

**HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR**

AA No.39/2017
MP No.1/2017

Date of order: 05.06.2017.

M/S NKG Infrastructure v. GRANCO Industries and anr.

Coram:

Hon'ble Mr. Justice Sanjeev Kumar, Judge

Appearing counsel:

For the Petitioner(s)	: Mr. Jehangir Iqbal Ganie, Sr. Advocate with M/S Mr. Syed Faisal Qadri, Moksha Kazmi, Tejaswi Shetty, Vaseen Aslam, Akash Johari & Raj Mohan Gupta, Advocates.
For the Respondent(s)	: Mr. Mohsin Qadri, Advocate.

i/	Whether to be reported in Press/Media	:	Yes
ii/	Whether to be reported in Digest/Journal	:	Yes

1. The appellant, a company incorporated under the provisions of Companies Act, 1956 having its corporate office in Gaziabad (U.P.), is in appeal against the order dated 25.11.2017 passed by the Principal District Judge, Srinagar (hereinafter referred to as "the Court below") in an application filed by respondent No.1 under Section 9 of the Jammu & Kashmir Arbitration and Conciliation Act, 1997 (hereinafter referred to as "the Act").

2. The factual antecedents leading upto the filing of this appeal, as are necessary for the disposal of this appeal, may be summed up in the following manner:-

The Chief Engineer, 31 Zone C/o 56 APO vide his letter No. 180869/142-E8 dated 24.12.2010 bearing Contract No.CESZ-06/2010-11 awarded a contract to the appellant-Company for construction of dwelling units and allied services for married accommodation project map phase-II at LSRC Leh. The appellant entered into a Memorandum of Understanding with one firm, namely, M/S G.R.Nagvi and Co. for carrying out the work aforesaid. The firm M/s G.R.Nagvi and Co. amalgamated with respondent No.1-Company, as a result whereof all assets and liabilities of M/S G.R.Nagvi and Co. were taken over by the respondents. As per the terms and conditions of the MOU, the appellant-Company was entitled to 3% of the amount of the work and the rest of the amount was to go to respondent No.1. The MOU was to remain valid till the successful completion of the work.

It was the case of the respondent No.1 before the Court below that both the parties acted upon the terms and conditions and executed the work after adhering to the payment arrangement as decided by the parties. Thereafter, a supplementary agreement too was executed between the parties containing new terms and conditions. It is claimed that the firm M/s G.R.Nagvi and Co. which later on amalgamated with respondent No.1 had executed a considerable quantity of work by the end of year 2013. However, during the year 2014-15 the appellant had some issues with the employer and because of that the payments for the work executed by M/S G.R.Nagvi and Co. were not made. A sum of Rs.9,50,00,000/- was the amount that was payable by the appellant for the work executed including the rental amount of installation of plant and machinery. The respondent No.1 claimed that the appellant did not discharge its liability nor did it permit the respondent No.1 to go ahead with the execution of the balance work. Series of requests and reminders issued by respondent No.1 too could not evoke any response from the appellant. Lastly, before the Court below the

respondent No.1 submitted that the liability which is admitted by the appellant towards respondent No.1 be directed to be discharged and also the accounts maintained by the appellant with the bank be frozen. The application under Section 9 of the Act was filed before the Court below in the context of aforesaid factual backdrop.

The application was contested by the appellant on numerous grounds. The maintainability of the application was disputed by the appellant on the ground that there was no arbitration agreement between the parties which is *sine qua non* for filing an application under Section 9 of the Act. The appellant even challenged the territorial jurisdiction of the Court below to entertain the application. It was also the submission of the appellant before the Court below that in the absence of respondent No.1 having demonstrated prima facie case in its favour along with balance of convenience and irreparable injury in the application, interim relief as prayed for was not maintainable. The Court below after considering the rival contentions disposed of the application finally vide its order dated 25.11.2017 directing the Chief Engineer/Garrison Engineer to make payment of Rs.9,36,38,351/- in favour of respondent No.1 with further condition that respondent No.1 shall submit an undertaking that in case the arbitral tribunal makes any direction for reimbursing the appellant, the respondent No.1 shall do so without any hesitation in the manner directed by the said arbitral tribunal. It is this order of the Court below which is subject matter of challenge in this appeal.

3. Having heard learned counsel for the parties and perused the record, it is necessary to set out the provisions of Section 9 of the Act which are as follows:-

“9. Interim measures etc., by the Court

A party may before or during arbitral proceedings or at any time after the making of the arbitral award but before it becomes decree of a Court, 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
- (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;
 - (b) securing the amount in dispute in the arbitration;
 - (c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute and arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing 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;
 - (d) interim injunction or the appointment of a receiver;
 - (e) such other interim measure of protection as may appear to be 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.”

4. From a plain reading of Section 9 of the Act, it is clear that a party to the arbitration agreement can approach the Court for a interim measure of protection before or during the arbitral proceedings or at any time after making of the arbitral award but before it becomes decree of a Court. However, when an application under Section 9 of the Act is filed before the commencement of the arbitral proceedings, there has to be manifest intention on the part of the applicant to take recourse to the arbitral proceedings in the immediate future, if at the time of presentation of the application under Section 9 of the Act the proceedings have not already commenced under Section 21 of the Act. It may not be necessary that a notice indicating the arbitration clause is issued to the opposite party before filing of the application under Section 9 of the Act and the party may be justified in approaching the Court for immediate interim measure even before issuing notice as contemplated by Section 21 of the Act. The provisions made in Section 9 of the Act permitting the party aggrieved to file

application even before the commencement of arbitral proceedings is with the object that some times in the given fact situation, immediate steps for preservation of the subject matter of arbitration may be called for even before the party takes steps for commencement of arbitral proceedings under Section 21 of the Act. The law on the point was summed up by the Supreme Court in the case of *Sundaram Finance Ltd. v. NEPC India Ltd.*; 1999 (2) SCC 479. In paragraph No.19 of the judgment the Supreme Court concluded thus:-

“19. When a party applies under Section 9 of the 1996 Act it is implicit that it accepts that there is a final and binding arbitration agreement in existence. It is also implicit that a dispute must have arisen which is referable to the arbitral tribunal. Section 9 further contemplates arbitration proceedings taking place between the parties. Mr. Subramaniam is, therefore, right in submitting that when an application under Section 9 is filed before the commencement of the arbitral proceedings there has to be manifest intention on the part of the applicant to take recourse to the arbitral proceedings if, at the time when the application under Section 9 is filed, the proceedings have not commenced under Section 21 of the 1996 Act. In order to give full effect to the words "before or during arbitral proceedings" occurring in Section 9 it would not be necessary that a notice invoking the arbitration clause must be issued to the opposite party before an application under Section 9 can be filed. The issuance of a notice may, in a given case, be sufficient to establish the manifest intention to have the dispute referred to arbitral tribunal, but a situation may so demand that a party may choose to apply under Section 9 for an interim measure even before issuing a notice contemplated by Section 21 of the said Act. If an application is so made the Court will first have to be satisfied that there exists a valid arbitration agreement and the applicant intends to take the dispute to arbitration. Once it is so satisfied the Court will have the jurisdiction to pass orders under Section 9 giving such interim protection as the facts and circumstances warrant. While passing such an order and in order to ensure that effective steps are taken to commence the arbitral proceedings, the Court while exercising jurisdiction under Section 9 can pass conditional order to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing the arbitral proceedings. What is apparent, however, is that the Court is not debarred from dealing with an application under Section 9 merely because no notice has been issued under Section 21 of the 1996 Act.”

5. Noticing the law laid down in *Sundaram Finance Ltd.* (supra), the Supreme Court in paragraph 17 of the judgment rendered in the case of *Firm Ashok Traders and another v. Gurumukh Das Saluja and others; 2004(3) SCC 155* further elaborated the law in the following manner:-

“17. There are two other factors which are weighing heavily with us and which we proceed to record. As per the law laid down by this Court in *M/ s. Sundaram Finance Ltd* an application under Section 9 seeking interim relief is maintainable even before commencement of arbitral proceedings. What does that mean? In *M/s. Sundaram Finance Ltd.*, itself the Court has said-

"It is true that when an application under Section 9 is filed before the commencement of the arbitral proceedings there has to be manifest intention on the part of the applicant to take recourse to the arbitral proceedings".

Section 9 permits application being filed in the Court before the commencement of the arbitral proceedings but the provision does not give any indication of how much before. The word 'before' means inter alia, 'ahead of; in presence or sight of; under the consideration or cognizance of. The two events sought to be interconnected by use of the term 'before' must have proximity of relationship by reference to occurrence; the later event proximately following the preceding event as a foreseeable or 'within sight' certainty. The party invoking Section 9 may not have actually commenced the arbitral proceedings but must be able to satisfy the Court that the arbitral proceedings are actually contemplated or manifestly intended (as *M/s Sundaram Finance Ltd.* puts it) and are positively going to commence within a reasonable time. What is a reasonable time will depend on the facts and circumstances of each case and the nature of interim relief sought for would itself give an indication thereof. The distance of time must not be such as would destroy the proximity of relationship of the two events between which it exists and elapses. The purposes of enacting Section 9, read in the light of the Model Law and UNCITRAL Rules is to provide 'interim measures of protection'. The order passed by the Court should fall within the meaning of the expression 'an interim measure of protection' as distinguished from an all-time or permanent protection.”

6. As is seen from a long line of decisions by the Supreme Court as well as various High Court, the parties generally approach the Courts for securing the amount in dispute and preventing the alienation or dissipation of the property

and the source of power of the Court to make orders by way of interim measure is only in Section 9 of the Act. There is no independent power in the Court *de hors* Section 9 of the Act. Under Section 9(ii)(b) of the Act, a party applying to the Court may seek to protect its financial interest by securing the amount in dispute in the arbitration and under Section 9(ii)(c) a party may pray for an interim measure permitting it to take symbolic possession of the property. Apparently there are no standards prescribed under the Act for grant of interim relief by the Court under Section 9 of the Act. The Court while considering an application under Section of the 9 of the Act would invariably apply the standards laid down in Order 39 and order 38 of the Code of Civil Procedure. The standards laid down in the Code of Civil Procedure for regulating the grant of interim relief may not be applicable to the proceedings under Section 9 of the Act *stricto sensu* but the underlying principles are applied by the Courts to pass interim orders to protect the subject matter of arbitration. The powers granted to the Court to grant interim measure in terms of Section 9 of the Act are wide enough to comprehend all type of interim measures of protection that may appear to the Court to be just and convenient. The degree of applicability of the provision of the Code of Civil Procedure under Section 9 of the Act fell for consideration before the Supreme Court in the case of **Arvind Construction v. 2007(6) SCC 798**. Paragraph 15 of the judgment wherein the Supreme Court indicated its view, though, *prima facie*, 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 receiver is noteworthy. It would be appropriate to reproduce paragraph 15 of the judgment which reads thus:-

“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.”

7. In the same year the issue aforesaid became subject matter of debate before the Supreme Court in the case of *Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.*; 2007 (7) SCC 125. In the aforesaid case the Supreme Court was of the opinion that “well known Rules of the Code of Civil Procedure would have to be kept in mind while granting interim relief under Section 9”. The three cardinal principles i.e. (i) *prima facie*; (ii) *balance of convenience*; and (iii) *irreparable injury*, would have to be kept in mind while granting interim measure of protection under Section 9 of the Act, was the observation made by the Supreme Court in the aforesaid case. What was stated

by the Supreme Court in paragraph No.16 of the aforesaid judgment is reproduced herein below:-

“16. Injunction is a form of specific relief. It is an order of a court requiring a party either to do a specific act or acts or to refrain from doing a specific act or acts either for a limited period or without limit of time. In relation to a breach of contract, the proper remedy against a defendant who acts in breach of his obligations under a contract, is either damages or specific relief. The two principal varieties of specific relief are, decree of specific performance and the injunction (See David Bean on Injunctions). The Specific Relief Act, 1963 was intended to be "An Act to define and amend the law relating to certain kinds of specific reliefs." Specific Relief is relief in specie. It is a remedy which aims at the exact fulfilment of an obligation. According to Dr. Banerjee in his Tagor Law Lectures on Specific Relief, the remedy for the non performance of a duty are (1) compensatory, (2) specific. In the former, the court awards damages for breach of the obligation. In the latter, it directs the party in default to do or forbear from doing the very thing, which he is bound to do or forbear from doing. The law of specific relief is said to be, in its essence, a part of the law of procedure, for, specific relief is a form of judicial redress. Thus, the Specific Relief Act, 1963 purports to define and amend the law relating to certain kinds of specific reliefs obtainable in civil courts. It does not deal with the remedies connected with compensatory reliefs except as incidental and to a limited extent. The right to relief of injunctions is contained in part-III of the Specific Relief Act. Section 36 provides that preventive relief may be granted at the discretion of the court by injunction temporary or perpetual. Section 38 indicates when perpetual injunctions are granted and Section 39 indicates when mandatory injunctions are granted. Section 40 provides that damages may be awarded either in lieu of or in addition to injunctions. Section 41 provides for contingencies when an injunction cannot be granted. Section 42 enables, notwithstanding anything contained in Section 41, particularly clause (e) providing that no injunction can be granted to prevent the breach of a contract the performance of which would not be specifically enforced, the granting of an injunction to perform a negative covenant. Thus, the power to grant injunctions by way of specific relief is covered by the Specific Relief Act, 1963.

8. The aforesaid observations came to be made by the Supreme Court by taking note of the provisions of Section 9 of the Act **“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.”** The observations made by the Supreme Court in paragraph No.11 of the aforesaid judgment deserve to be noticed:-

“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 de hors 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."

9. From a bare reading of various decisions rendered by the Supreme court and various High Courts on the scope of jurisdiction of the Court for grant of interim relief under Section 9 of the Act, the two lines of reasoning emerge:- An exclusive approach and inclusive approach. The former line of reasoning would suggest that rigors of provisions in the Code of Civil Procedure cannot be put into place to defeat the grant of relief provided under Section 9 of the Act. Whereas later line of reasoning constitutes that the proceedings under Section 9 of the Act are to be regulated and guided by the provisions of Order 38 Rule 5 and Order 39 Rule 1 and 2 of the Code of Civil Procedure in the matter of grant of interim injunction or interim measure of protection. But, if we carefully go through the Section 9 of the Act as a whole, it leaves no scope for assuming that the powers given to the Court for grant of interim measure are limited or circumscribed by the provisions of Code of Civil Procedure like Order 40 Rule 1 in the matter of appointment of receiver and Order 39 Rule 1 and 2 in the matter of grant of interim injunction or Order 38 Rule 5 for orders akin to order of attachment before judgment. The provision is wide in sweep and entrusts power to a Court for grant of interim measure of protection in respect of preservation,

interim custody or sale of any goods subject matter of arbitration agreement; securing the amount in dispute in the arbitration; the detention, preservation and inspection of the property subject matter of dispute and arbitration; interim injunction or the appointment of receiver. It also confers power to order such other interim measure of protection as may appear to the Court to be just and convenient. This is so provided in Section 9(ii)(e) of the Act. Indisputably, sub section (e) of Section 9 of the Act is required to be read *ejusdem generis* with other clauses of sub section (ii) of Section 9 of the Act.

10. The interim measure of protection that could be ordered by the Court ought to be such which are necessary to protect the list and to thwart an attempt by the opposite party to frustrate the arbitration proceedings. While granting such measure of protection, the Court enjoys the same powers as it has for making orders for the purpose of and in relation to any proceedings before it. The power to be exercised under Section 9 of the Act is by the Court as defined in sub section 2(e) of the Act. The “Court” means the Principal Court of Original Jurisdiction in a district and includes the High Court in exercise of its extra ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of arbitration if the same had been the subject matter of suit etc. The Court exercising power under Section 9 of the Act is, undoubtedly, a Court of civil jurisdiction and, therefore, has the power to make orders under the Jammu and Kashmir Specific Relief Act, Code of Civil Procedure etc in relation to the proceedings before it.

11. From the aforesaid discussion, the following conclusions are deductible:-

- i) Application under Section 9 of the Act can, *inter alia*, be made before the actual commencement of the arbitral proceedings in terms of Section 21 of the Act.

- ii) When such application is made before the actual commencement of the arbitral proceedings in terms of Section 21 of the Act, the party applying for interim measure of protection etc. must demonstrate that there has been manifest intention on the part of the applicant to take recourse to the arbitral proceedings, if at the time when the application under Section 9 of the Act is filed, the arbitral proceedings in terms of Section 21 of the Act have not commenced. Such manifest intention can be discernible from the positive averments made in the petition followed by effective steps taken in that behalf by the applicant. Such manifest intention should also be discernible from the subsequent conduct of the applicant.
- iii) The Court under Section 9 of the Act enjoys wide powers in the matter of grant of interim measures and such power entrusted to the Court is not limited, controlled or circumscribed by the provisions of order 39 Rule 5, Order 39 Rule 1 and 2 of the Code of Civil Procedure. The Court while adjudicating the application under Section 9 of the Act would, however, be guided by the general principles governing grant of interim injunctions as envisaged in Order 39 Rule 1 and 2 of the Code of Civil Procedure i.e. prima facie case, balance of convenience and irreparable injury. Similarly in the matter of grant of interim measures of protection by appointment of receiver, the Court would be guided by the general principles laid down in Order 40 Rule 1 of the Code of Civil Procedure. Similarly, the principles laid down in different provisions of Specific Relief Act insofar as it pertains to the grant of injunctions shall also serve as a guide for regulating the exercise of power by the Court under Section 9 of the Act.
- iv) The Court exercising powers under Section 9 of the Act is a Court of Civil jurisdiction and would enjoy the same powers for making interim orders as it has for the purposes of and in relation to any proceedings before it.

Such powers would include powers to appoint receiver under Order 40 Rule 1 CPC, power to direct attachment of the property before judgment under Order 38 Rule 5 and power to grant interim order for preservation of the subject matter of the *lis* in terms of Order 39 Rule 1 and 2 etc.

12. In the backdrop of aforesaid legal position, the facts in the instant case need to be examined. For the purpose of disposal of this appeal atleast, the appellant has not raised the issue of maintainability of application under Section 9 of the Act before the Court below on the ground that there was no arbitration agreement between the parties which is sine qua non for invoking such power of the Court.

13. The matter was argued by both the parties on merits. Before I proceed to deal with the contentions of learned counsel for the parties, it would be appropriate to delineate, particularly on the scope of interference by this Court in exercising power of appeal under Section 37 of the Act. The scope of appeal, as is apparent from a bare reading of Section 37 of the Act, is the same as that of a Court hearing miscellaneous appeal against an interim order passed by Civil Court subordinate to it under order 39 Rule 1 and 2 of the Code of Civil Procedure.

14. Indisputably, the order passed by the Court under Section 9 of the Act falls in the realm of discretionary relief and the appellate Court would not substitute its view in the matter merely on the ground that in its opinion the facts of the case call for a different conclusion. As long as the view of the trial Court is a possible view and the same does not suffer from any perversity, the appellate Court would be loathe to interfere. The position of law was enunciated by the Apex Court in the case of ***Wander Ltd. v. Antox India (P) Ltd.; 1990 (Supp) SCC 727***. Paragraph No.14 of the judgment reads thus:-

“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. v. Pothan Joseph*: (SCR 721)

“.....These principles are well established, but as has been observed by Viscount Simon in *Charles Osenton & Co. v. Jhanaton*’..... 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.”

15. The aforesaid view was reiterated in the case of ***Mohd. Mehtab Khan and others v. Khushnuma Ibrahim and ors.***; **2013 (9) SCC 221**, strongly relied upon by the learned counsel for the respondent No.1. While there is no denial of the fact that the relief which is granted by the Court under Section 9 of the Act is discretionary and exercise of discretion by the Court below should not be normally interfered with by the appellate court merely on the ground that on the facts and evidence that was before the Court below, another view is possible. So long as the view taken by the court below is not perverse and against the judicially established norms laid down for exercise of such discretion, the appellate court should not interfere.

16. I have carefully gone through the order impugned and in my considered opinion, the Court below has overstepped its jurisdiction in granting relief, which on the fact of it, is contrary to the established principles governing grant of relief under Section 9 of the Act. That apart, the order impugned suffers from serious perversity in law and facts. I have gone through the pleadings of the parties which were filed before the Court below, I do not find any convincing evidence on record to assume that the appellant has admitted the liability to the tune of Rs.9,36,38,351/- as held by the Court below. Needless to remind that the Court while exercising its power conferred under Section 9 of the Act was not acting as arbitral tribunal having the power and jurisdiction to pass interim award at the admission of parties. The extent of liability of a party essentially would be subject matter of arbitration and the same cannot be made subject matter of adjudication in an application under Section 9 of the Act. The respondent No.1, as is apparent from its application, had approached the Court below for grant of interim measure of protection so that the amount, subject matter of arbitration, could be secured till the arbitration proceedings are conducted and finalized. The relief which was sought by respondent No.1 was essentially akin to the relief that can be claimed from a Civil Court under Order 38 Rule 5 of the Code of Civil Procedure. Though, the rigors of Order 38 Rule 5 CPC may not apply *stricto sensu*, yet the principles underlying the aforesaid provisions are to be kept in mind while granting such interim measure of protection.

17. The Court below probably on the assumption that the appellant has admitted the liability to the tune of Rs.9,36,38,351/- and therefore, directed the employer of the appellant to directly pay to respondent No.1 least realizing that the employer of the appellant was neither party to the agreement nor party in the application filed by respondent No.1 under Section 9 of the Act.

18. On being repeatedly asked, the learned counsel for respondent No.1 could not specifically point out any averment in the reply filed by the appellant before the Court below to indicate that the appellant had admitted the liability of Rs.9,36,38,351/- towards respondent No.1. Whether the evasive denial would amount to admission or whether the communication relied upon by respondent No.1 and not very specifically denied by the appellant amounts to admission, are the matters which require evidence and such evidence would be led only when the arbitration proceedings are commenced and conducted to resolve the dispute between the parties. The Court below, therefore, swayed away by the considerations not germane to the exercise of power under Section 9 of the Act. The Court below also did not take into consideration the settled position of law as adumbrated above, that a party approaching the Court for interim measures under Section 9 of the Act must aver in its application that he has manifest intention to take recourse to arbitration proceedings and such intention must be discernible from the steps it has taken or is contemplating to take which would include his subsequent conduct as well.

19. Admittedly, there is no averment made in the application in this regard nor anything has been brought on record to show that the respondent No.1 intends to have recourse to the arbitral proceedings. Mere filing of an application under Section 9 of the Act would not *ipso facto* mean that respondent No.1 admits the existence of arbitration agreement and therefore, it has manifest intention to go for arbitration.

20. The application under Section 9 of the Act before the Court below was filed on 04.10.2017 and till the date this matter was reserved, the respondent No.1 had not taken any step to have recourse to the arbitral proceedings. On this

score alone, the application of respondent No.1 could have been dismissed by the Court below.

21. In view of the aforesaid, it cannot be said that the order impugned does not suffer from any perversity and is passed in the exercise of discretion which does not call for any interference by the appellate Court. The existence of prima facie case itself would not be sufficient to pass interim order of protection of the nature it has been passed in the instant case. The Court below was, however, obliged to deal with other factors like balance of convenience and irreparable injury. As stated above, the relief which the respondent No.1, in essence, had prayed for was the relief of interim protection for securing the amount, subject matter of arbitration, till the arbitration proceedings are commenced and culminate into passing of the award. Interestingly, I do not find any such pleading in the application which would prima facie show that the appellant was about to remove or dispose of whole or part of his property with the intention of destroying the subject matter of arbitration and thus, obstructing the execution of the award that may be passed against him.

22. In the absence of any averment justifying an order akin to the order of attachment before the judgment in terms of Order 38 Rule 5 CPC, even interim measure of protection of securing the subject matter of arbitration could not have been passed.

23. In view of the aforesaid discussion, though, I am inclined to accept this appeal and set aside the order impugned, yet keeping in view the larger interest of justice and to protect the *lis* pending arbitration proceedings, it appears to me just and convenient to modify the order of the Court below by providing that the Chief Engineer/Garrison Engineer shall set apart a sum of Rs.9,36,38,351/- out

of the amount payable to the appellant and keep the same in an interest bearing FDR in some Nationalized or Scheduled Bank. Ordered accordingly.

24. The disbursement of the aforesaid amount to the appellant or the respondent No.1, as the case may be, shall, however, depend upon the decision of the arbitral proceedings, if any commenced by the parties, particularly, the respondent No.1. The respondent No.1 shall take effective steps for seeking recourse to the arbitral proceedings within four weeks from the date of this judgment, failing which the aforesaid interim measure of protection granted by this Court shall cease to operate.

25. The appeal along with connected MP stands disposed of in the above terms. There shall be no order as to the costs.

(Sanjeev Kumar)
Judge

Srinagar.
05.06.2018
Vinod.

Judgment is pronounced by me in terms of Rule 138(3) of the Jammu and Kashmir High Court Rules, 1999.

(M.K.Hanjura)
Judge

Srinagar
05.06.2018