anr. Vs. Gurumukh Das Saluja & Ors. [(2004) 3 S.C.C. 155] in that behalf does not also help much, since this Court in that case did not answer that question finally but prima facie felt that the objection based on Section 69 (3) of the Partnership Act may not stand in the way of a party to an arbitration agreement moving the court under Section 9 of the Act. The power under Section 9 is conferred on the District Court. No special procedure is prescribed by the Act in that behalf. It is also clarified that the Court entertaining an application under Section 9 of the Act shall have the same power for making orders as it has for the purpose and in



relation to any proceedings before it. Prima facie, it appears that the general rules that governed the court while considering the grant of an interim injunction at the threshold are attracted even while dealing with an application under Section 9 of the Act. There is also the principle that when a power is conferred under a special statute and it is conferred on an ordinary court of the land, without laying down any special condition for exercise of that power, the general rules of procedure of that court would apply. The Act does not prima facie purport to keep out the provisions of the Specific Relief Act from consideration. No doubt, a view that exercise of power under Section 9 of the Act is not controlled by the Specific Relief Act has been taken by the Madhya Pradesh High Court. The power under Section 9 of the Act is not controlled by Order XVIII Rule 5 of the Code of Civil Procedure is a view taken by the High Court of Bombay. But, how far these decisions are correct, requires to be considered in an appropriate case. Suffice it to say that on the basis of the submissions made in this case, we are not inclined to answer that question finally. But, we may indicate that we are prima facie inclined to the view that exercise of power under Section 9 of the Act must be based on well recognized principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a receiver."

In Adhunik Steels Ltd, the Hon'ble Supreme Court held as follows :

"21..... it would not be correct to say that the power under Section 9 of the Act is totally independent of the well-known principles governing the grant of an interim injunction that generally govern the courts in this connection."

9.I am acutely conscious of the fact that ITI Ltd vs. Siemens Public Communications reported in (2002) 5 SCC 510 which held that merely because the 1996 Act does not provide CPC to be applicable, it should not be inferred that the Code is inapplicable has been doubted by another Bench in the decision reported in (2017) 2 SCC 37 (MTNL Vs. Applied Electronics Ltd). In MTNL case, a reference has been made in the following terms :

"27.Section 5 which commences with a non-obstante clause clearly stipulates that no judicial authority shall interfere except where so provided in Part 1 of the 1996 Act. As we perceive, the 1996 Act is a complete Code and Section 5 in categorical terms along with other provisions, lead to a definite conclusion that no other provision can be attracted. Thus, the application of CPC is not conceived of and, therefore, as a natural corollary, the cross-objection cannot be entertained. Though we express our view in the present manner, the judgment rendered in ITI Ltd. (supra) is a binding precedent. The three- Judge Bench decision in

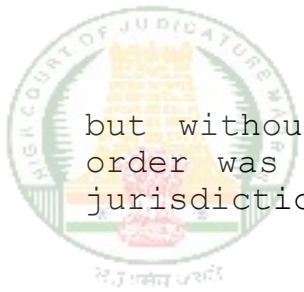


International Security & Intelligence Agency Ltd. (supra) can be distinguished as that is under the 1940 Act which has Section 41 which clearly states that the procedure of CPC would be applicable to appeals. The analysis made in ITI Ltd. (supra) to the effect that merely because the 1996 Act does not provide CPC to be applicable, it should not be inferred that the Code is inapplicable seems to be incorrect, for the scheme of the 1996 Act clearly envisages otherwise and the legislative intendment also so postulates.

28.As we are unable to follow the view expressed in ITI Ltd., and we are of the considered opinion that the said decision deserves to be reconsidered by a larger Bench. Let the papers be placed before the Hon'ble the Chief Justice of India for constitution of an appropriate larger Bench."

10.I must highlight an irony here. The respondents in their petitions before the court below have invoked not only Section 9 of the Act but also Order 39 of CPC. But then, the contention urged before me by them is that Order 39 is not applicable. In any event, it is purely a question of law and Shri.M.R.Venkatesh need not feel shackled by any principle of estoppel here! I am of the view that the question is not whether CPC is applicable or not. The question is not whether Order 39 CPC is applicable or not. While a two Judges Bench in the year 2002 held that CPC would apply, another Bench 15 years later has doubted the correctness of the said proposition. But, as on date, there are atleast two binding rulings in Adhunik Steels Ltd and Arvind Constructions laying down the proposition that the principles that generally govern the grant of the relief of injunction will have to be borne in mind while exercising the power under Section 9 of the 1996 Act. These two decisions still hold the field and will have to be respectfully followed.

11.It was also contended by the respondents that even if this Court were to assume the applicability of Order 39, in this case, Rule 3 of Order 39 is not mandatory and that omission to record reasons cannot lead to the impugned orders being set aside. I cannot agree with the aforesaid submission of the learned counsel appearing for the respondent. In Ramrameswari Devi vs. Nirmala Devi (2011) 8 SCC 249, the Hon'ble Supreme Court held that ordinarily short notice should be issued to the defendants/respondents and only after hearing the parties concerned, appropriate orders should be passed. A three Judges Bench of the Hon'ble Supreme Court in the decision reported in (1993) 3 SCC 161 (Shiv Kumar Chadha and others vs. Municipal Corporation of Delhi and others) held that the proviso to Rule 3 of Order 39 which requires the court to record reasons in cases where it is granting ex parte relief is imperative in nature. This decision was followed by the Madras High Court in Sri Suriyandayana Paper and Boards Private Limited vs. Padmakumar (1995) 2 L.W 266. In that case, an ex parte interim order was passed

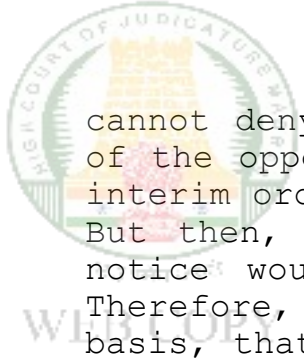


but without complying with the aforesaid requirements. The said order was set aside by the Madras High Court in exercise of its jurisdiction under Article 227 of the Constitution of India.

12. It is a fundamental principle that when rules to the contrary are absent, the court's practice is a law of the court. It was laid down by the Hon'ble Supreme Court in (2003) 4 SCC 257 (Jamal Uddin Ahmed vs. Abu Saleh Nazmuddin) that CURSUS CURIAE EST LEX CURIAE - The practice of the Court is the law of the Court. Section 9 of the 1996 Act states that when a party applies to a court seeking interim measures, the court shall have the same power for making order as it has for the purpose of, and in relation to any proceedings before it. In SPB & Co., vs. Patel Engg. Ltd (2005) 8 SCC 618, the Hon'ble Supreme Court after referring to the aforesaid expression occurring in Section 9 observed that surely when a matter is entrusted to a civil court in the ordinary hierarchy of courts without anything more, the procedure of that court would govern the adjudication. It was held in National Sewing Thread Company vs. James Chadwick & Bros Ltd (AIR 1953 SC 357) that the rule is well settled when a statute directs that an appeal shall lie to a court already established, then that appeal must be regulated by the practice and procedure of that court. The principle "When a question is stated to be referred to an established Court without more, it imports that the ordinary incidents of the procedure of that Court are to attach" was quoted. This decision has been followed as late as in the case reported in (2018) 11 SCC 769.

13. Section 9 of the 1996 Act enables a party to an arbitration agreement to obtain interim relief by moving the principal civil court of original jurisdiction in a District. The said provision has not prescribed any particular procedure. The court of Principal District Judge is an established institution. Therefore, the usual procedure that is followed by the said court for granting injunction is obviously applicable. The Hon'ble Supreme Court in Adhunik Steels Ltd and Arvind Constructions Co.(P) Ltd has already held that the triple tests of prima facie case, balance of convenience and irreparable injury will have to be borne in mind. But then, they are not only tests. These principles will have to be taken into account while granting an interim order of injunction. But then, the issue on hand is what should be the approach of the court for granting an interim order that is also ex parte in nature.

14. Since in the very nature of things, the opposite party will be affected, the court will have to state the reason as to why it is dispensing with the requirement to issue notice in that particular case. Recording reasons is the very soul of natural justice. It is a fundamental postulate of natural justice that no one shall be condemned unheard. No order to the prejudice of a party shall be passed without hearing him. Of course, no court will pass the final order without serving notice on the opposite party. But, one



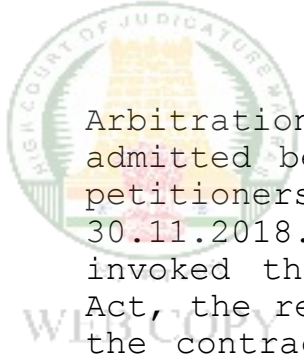
cannot deny that an interim order also has an impact on the rights of the opposite party. That is why, it is stipulated that even an interim order cannot be passed without notice to the opposite party. But then, there can be occasions where insistence on issuance of notice would render the interim application itself infructuous. Therefore, courts are empowered to pass interim orders on an ex parte basis, that is without notice to the other side. But then, it is a departure from the standard approach. In order to ensure that this power is not abused and that the court applies its mind, it is insisted that reasons must be recorded as to why passing of an ex parte order is warranted. This is a requirement apart and over and above the triple tests of prima facie case, balance of convenience and irreparable injury.

15. In this case, the court below has nowhere recorded the reasons as to why it did not order notice to the opposite party before granting interim relief. The court below has not stated as to why it felt constrained to grant ex parte relief. When there is a departure from the general approach, the reasons must be set out justifying such a departure. Reasons are the only key to unlocking the mind of the court. Since in this case admittedly no reasons have been assigned as to why an ex parte interim order is being passed, this Court has to necessarily come to the conclusion that there was non application of mind.

16. I hold that the principles underlying Rule 3 to Order 39 of CPC will have to be borne in mind while considering an application under Section 9 of the 1996 Act. Since in this case the same has been lost sight of totally, I have no hesitation to set aside the orders impugned in these civil revision petitions. Accordingly, the orders impugned in these civil revision petitions are set aside.

17. The learned Senior Counsel appearing for the revision petitioners, on instruction, would state that the revision petitioners would file a counter in the Arbitration O.P on or before 09.11.2018. Before filing counter, the same shall be served on the respondent herein on 08.11.2018. The learned counsel appearing for the respondent agrees that they would file their re-joinder on or before 15.11.2018. The learned Principal District Judge, Tuticorin, shall take up the matters for enquiry on 19.11.2018 and 20.11.2018. Considering the special circumstances arising in these cases, the learned Principal District Judge, Tuticorin, is directed to dispose of Arbitration O.P.No.72 of 2018 positively by 26.11.2018 on merits and in accordance with law entirely uninfluenced by any of the observations made in this order. It is made clear that under no circumstances an application for extension of time would be entertained. The process constituting the Arbitral Tribunal can go on.

18. It is admitted that even though tenders have been received, they have not been opened till date. The learned counsel for the revision petitioners undertakes that tenders will not be opened till



Arbitration O.P. No.72 of 2018 is disposed of. It has been also admitted before me by the learned senior counsel for the revision petitioners that the contract in question will continue upto 30.11.2018. It is also observed that merely because the respondent invoked the arbitral remedy, particularly under Section 9 of the Act, the revision petitioners will not resort to any action de hors the contractual provisions. It is reiterated that setting aside the orders impugned in these Civil Revision Petitions will not mean that this Court has pronounced anything on merits of the case.

19. In the result, these Civil Revision Petitions are allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(Records)

/True Copy/

Sub Assistant Registrar(CS-I)

To,
The Principal District Judge, Tuticorin.

- 1 CC TO Mr.G.PRABU RAJADURAI , ADVOCATE IN SR No.93692.
- + 2 CCs TO Mr.C.GODWIN , ADVOCATE IN SR Nos. 93706,93600.

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