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**Simplex Infrastructures Ltd. Vs. National Highways Authority of India**

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**Court** : Delhi

**Decided On :** Jan-14-2011

**Judge** : Vikramajit Sen; Mukta Gupta, Jj.

**Acts** : Arbitration & Conciliation Act, 1996 - Section 9, 41; Code of Civil Procedure (CPC), 1908 - Order 39 Rules 1, 2

**Appeal No.** : FAO(OS) No.200/2010 & CM No.5445/2010; FAO(OS) No.536/2009 & CM Nos.15975/2009, 14264/2010

**Appellant** : Simplex Infrastructures Ltd.

**Respondent** : National Highways Authority of India

**Advocate for Def.** : Mr. Sandeep Sethi And Ors.

**Advocate for Pet/Ap.** : Mr. K.V. Singh; Mr. Manish Dembla, Advs.

**Judgement** :
1. Whether reporters of local papers may be allowed to see the Judgment? No

2. To be referred to the Reporter or not? Yes

3. Whether the Judgment should be reported in the Digest? Yes

1. This Appeal is directed against the Order of the learned Single Judge dated 4.3.2010 passed in OMP No.484/2009. The learned Single Judge had turned down a request under Section 9 of Arbitration & Conciliation Act, 1996 (A&C; Act

for short) to pass an interim order restraining the Respondents from implementing and/or enforcing or otherwise giving effect to its letter nos. NHAI/40020/Tech-III/EW-III/2006/WB-4/735 and NHAI/PIU/ Araria/ escalation/2009 dated July 20, 2009 and July 29, 2009 respectively, Annexures P-1 and P-2 to the petition. Further, the Court had declined the prayer for restraining the Respondent/NHAI from deducting any amounts from the payments due to the petitioner or otherwise recovering any payments in pursuance of the said letters until the eventual resolution of the dispute between the petitioner and the Respondent. In the opinion of the Court such an Order would have the effect of directing the National Highways Authority of India (NHAI) to make payments as per the original understanding between the parties during the pendency of arbitration proceedings. Such a direction, being in the nature of a positive injunction, would, as articulated in the impugned Order, therefore transgress the law.

2. The disputes pertain to the interpretation of a Clause 70.3 in the Contract. It is the Appellant's case that the said Clause 70.3 was construed by NHAI and understood by the parties in a particular manner and payments had been made as per that understanding for a period spanning three years; and pursuant to which 31 Interim Payment Certificates (IPCs) from the year 2006 to 2009 had been disbursed. On July 11, 2009, the Respondents issued a letter positing that excess payments had been made to the Appellant due to wrong recommendations by the Engineer. Two impugned Notifications were issued by NHAI directing the Engineer to process the IPCs as per the new interpretation of the Clause 70 pertaining to Price Adjustment.

3. Learned Counsel for the Appellant contends that in the contract between the parties Clause 70 of Conditions of Particular Application (COPA) provides for adjustment of contract price predicated on any rise or fall in cost of labour, equipment, plant, material and other inputs to the works. Heretofore, this adjustment has been made as per the actual price of the inputs of work. Vide the impugned Notification, endeavour of the Respondent is to adjust prices on the basis of base price instead of actual price. The extant method of price adjustment is stated by the NHAI to be illegal and against the spirit of the Agreement entered into by the parties viz. the Price Adjustment Clause, viz. Clause 70. The Appellant

has invoked the Dispute Resolution Clause provided in COPA and has referred the disputes to Disputes Review Board (DRB) which will decide on the validity of the virtual volte-face of the Respondent. Meanwhile, the Appellant is pressing for a stay of the operation of the impugned Notification issued by NHAI.

4. Indubitably, if the prayers are granted, it will have the effect of asking the NHAI to continue the disbursement of payments as per the earlier practice. Mr. Sandeep Sethi, learned Senior Counsel for the Respondent, has sought to urge that such an interim injunction would, in turn, have the effect of granting the Appellant the final relief which he seeks by means of A&C; Act through his Section 9 application. It is also argued that the Courts cannot, by means of an interim injunction or arrangement, order payment of amounts or dues which are disputed between the parties. The learned Senior Counsel relies on the H.M. Kamaluddin Ansari vs- Union of India, (1983) 4 SCC 417 to buttress his argument on this score.

5. The Appellant, however, states that the Courts under Section 9 of the A&C; Act have ample powers to secure the interests of parties; and that the Petitioner merely prays for a status quo order in respect of the interpretation of the Contract. The learned counsel sought to controvert the argument of the Respondent on the aspect of feasibility of such an injunction on the strength of Transmission Corp. of A.P. Ltd. vs- Lanco Kondapalli Power (P) Ltd., (2006) 1 SCC 540. Kamaluddin Ansari is sought to be distinguished on the ground that firstly the said Judgment was delivered in the backdrop at Section 41 of Arbitration Act, 1940 which now stands replaced by Section 9 of A&C; Act which vests much wider powers in the Courts to grant interim injunctions. Secondly, it is argued that in that case an injunction was sought to restrain the Respondent/Union of India from withholding the payments of the Appellant under other Bills, whereas a direction is sought in this case to continue payment on the basis on which NHAI has been paying heretofore and for as long as the immediately previous three years and in 31 instances.

6. In FAO(OS) 338/2008 titled NHAI vs- Unitech-NCC Joint Venture, which we had decided on 30th August, 2010. Keeping in perspective the views of the Dispute Resolution Board as well the Arbitral Tribunal, which were adverse to the stand

taken by the NHAI, we had dismissed the Appeal. The argument of the learned Additional Solicitor General to the effect that the new interpretation of a comparable Clause, sought to be enforced by a similar subsequent Notification should not be interfered with, did not find our favour. On merits, therefore, the NHAI indubitably will face insurmountable obstacles. But we are not concerned with the merits of the dispute.

7. Our attention has been drawn to the circumstances in Transmission Corp. which appear to be kindred to the factual matrix existing in the case in hand. In that case, the dispute pertained to payments in respect of power supply where the State Agency had been making payments on the output of the concerned Power Plant pegged at 368.144 MW. This was sought to be altered by issuing a notice that the base should have been fixed at 351.49 MW and that all future payments were to be computed and collected on that basis. The Hon'ble Supreme Court, while upholding the injunction granted by the High Court, observed as follows:-

49. Conduct of the parties is also a relevant factor. If the parties had been acting in a particular manner for a long time upon interpreting the terms and conditions of the contract, if pending determination of the lis, an order is passed that the parties would continue to do so, the same would not render the decision as an arbitrary one, as was contended by Mr Rao. Even the appellant had prayed for adjudication at the hands of the Commission in the same manner. Thus, it (sic appellant') itself thought that the final relief would be granted only by the arbitrator.

(words in parenthesis have been added by us)

8. We shall first analyse Kamaluddin Ansari to determine whether the principle laid down as regards the power to grant interim injunction holds good after coming into effect of the A&C; Act. Their Lordships were called upon to decide an application under Section 41 of the Arbitration Act read with Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908. Section 41 of the Arbitration Act was couched in these words:-

41. Procedure and powers of Court.Subject to the provisions of this Act and of rules made thereunder (a) the provisions of the Code of Civil Procedure, 1908 (5

of 1908), shall apply to all proceedings before the Court, and to all appeals, under this Act; and (b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court: Provided that nothing in clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters.

9. Thus, the provision provides a Court seized of a matter which is subject matter of Arbitration, power to make orders in respect of the matters in the Second Schedule which reads thus:-

1. The preservation, interim custody or sale of any goods which are the subject-matter of the reference.

2. Securing the amount in difference in the reference.

3. The detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

4. Interim injunctions or the appointment of a receiver.

5. The appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceedings.

10. The argument is that the A&C; Act provides wider powers to grant interim injunction in respect of an arbitrable dispute as would be evident from a perusal of Section 9 of the A&C; Act which reads as follows:-

9. Interim measures, etc. by Court.A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is

enforced in accordance with Section 36, apply to a Court: (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or (erstwhile 5th Clause of IInd Schedule) (ii) for an interim measure of protection in respect of any of the following matters, namely:

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; (erstwhile 1st Clause of IInd Schedule)

(b) securing the amount in dispute in the arbitration; (erstwhile 2nd Clause of IInd Schedule)

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;(erstwhile 3rd Clause of IInd Schedule)

(d) interim injunction or the appointment of a receiver; (erstwhile 4th Clause of IInd Schedule)

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

A careful perusal discloses that except for the residual Clause (e), which is very widely worded, the power to grant injunctions remain the same in both the statutes.

11. We shall now revert to Kamaluddin Ansari. Their Lordships had extracted paragraph 6 from the previous decision in Union of India vs- Raman Iron Foundary, AIR 1974 SC 1265; 1974 2 SCC 231 to underscore the distinction between a negative and a positive injunction:-

The Court has, therefore, power under Section 41(b) read with the Second Schedule to issue interim injunction, but such interim injunction can only be for the purpose of and in relation to arbitration proceedings. The arbitration proceedings in the present case were for determination of the mutual claims of the appellant and the respondent arising out of the contract contained in the acceptance of tender dated July 16, 1968. The question whether any amounts were payable by the appellant to the respondent under other contracts was not the subject matter of the arbitration proceedings. The Court obviously could not, therefore, make an interim order which, though ostensibly in form an order of interim injunction, in substance amounted to a direction to the appellant to pay the amounts due to the respondent under other contracts. Such an interim order would clearly not be for the purpose of or in relation to the arbitration proceedings as required by Section 41(b).

Paraphrasing these words, it seems to us that Their Lordships had highlighted the position that a breach of the Order of interim injunction would not result from the non-payment of amount since the Court had only interdicted recovery by the Respondent of its claims. After cogitating upon all the clauses in the Contract before Their Lordships, the larger Bench in Kamaluddin Ansari expressed the opinion that an injunction Order restraining the Respondents from withholding the amount due under other pending bills to the Contractor virtually amounts to a direction to pay the amount to the Contractor- appellant. Such an Order was clearly beyond the purview of Clause (b) of Section 41 of the Arbitration Act. The Union of India has no objection to the grant of an injunction restraining it from recovering or appropriating the amount lying with it in respect of other claims of the contractor towards its claim for damages. But certainly Clause 18 of the standard contract confers ample power upon the Union of India to withhold the amount and no injunction order could be passed restraining the Union of India from withholding the amount.

12. We shall now proceed to discuss Transmission Corp. which has been relied upon by the Appellant. The Two Judge Bench had analysed the nature of an ad interim injunction and the concomitants of such a relief. After referring to the connotation to be drawn from the phrase prima facie case', the Apex Court applied

the dictum in American Cyanamid Co. vs- Ethicon Ltd., (1975) I All ER 504, especially with regard to the preservation of the status quo. It reiterated that if- other factors appear to be evenly balanced it is a council of prudence to take such measures as are calculated to preserve the status quo. If the Defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the Trial is to postpone the date at which he is able to embark on a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.

13. Transmission Corp. also makes a reference to Firm Ashok Traders vs- Gurumukh Das Saluja, (2004) 3 SCC 155 but only for the purpose of enunciating that it is salutary to preserve the status quo. Ashok Traders, however, also touches upon the wider amplitude of powers available to the Court under the A&C; Act in contradistinction to those that had been bestowed on the Court under the 1940 Act. In Sundaram Finance Ltd. vs- NEPC, (1999) 2 SCC 479, the Hon'ble Supreme Court, while distinguishing the provisions of 1940 Act from the A&C; Act, observed thus The 1996 Act is very different from the Arbitration Act, 1940. The provisions of this Act have, therefore, to be interpreted and construed independently and in fact reference to 1940 Act may actually lead to misconstruction. In other words the provisions of 1996 Act have to be interpreted being uninfluenced by the principles underlying the 1940 Act. In order to get help in construing these provisions it is more relevant to refer to the UNCITRAL Model Law rather than the 1940 Act. Once this difference is noted, it will be clear that Kamaluddin Ansari does not proffer proportions which are irreconcilable with Transmission Corp., which lays emphasis on the advisability of maintaining status quo, but also garners support from the principle of estoppel. It was in this analysis of the change in law that the Hon'ble Supreme Court perceived no obstacle in upholding the direction to the Union of India to continue to adhere to the payments made prior to the clarificatory notification which was predicated on the installed capacity of 368.144 MW. No sooner the significance in the change of the law is borne in mind, the need to advert to Union of India vs- Raghubir Singh, (1989) 2

SCC 754 is obviated.

14. We shall briefly discuss Indian Oil Corporation vs- Amritsar Gas Services, (1991) 1 SCC 533 since it is often quoted to buttress the argument that granting mandatory injunctions should be abjured by the Court. Their Lordships recorded the view that the subject contract was (a) for an indefinite period terminable by a notice and (b) the contract was avowedly terminable. Since that engagement has been terminated, the Court observed that the restoration of the dealership could not have been ordered; that would tantamount to restoring the status quo ante by passing a mandatory injunction. We have an altogether different factual matrix before us. The contract is operational and in the continuum status quo is to be maintained or rent asunder.

15. It appears to us, therefore, that the Learned Single Judge was not correct in declining to grant the injunction prayed for before him viz. restraining the Respondent from implementing and/or enforcing its letter Nos. NHAI/40020/ Tech-III/EW- III/2006/WB-4/735 and NHAI/PIU/Araria/ escalation/2009 dated July 20, 2009 and July 29, 2009 respectively, erroneously feeling bound by Kamaluddin Ansari. In Adhunik Steels Ltd. vs- Orissa Manganese & Minerals Pvt. Ltd., AIR 2007 SC 2563, it has been opined that it would not be correct to say that the power under Section 9 is totally independent of the well known principles governing the grant of interim injunction that generally govern the Courts in this connection. Their Lordships have also extracted portions from International Commercial Arbitration in UNCITRAL Model Law Jurisdictions by Dr. Peter Binder. Several other treatise have been referred to, and we cannot do better than commend the reading of this detailed Judgment. The following paragraph justifies reproduction:-

11. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject-matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well-known rules and it is difficult to imagine that the

legislature while enacting Section 9 of the Act intended to make a provision which was dehors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the section itself brings in the concept of just and convenient while speaking of passing any interim measure of protection. The concluding words of the section, and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act.

16. This is also the view preferred in Arvind Construction Co. Ltd. vs- M/s. Kalinga Mining Corporation, AIR 2007 SC 2144. This position of the law would become obvious because of the introduction of Section 9(e) into the A&C; Act. Under the erstwhile jural regime, postulated in Section 41 of the 1940 Act, the dictates of justice and convenience as conceptualized by the Court, has not been envisioned. The learned single Judge ought to have pursued the path traversed in Transmission Corp. and Adhunik Steels Ltd. and should have applied the principles of estoppel or the expediency of continuing the status quo albeit with protection. Russell on Arbitration, 21st Edition, in Chapter 7-128 opined that the power to grant a Mareva injunction or a mandatory injunction is available to the Court in light of Section 44 of the English Arbitration Act, 1996. It seems to us that there is a general consensus of opinion on this legal point.

17. The Appeal is accordingly allowed. CM No.5445/2010 is disposed of. Respondents are directed to continue to make payments on the foundation followed in 31 prior instances. Since we are dealing with discretionary power, which is implicit in any injunction that is passed, we think that it would be appropriate to call upon the Appellants to furnish Bank Guarantees for the

differential between the formulation followed in the previous 31 payments viz-a-viz the computation and claims put forward by the Respondents as a consequence of their impugned notification. There shall be no Order as to Costs.

18. This Appeal assails the Order dated 04.11.2009, wherein the Learned Single Judge found no justification to grant the injunction sought by the Petitioner/Appellant, namely, to stay the operation of sundry letters issued by the NHAI/Respondents. However, in light of interim orders passed on 02.09.2009 and continued thereafter by a Division Bench against similar letters issued by the NHAI, the learned Single Judge in FAO(OS) 383/2009 titled Simplex Infrastructure vs- NHAI kept the petition pending with a direction to stay of the operation of letters subject to the Petitioner furnishing fresh Bank Guarantees in favour of the Respondent with respect to each amount which the Petitioner receives in terms of the interpretation of the subject Clause 70 of the COPA. FAO(OS) 383/2009 was withdrawn as infructuous on 29.04.2010 since the final decision in that very matter (OMP 484/09) came to be delivered in terms of the Order dated 04.03.2010 impugned in the foregoing FAO(OS) 200/2010. Ironically, the same learned Single Judge has chartered a course different to the interim orders dated 02.09.2009 in Simplex Infrastructure itself whilst applying the latter in this Appeal.

19. In the present Appeal, the Appellant has sought the following reliefs:-

(i) Quashing and/or setting aside the impugned order dated 4.11.2009 passed in OMP No.545/2009 to the extent that the same is against the Appellant.

(ii) Restraining and/or staying the implementation and/or the enforcement of the impugned letter dated July 20, 2009, September 01, 2009, September 18, 2009 and October 12, 2009 and

(iii) Restraining the Respondents from otherwise giving effect to its aforesaid letters and/or deviating from the agreed interpretation of the price adjustment clause, in any manner.

20. The learned Single Judge has discussed both Kamaluddin Ansari and Transmission Corp., and arrived at the conclusion that the later decision cannot

prevail upon the earlier one, which additionally was of a larger Bench. As already discussed above, we are of the opinion that the Judgments are not in conflict with each other since Kamaluddin Ansari construed the relevant provisions of the 1940 Act, whereas Transmission Corp. has analysed the A&C; Act. We have found it unignorably relevant that Section 9(e) of the A&C; Act is an altogether new provision which, in essence, enables the Court to draw upon the provisions of the CPC as also the Specific Relief Act, 1963. Having said this, a perusal of the operative part of the impugned Order will disclose that it is in consonance with the Orders passed by us in FAO(OS) 200/2010. It is for this reason that the Appeal along with the pending Applications is dismissed. We clarify that the Respondent shall make payment to the Appellant by adhering to the interpretation/practice adopted by it in the payments made heretofore upon the Appellant providing a Bank Guarantee to cover the differential.

21. Parties to bear their respective costs.

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