

**IN THE HIGH COURT OF KARNATAKA AT BENGALURU**

**DATED THIS THE 19<sup>TH</sup> DAY OF JULY, 2024**

**PRESENT**

**THE HON'BLE MRS JUSTICE ANU SIVARAMAN**

**AND**

**THE HON'BLE MR JUSTICE ANANT RAMANATH HEGDE**

**COMMERCIAL APPEAL NO. 56 OF 2024**

**IN**

**COM.A.A 3 OF 2024**

**BETWEEN:**

M/S KLR GROUP ENTERPRISES  
NO.306, 3<sup>RD</sup> FLOOR,  
EMBASSY CHAMBERS,  
NO.5, VITTAL MALLYA ROAD,  
BENGALURU - 560 001,  
REPRESENTED BY ITS PARTNER,  
MR.P. LAVAKUMAR.

...APPELLANT

(BY SRI DHANANJAY JOSHI, SENIOR COUNSEL FOR  
SRI SHASHIDHAR R, ADVOCATE)

**AND:**

1. MADHU H V,  
S/O LATE MR H N VENKATESH,  
AGED ABOUT 27 YEARS,
2. MR. MANOHAR V,  
S/O LATE MR H N VENKATESH,  
AGED ABOUT 31 YEARS,
3. MRS. C T BHAGYAMMA  
W/O LATE MR H N VENKATESH,  
AGED ABOUT 54 YEARS,

4. MRS. ANITHA  
W/O LATE MR N SHANKARAPPA @ H N SHANKAR,  
AGED ABOUT 45 YEARS,
5. MRS. NIRANJAN GOWDA S,  
S/O LATE MR N SHANKARAPPA @ H N SHANKAR,  
AGED ABOUT 24 YEARS,

ALL DEFENDANTS RESIDING AT  
HEGGONDAHALLI VILLAGE,  
SARJAPUR HOBLI, ANEKAL TALUK,  
BENGALURU DISTRICT, KARNATAKA-560087.

...RESPONDENTS

(BY SRI PRASHANTH G, ADVOCATE FOR R1,  
SRI ASHOK HARANAHALLI, SENIOR COUNSEL A/W  
SRI PRASANNA B R, ADVOCATE FOR R2 TO R5)

THIS COMMERCIAL APPEAL IS FILED UNDER SECTION 13(1-A)  
OF THE COMMERCIAL COURTS ACT, 2015 READ WITH SECTION  
37(1)(B) OF THE ARBITRATION CONCILIATION ACT, 1996 READ WITH  
ORDER 43 RULE 1(R) READ WITH SECTION 151 OF THE CODE OF  
CIVIL PROCEDURE, 1908 PRAYING TO:

A) SET ASIDE THE ORDER DATED 13.02.2024 R/W ORDER  
DATED: 16/02/2024 ON I.A.NO.3 IN COM.A.A.NO.3/2024 PASSED BY  
THE HON'BLE COURT OF THE X ADDITIONAL DISTRICT AND  
SESSIONS JUDGE, BENGALURU RURAL (COMMERCIAL DIVISION).

B) GRANT AN ORDER OF AD-INTERIM EX-PARTE INJUNCTION  
RESTRAINING THE RESPONDENTS FROM INTERFERING WITH THE  
APPLICANT/APPELLANTS PEACEFUL POSSESSION AND ENJOYMENT OF  
THE SCHEDULE PROPERTY AND THE DEVELOPMENT WORKS TILL  
DISPOSAL OF THE PROCEEDINGS IN COM.A.A.NO.3/2024.

C) PASS ANY OTHER ORDER HAS THIS HON'BLE COURT DEEMS  
FIT IN THE INTEREST OF JUSTICE AND EQUITY.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR  
JUDGMENT ON 15<sup>TH</sup> JULY, 2024 AND COMING ON FOR  
PRONOUNCEMENT THIS DAY, THE COURT PRONOUNCED THE  
FOLLOWING:

**CAV JUDGMENT**

**(PER: HON'BLE MR JUSTICE ANANT RAMANATH HEGDE)**

1. Whether an order refusing or granting *ex-parte* interim measure on an application under Section 9 of the Arbitration and Conciliation Act, 1996 (for short 'Act, 1996') falling under 'Commercial Arbitration Dispute' is appealable order under Section 37 of the Act, 1996, or such an appeal, barred under the *proviso* to Section 13(1A) of the Commercial Courts Act, 2015? (for short 'Act, 2015').

2. The respondents have raised a contention that the present appeal impugning the order of the Commercial Court, issuing emergent notice, and declining '*ex-parte*' interim measure on an application under Section 9 of the Act, 1996 is not maintainable.

3. Learned Senior counsel Sri.Dhananjay Joshi, appearing for the appellant raised the following contentions:

- The power to grant interim order under Section 9 of the Act, 1996 also includes the power to grant *ex-parte* interim order. Such power is expressly recognised in the High Court of Karnataka Arbitration (Proceedings before the Courts) Rules, 2001 (for short 'Rules, 2001'). Thus, an order issuing an emergent notice and declining *ex-parte* order is also an appealable order under Section 37 of the Act, 1996.
- The co-ordinate Bench of this Court in ***M/s. Sorting Hat Technologies Private Limited vs. Sri Vishal Vivek Tiwar*** (COMAP No.274/2022) following the judgment of the Delhi High Court and Andhra Pradesh High Court has held that the appeal against the order under Section 9 refusing *ex-parte* interim measure under Section 9 of the Act, 1996 is maintainable and the law laid down in ***Symphony Services Corporation (India) Private Limited, Bangalore vs. Sudip Bhattacharjee***<sup>1</sup> is no longer good law

4. Reliance is also placed on the following judgments:-

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<sup>1</sup> (2008) 2 KLJ 24

1. *M/s Sorting Hat Technologies Private Limited vs. Sri Vishal Vivek Tiwari*<sup>2</sup>
2. *ICICI Bank Limited vs. IVRCL Ltd. (formerly known as ICRCL Projects and Infrastructure Ltd) and others*<sup>3</sup>
3. *M/S Bilasraika Sponge Iron Pvt. Ltd., vs. M/S Devi Trading Company*<sup>4</sup>
4. *Aventis Pasteur S.A vs. Cadila Pharmaceuticals Ltd.*<sup>5</sup>
5. *Perin Hoshang Davierwalla And Another vs. Kobad Dorabji Davierwalla and others*<sup>6</sup>
6. *M/S Nikitha Build-Tech (P) Ltd., vs. M/S Natural Textiles Pvt. Ltd.*<sup>7</sup>
7. *M/S Nikitha Build-Tech (P) Ltd., vs. M/S Natural Textiles Pvt. Ltd.*<sup>8</sup>
8. *Smt Madhumati vs. The State of Karnataka and others*<sup>9</sup>
9. *Essar House Private Limited vs. Arcelor Mittal Nippon Steel India Limited*<sup>10</sup>

5. Sri Ashok Haranahalli, the learned Senior counsel appearing for respondents No.2 to 5, raised the following contentions:-

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<sup>2</sup> COMAP NO.274/2022

<sup>3</sup> 2015 SCC ONLINE Hyd 311

<sup>4</sup> 2011 SCC ONLINE AP 210

<sup>5</sup> 2002 SCC ONLINE Guj 288

<sup>6</sup> 2014 SCC ONLINE Bom 534

<sup>7</sup> ILR 2010 KAR 4722

<sup>8</sup> ILR 2010 KAR 2846

<sup>9</sup> WP NO.103965/2023

<sup>10</sup> 2022 SCC ONLINE SC 1219

- In a proceeding under the Act, 1996, in respect of a Commercial Arbitration Dispute, the appeal under Section 37 of the Act, 1996 is maintainable against an interlocutory order, only if, such order falls under Order XLIII of the Code of Civil Procedure, in view of the *proviso* to Section 13(1A) of the Act, 2015.
- The impugned order is not a final order under Section 9 of the Act, 1996 and the application on which the impugned order is passed is still pending consideration before the learned District Judge, as such, the appeal is not maintainable.
- The order in *M/s. Sorting Hat Technologies Private Limited supra* is not a law declared and it is only a tentative view expressed while issuing notice to the respondent and law laid down by the single judge of this Court in ***Symphony Services Corporation (India) Private Limited, Bangalore supra*** still holds the field.
- The scheme of the Act, 1996 and Act, 2015 does not enable an appeal against an order refusing to grant an *ex-parte* order and if such an appeal is held to be

maintainable, it will defeat the very object of the Act, 1996 and the Act, 2015 in view of the law in *BGS SGS SOMA JV Vs. NHPC LTD*<sup>11</sup> by the Apex Court.

- The dispute raised under Section 9 of the Act, 1996 is also not a commercial dispute as such the commercial appeal itself is not maintainable before this Court.

6. Learned Senior counsel appearing for the respondents No.2 to 5 has placed reliance on the judgments:

1. *A Venkatasubbaiah Naidu Vs S Challappan and ors.*<sup>12</sup>
2. *M/S Parijatha And Another Vs Kamalaksha Nayak and ors.*<sup>13</sup>
3. *MR.R.Ravindaranatha Manvi VS Mr.K.R.Ramesh and ors.*<sup>14</sup>
4. *Madiwalappa Shivappa Badiger vs Sri Sukshethra Sri.Somanatha Shivappa Muttya Committee*<sup>15</sup>
5. *National Thermal Power Corporation Ltd. Vs. Meghalaya Power Distribution Corporation. Ltd. and others*<sup>16</sup>
6. *BGS SGS SOMA JV Vs. NHPC Ltd.*<sup>17</sup>
7. *Ambalal Sarabhai Enterprises Ltd. Vs. K.S Infraspace LLP & Another*<sup>18</sup>

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<sup>11</sup> AIR Online 2019 SC 1720

<sup>12</sup> (2000) 7 SUPREME COURT CASES 695

<sup>13</sup> AIR 1982 Karnataka 105

<sup>14</sup> Misc. First Appeal No.3837/2018

<sup>15</sup> ILR 1992 KAR 2644

<sup>16</sup> AIR 2021 MEGHALAYA 53

<sup>17</sup> AIR Online 2019 SC 1720

7. This Court has considered the contentions raised at the bar. This Court has to consider the interplay of Sections 9 and 37 of Act, 1996, Section 13 of Act, 2015, and Rule 9 of Rules, 2001.

8. Section 9 of the Act, 1996 provides for interim measures in an arbitrable dispute. Section 37 of the Act, 1996 provides for an appeal against certain orders in a proceeding under the Act, 1996.

9. The relevant portion of Section 37 of Act, 1996 reads as under:-

*"37. **Appealable orders.** 1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—*

*(a) xxx*

*(b) granting or refusing to grant any measure under section 9*

*(c) xxx*

(Emphasis supplied)



10. Section 37 of the Act, 1996 starts with a non-obstante clause introduced in 2019 by way of an amendment. Section 37 not only provides as to which orders under the Act, 1996 are appealable but also puts a specific bar that appeal shall not lie from any other order. Section 37 as amended in 2019, because of the non-obstante clause takes care of any inconsistency in any other law providing for an appeal in respect of the matters covered under the Act, 1996. Under Section 37 of the Act, 1996, the final order granting or refusing to grant any interim measure under Section 9 is appealable. There is no dispute on the point.

11. The respondent is urging that the order granting or refusing an '**ex-parte**' order is not appealable.

12. If, the expression, "granting or refusing to grant any measure under Section 9" appearing in Section 37(1)(b) of Act, 1996 includes the order granting or refusing the ex-parte interim order, then, under Section 37 of Act, 1996, appeal against such an order is maintainable.

13. Thus, the Court has to consider whether the expression "**granting or refusing to grant any measure under Section 9**" appearing in Section 37 of Act,1996 includes only a 'final order' under Section 9, or it includes an 'ex-parte interim measure'.

14. Now it is necessary to refer to the relevant portion of Rule 9 of Rules, 2001, which reads as under:-

"9. Application for an interim measure, etc. - 1).  
**When an application is made for an interim measure, under Section 9 of the Act, the Court shall in all cases, except where it appears that the object of granting the interim measure would be defeated by the delay,** before passing the interim order, direct notice of the application to be given to the opposite party:

**Provided that, where it is proposed to make an order by way of interim measure without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the interim measure would be defeated by delay, and require applicant.-**

(a) XXX

(ii) XXX

(b) XXX

15. The language used in Rule 9 of Rules, 2001 is not identical, though similar to the language used in Order XXXIX Rule 3 of the Code of Civil Procedure, 1908. (for short 'Code'). Order XXXIX Rule 3 of the Code, invests the power on the Court to grant *ex-parte* interim orders. However, the language used in Rules, 2001, particularly the expression, "*When an application is made for an interim measure, **under Section 9 of the Act**, the Court shall in all cases, except where it appears that the object of granting the interim measure would be defeated by the delay before passing the interim order, direct notice of the application to be given to the opposite party*", unerringly suggests that the *ex-parte* interim measure, if granted, is in exercise of power under Section 9 of the Act, 1996 itself. Rule 9 of Rules, 2001 does not confer the power to pass an *ex-parte* order, but it only recognises the power inherent in Section 9 of the Act, 1996 and Rule 9 also deals with the procedure to be followed in case of *ex-parte* order.

*(Emphasis supplied)*

16. Learned Senior Counsel for the respondents No.2 to 5 contends that even if the order granting or declining *ex-parte* interim measure is in the exercise of Section 9 of the Act, 1996, considering the object of speedy resolution of disputes envisaged under the Act, 2015 and Act, 1996, there is no right of appeal against an order granting or refusing *ex-parte* order.

17. Section 13 of the Act, 2015 reads as under:

***13. Appeals from decrees of Commercial Courts***

***and Commercial Divisions.— (1) Any person aggrieved by the judgment or order of a Commercial Court below the level of a District Judge may appeal to the Commercial Appellate Court within a period of sixty days from the date of judgment or order.***

*(1A) Any person aggrieved by the judgment or order of a Commercial Court at the level of District Judge exercising original civil jurisdiction or, as the case may be, Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of the judgment or order:*

*Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 (5 of 1908)*

*as amended by this **Act and section 37 of the Arbitration and Conciliation Act, 1996 (26 of 1996).***

*(2) Notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court, no appeal shall lie from any order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of this Act.*

*(Emphasis supplied)*

18. Section 13 of the Act, 2015 not only deals with the forum of appeal but also provides as to which the judgments and orders are appealable. As far as appealable orders (not judgments) are concerned, it is linked to Order XLIII Rule 1 of the Code as a result only those orders enumerated under Order XLIII Rule 1 are appealable. However, as far as appealable orders under Section 37 of the Act, 1996 are concerned, it is not linked to Order XLIII of the Code but the same is still governed by Section 37 of the Act, 1996. And Section 37 as already noticed, has a non-obstante clause. There is nothing in the language of Section 13 of the Act, 2015 to hold that the only

'final order' under Section 9 is appealable under Section 37 of Act, 1996 read with Section 13 of Act, 2015 when it comes to arbitration disputes coming under the jurisdiction of the Commercial Courts Act.

19. There is one more angle to it. Though the order refusing '*ex-parte* interim measure' is a discretionary order, the discretion conferred on the Court is not absolute but is guided by certain principles. While declining the '*ex-parte* interim measure', and ordering notice to the respondent, the Court must arrive at a *prima facie* conclusion that the object of issuing *ex-parte* interim measure would not be defeated by delay caused in issuing notice to the opponent, before considering the prayer for interim measure. Thus, if the Court takes a view that there are no grounds to pass the '*ex-parte* interim order', said view and consequent order declining '*ex-parte* interim measure' is in the nature of the final order as the relief of '*ex-parte* order' prayed by the applicant is declined once for all in the said proceeding. The reason is quite simple. If an *ex-parte* order is declined, then after notice and hearing the other side, if the interim measure is granted, such an order is not an '*ex-parte* order'. In that view,

the order refusing '*ex-parte* interim measure' has all the *attributes of a final order* as a prayer to grant '*ex-parte*' order is declined and *rendered irreversible* by that Court by issuing notice to the opponent. Thus, the party aggrieved by refusal can file an appeal against such order invoking Section 37 of the Act, 1996. However, though there is a right of appeal, the scope of such appeal is limited as the application seeking interim measure will be still pending consideration before the Section 9 Court.

20. Applying the same analogy, the order granting *ex-parte* interim measure under Section 9 of the Act, 1996 is also appealable. However, the scope for interference in such a case is still more limited, as the party aggrieved by such *ex-parte* interim order will have the remedy of moving the Section 9 Court to vacate the *ex-parte* interim order. The Court would be extremely slow in entertaining appeals from an order granting *ex-parte* order and such appeals can be entertained in exceptional cases.

21. This being the position, this Court is of the view that an order granting or declining *ex-parte* interim measure is

appealable under Section 37 of the Act, 1996 even if Section 9 dispute is before the Commercial Court.

22. This Court has also referred to the judgments cited by both sides.

23. The first four judgments cited by the learned Senior Counsel for respondents No.2 to 5 are on the orders on an application under Order XXXIX of the Code. Those judgments do not deal with the appeal against an order under Section 9 of the Act of 1996. Hence, the ratio laid down in the aforementioned judgments has no application to the facts of the case.

24. Referring to the judgment in **BGS SGS Soma JV** *supra*, it is urged that any order under Section 9, which does not dispose of the Section 9 application and which is in the nature of a step towards interim order, would not amount to granting or refusing to grant any measure under Section 9 of the Act, 1996.

25. The judgment in **BGS SGS Soma JV** *supra*, the Apex Court was dealing with a question, as to whether order Under Order VII Rule 10 of the Code, returning Section 34 application for want of jurisdiction is appealable or not? Said judgment is not



a ratio on an order under Section 9 of the Act, 1996. It is held in the said judgment that Order allowing Order VII Rule 10 application is not appealable under Section 37 of the Act, 1996 as such an order cannot be construed as an order refusing to set aside the award.

26. Reference to paragraph No.21 of the said judgment to contend that the order refusing ex-parte interim measure is placed. On careful consideration of the discussion of the judgment in the case of **Antrix vs Davas**<sup>19</sup>, this Court is of the view that the said judgment supports the case of the appellant as the Delhi High Court has held that appeal against an order directing the opponent to furnish an affidavit, in the exercise of jurisdiction under Section 9 of Act, 1996 is maintainable.

27. Though the learned Senior Counsel laid lot of emphasis on the judgment of the Meghalaya High Court in **National Thermal Corporation** supra, with due respect, this Court is unable to agree with the decision. In the said judgment, it appears that the ratio in judgment in **BGS SGS Soma JV** supra is incorrectly applied. Even otherwise, in the said case, the order

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<sup>19</sup> 2018 SCC online Delhi 9338

passed under Order XXXIX Rule 4 was under challenge, and the order granting *ex-parte* interim measure under Section 9 was not under challenge.

28. In the judgments cited by the learned Senior Counsel of the appellant, various High Courts have taken a view which supports the contentions of the appellant.

29. Conclusions on the question of law.

- (a) The appeal under Section 37 of the Arbitration and Conciliation Act, 1996 is maintainable against an order granting or refusing *ex-parte* interim measure under Section 9 of the Act, 1996, even if the Section 9 application is filed before the Commercial Court, as defined under Commercial Courts Act, 2015.
- (b) As a corollary, appeal under Section 37 of the Act, 1996 is maintainable against an order granting or refusing *ex-parte* interim measure under Section 9 of the Act, 1996, if the Section 9 application is filed before the Court exercising jurisdiction under the Act, 1996.

- (c) Though the appeal under Section 37 of the Act, 1996 is maintainable against the order refusing 'ex-parte' measure, the scope of interference in such appeal is limited as the Appellate Court is only required to consider whether consideration of prayer of ex-parte interim measure can be deferred till the appearance of the respondent.
- (d) In an appeal under Section 37 of the Act, 1996 against the order granting 'ex-parte' measure, the appeal may be entertained only in exceptional cases as the aggrieved party will have an efficacious remedy of moving the same Court which passed the order, to vacate the 'ex-parte' order.
- (e) Law laid down in ***Symphony Services Corporation (India) Private Limited, Bangalore vs. Sudip Bhattacharjee*** (2008) 2 KLJ 24 stands overruled.

30. Now the question is whether the appellant is entitled to interim protection till the application under Section 9 before the Section 9 Court is considered. The impugned order is passed on 13.02.2024. Thereafter, the appeal is filed. This Court vide

interim order dated 22.02.2024 granted interim protection to the appellant. Since then the interim protection has been extended. Now it is stated that the Section 9 application is listed on 29.07.2024 for final disposal.

31. Under these circumstances, the matter is remitted to the Trial Court to consider Section 9 application in accordance with the law extending the interim protection till then. However, it is made clear that the interim order granted by this Court should not be construed as an order in favour of the appellant indicating the merit of the appellant's claim. Nothing is expressed on the merits of the claim of the appellant seeking interim measure.

32. Since the interim order has been operating against the respondents since February 2024, we expect Section 34 Court will hear the objections of the respondents expeditiously and the parties shall co-operate for early disposal of Section 9 application.

33. It is brought to the notice of the Court, that the respondents have raised a contention that the dispute between the parties is not a commercial dispute. Said question is not

addressed by this Court and same shall be addressed by the Commercial Court, if not already decided.

34. Accordingly, the Appeal is ***disposed of.***

35. Costs made easy.

**Sd/-  
(ANU SIVARAMAN)  
JUDGE**

**Sd/-  
(ANANT RAMANATH HEGDE)  
JUDGE**

BRN