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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 06.03.2025*

\+ **FAO (COMM) 68/2025**

M/S GTL INFRASTRUCTURE LTD. .....Appellant

Through: Mr. Swetank Shantanu, Mr. Pratap Shanker & Mr. Ankit Kumar, Advs.

Versus

S.C WADHWA AND SONS (HUF) .....Respondent

Through: Mr. Anupam Srivastava, Sr. Adv. with Mr. Ujjwal Malhotra, Mr. Gaurav Arora, Mr. D. Gupta & Mr. V. Misra, Advs.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE TEJAS KARIA

VIBHU BAKHRU, J (*Oral*).

CM No. 13738/2025 (Filing) and CM No. 13740/2025 (Re-filing)

1. For the reasons stated in the applications, the delay in filing and re-filing the appeal is condoned.

2. The applications are disposed of.

FAO (COMM) 68/2025 & CM Nos.13736/2025, 13737/2025, 13739/2025

3. The appellant has filed the present appeal under Section 37(1)(b) of the Arbitration & Conciliation Act, 1996 [**the A&C Act**] impugning an order dated 09.10.2024 [**the impugned order**] passed by the learned Commercial Court, whereby the appellant was directed to immediately remove the mobile / cellular tower erected on top of the respondent's property (property bearing No.J-5/57, Rajouri Garden, New Delhi) and to restore the licensed property to its original state. In addition, the learned

Commercial Court had also directed that a sum of ₹18,95,706/-, which is admittedly the outstanding license fee, be deposited in a fixed deposit before the learned Commercial Court within a period of two months from the date of the impugned order.

INTRODUCTION

4. The appellant has assailed the impugned order on, essentially, two fronts. First, it is contended that the impugned order, in effect, grants the final relief as sought for by the respondent, and the court could not grant any such relief in proceedings under Section 9 of the A&C Act. It is contended that the scope of Section 9 of the A&C Act is confined to granting interim measures of protection, and no relief which has trappings of finality can be granted. Second, it is submitted that although arrears of license fee, as directed to be deposited, are admitted, the respondent cannot claim the entire amount, as it relates to license fee for the period of nine years, and the respondent's claim in this regard is belated.

FACTUAL CONTEXT

5. The respondent, a Hindu Undivided Family (HUF), acting through its *Karta*, who has since expired, entered into a License Agreement dated 11.06.2009 [**the License Agreement**] for granting a license for an area of 800 sq. ft. on the roof of the respondent's property bearing No.J-5/57, Rajouri Garden, New Delhi-110027 [**the licenced property**] to the appellant for the purpose of erecting a cellular tower.

6. In terms of the License Agreement, the parties had agreed that the appellant (licensee) would pay a monthly license fee of ₹17,000/- on or before the tenth day of each calendar month. It was further agreed that the

said license fee would be enhanced by 10% on expiry of every three years. The term of the License Agreement was fifteen years, that is till 10.06.2024. The appellant had also agreed that on termination of the License Agreement, it would vacate the licensed property and remove all furniture, fixtures and belongings brought to the licensed property.

7. The relevant clauses of the License Agreement are set out below:

> "2. **GRANT OF RIGHT**
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> a. The Licensor hereby grants permission / License to the Licensee for the Licensed Property **admeasuring 800 sq. ft**. more particularly described in the schedule hereunder written for the development and expansion of its telecom other services. The Licensor hereby grants the right to the Licensee to bring its belongings and things (including for telecommunication network equipment) for using at the Licensed Property during the term of this License without any hindrance or disturbance of any nature whatsoever.
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> b. The Licensor agree and confirm that the Licensed Property can and may be used by the Licensee or any of the group Companies of the Licensee and the same shall not amount to violation of this License agreement.
>
> 3. **LICENSEE COVENANTS**
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> d. The Licensee shall in consideration of the license hereby granted by the Licensor pay to the Licensor the license fee of Rs.17,000/- (Rupees Seventeen Thousand only) Service tax if applicable would be borne by licensee on receiving invoice from licensor per month (hereinafter referred to as "**License Fee**") subject to applicable Tax Deduction at Source, during the subsistence of the license and the compensation is payable in favour of the Licensor(s) on a monthly basis on or before 10th of the each English calendar month it relates to. The Compensation / License fee shall be deemed to have started from the date the **Letter of Permission to Use** duly signed by the Licensee is handed over to the Licensor.
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> e. The said license fee shall be enhanced by 10% at the expiry

of every 3 (Three) years of the last license fee paid.

** ** ** ** **

5. TERM

This License shall commence from **11th June 2009** and be in force for a period of **15 (Fifteen)** years i.e. till **10th June 2024**. However, the possession of the Licensed Property shall be given to the Licensee on **11th July 2009** and the period of 30 days shall be the Compensation Free period for which no compensation shall be payable by the Licensee to the Licensor, enabling the Licensee to carry out its formalities. The License shall be irrevocable for the said term from the date of commencement provided always, however, the Licensee shall have the right to determine this License for whatsoever reasons by giving to the Licensor(s) three (3) months prior notice in writing at any time during the currency of this License.

6. **TERMINATION OF THE LICENSE AGREEMENT**

a. By efflux of time this License Agreement will be terminated on the date as mentioned in this agreement.

c. The Licensor shall be entitled to terminate this agreement during the Term only if the Licensee fails to pay compensation for 3 months consecutively and despite written demand being made by the Licensor to the Licensee for payment. However upon payment of the outstanding compensation, the default shall cease to exist.

** ** ** ** **

7. **CONSEQUENCES OF TERMINATION**

a. Upon termination or early determination of this Agreement, the Licensee shall cause itself and its employees and officers to vacate the Licensed Property and remove there from all its furniture and belongings brought in by the Licensee in the Licensed Property.

b. The Licensor shall refund the said Security Deposit to the Licensee on the expiry or earlier termination / determination of this Agreement subject to deduction, if any, of arrears of License Fee/compensation payable and other amounts simultaneously on the Licensee vacating the

> Licensed Property. In the event the Licensor is unable to refund the Security Deposit, Licensor shall be disentitled from asking the Licensee to give vacant possession of the Licensed Property and the Licensee shall be entitled to use the Licensed Property without any liability towards payment of the monthly License Fee / compensation or any other charges payable by the Licensee under this agreement until repayment of the Security Deposit. Further, the Security Deposit will carry interest @ 24% per annum compounded every month from the date on which the refund is due to the Licensee from the Licensor till its repayment and the Licensor shall be liable to the repayment of the Security Deposit along with the interest. This shall be without prejudice to the Licensee's rights and remedies available in law to seek refund of the Security Deposit."

8. The License Agreement included an arbitration clause, whereby the parties had agreed to resolve their disputes by arbitration.

9. There is no dispute that the appellant has failed and neglected to pay the license fee and accordingly, the respondent terminated the License Agreement by a notice of termination dated 20.04.2022.

10. The respondent also initiated arbitration proceedings in respect of its claims, which included the license fee as well as restoration of the licensed property to the condition in which it was originally licensed.

11. In the aforesaid context the respondent filed an application under Section 9 of the A&C Act, *inter alia*, praying as under:

> "a. Pass an Order/ direction to the Respondent/s to immediately remove the Mobile/Cellular Tower erected by them on top of the Petitioner's Property bearing "J-5/57 Rajouri Garden, New Delhi– 110027' and restore the Licensed Property to its original state; OR
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> b. In the alternative, pass an Order/ Direction allowing the Petitioner to remove the Mobile/ Cellular Tower erected by the Respondent/s on top of Property bearing 'J-5/57 Rajouri Garden, New Delhi- 110027' on its own and

claim the charges/ repair costs/ costs incurred from the Respondent/s in future; AND

c. Secure the amount in dispute in arbitration by directing the Respondent/s to deposit a sum of INR 26,29,001/- (Rupees Twenty Six Lakhs Twenty Nine Thousand and One Only) before this Hon'ble Court; AND"

REASONS & CONCLUSION

12. As noted above, it is the appellant's case that the relief as sought for by the respondent could not be granted as the same in effect grants the final relief to the respondent.

13. There is no dispute that the parties had entered into the License Agreement or the terms and conditions of the license as recorded therein. On the contrary, the appellant seeks to rely on the same. There is no dispute that the term of the License Agreement has expired by efflux of time. Thus, admittedly, the licence to use the licensed property has expired and there is no cavil that the appellant is required to vacate the licensed premises and hand over the same to the respondent in the same condition as it was licensed to the appellant.

14. In the given facts, the contention that an order under Section 9 of the A&C Act could not be passed directing the appellant to remove the tower is unpersuasive. It is settled law that powers of a court under Section 9 of the A&C Act are wide and encompass such orders as are necessary to protect and preserve the subject matter of the arbitration, including issuing mandatory injunctions. The court must adopt a course, which is least likely to result injustice if the same is finally found to be wrong. In ***Ajay Singh v. Kal Airways Private Ltd. & Ors.: Neutral Citation No.: 2017:DHC:3208-DB*** observed as under:

"26. Though apparently, there seem to be two divergent strands of thought, in judicial thinking, this court is of the opinion that the matter is one of the weight to be given to the materials on record, a fact dependent exercise, rather than of principle. That Section 9 grants wide powers to the courts in fashioning an appropriate interim order, is apparent from its text. Nevertheless, what the authorities stress is that the exercise of such power should be principled, premised on some known guidelines - therefore, the analogy of Orders 38 and 39. Equally, the court should not find itself unduly bound by the text of those provisions rather it is to follow the underlying principles. In this regard, the observations of Lord Hoffman *in Films Rover International Ltd. v. Cannon Film Sales Ltd.* (1986) 3 All ER 772 are fitting:

> *"But I think it is important in this area to distinguish between fundamental principles and what are sometimes described as 'guidelines', i.e. useful generalisations about the way to deal with the normal run of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle."*

27. It was observed later, in the same judgment that:

> *"The question of substance is whether the granting of*

> *the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. The second point is that in cases in which there can be no dispute about the use of the term 'mandatory' to describe the injunction, the same question of substance will determine whether the case is 'normal' and therefore within the guideline or 'exceptional' and therefore requiring special treatment. If it appears to the court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the court does not feel a 'high degree of assurance' about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction."*

15. In ***National Highways Authority of India v. Punjab National Bank***: ***2017 SCC OnLine Del 11312***, this court followed the principles as enunciated in ***Ajay Singh v. Kal Airways Private Ltd. & Ors*** (supra), upheld the decision directing National Highways Authority of India to deposit a sum of ₹354.744 Crores in an escrow account in terms of the contract in question. The relevant extract of the said decision is set out below:

> "37. On the question of exercise of power under Section 9 of the A&C Act, we have already referred to Clauses 37.3.1 of the Concessionaire Agreement which is an express and mandatory provision when said agreement is terminated on account of concessionaire fault. We have also referred to Clauses 3.2 and 4.2 of the tripartite Escrow Agreement which refers to termination payment. To accept the plea of NHAI that section 9 of the A&C Act cannot be invoked, would negate and obliterate the aforesaid Clauses and their effect. In the aforesaid circumstances the ratio of decision of the Division Bench of this Court in *Value Source Mercantile Limited v. Span Mechnotronix Limited*: (2014) 143 DRJ 505, is apposite, if not definite and conclusive. Referring to Section 9 of the A&C Act, this decision emphasized that the said provision uses the expression

'interim measure of protection' as distinct from the expression 'temporary injunction' used in Rules 1 and 2 of Order XXXIX of the Code of Civil Procedure, 1908. Interim injunction is one of the measures or orders prescribed in Clause (d) to Section 9(ii) of the A&C Act, albeit a party to the arbitration agreement is entitled to apply for and seek 'interim measure of protection'. Clause (e) to Section 9(ii) is a residuary power of the court to issue or direct other "interim measures of protection". Thus, the court has the power to issue or direct other interim measures of protection as may appear to the court to be just and convenient. Section 9 encompass the power of making orders as the Civil Court has for the purpose of, and in relation to any proceedings before it. This decision refers to Rule 10 of Order XXXIX of the aforesaid Code which empowers the Court to direct to deposit payment of the admitted amount. Therefore the court exercising power under Section 9 of the A&C Act has the same power as that of a civil court during pendency of the suit."

16. In ***Adhunik Steels Ltd. v. Orissa Manganese & Minerals (P) Ltd.: (2007) 7 SCC 125***, the Supreme Court had observed as under:

"8. There was considerable debate before us on the scope of Section 9 of the Act. According to learned counsel for Adhunik Steels, Section 9 of the Act stood independent of Section 94 and Order 39 of the Code of Civil Procedure and the exercise of power thereunder was also not trammelled by anything contained in the Specific Relief Act. Learned counsel contended that by way of an interim measure, the court could pass an order for the preservation or custody of the subject-matter of the arbitration agreement irrespective of whether the order that may be passed was in a mandatory form or was in a prohibitory form. The subject-matter of arbitration in the present case was the continued right of Adhunik Steels to mine and lift the ore to the surface on behalf of OMM Private Limited and until the arbitrator decided on whether OMM Private Limited was entitled to breach the agreement or terminate the agreement and what would be its consequences, the court had not only the power but the duty to protect the right of Adhunik Steels conferred by the contract when approached under Section 9 of the Act. Learned counsel emphasised that what was liable to be protected in an appropriate case was the subject-matter of the arbitration agreement. Learned counsel referred to *The Law*

and Practice of Commercial Arbitration in England by Mustill and Boyd and relied on the following passage therefrom:

"(b) Safeguarding the subject-matter of the dispute

The existence of a dispute may put at risk the property which forms the subject of the reference, or the rights of a party in respect of that property. Thus, the dispute may prevent perishable goods from being put to their intended use, or may impede the proper exploitation of a profit-earning article, such as a ship. If the disposition of the property has to wait until after the award has resolved the dispute, unnecessary hardship may be caused to the parties. Again, there may be a risk that if the property is left in the custody or control of one of the parties, pending the hearing, he may abuse his position in such a way that even if the other party ultimately succeeds in the arbitration, he will not obtain the full benefit of the award. In cases such as this, the court (and in some instances the arbitrator) has power to intervene, for the purpose of maintaining the status quo until the award is made. The remedies available under the Act are as follows:

(i) The grant of an interlocutory injunction.

(ii) The appointment of a receiver.

(iii) The making of an order for the preservation, custody or sale of the property.

(iv) The securing of the amount in dispute."

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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.

12. The power and jurisdiction of courts in arbitral matters has been the subject of much discussion. The relationship between courts and Arbitral Tribunals have been said to swing between forced cohabitation and true partnership. The process of arbitration is dependent on the underlying support of the courts who alone have the power to rescue the system when one party seeks to sabotage it. The position was stated by Lord Mustill in *Coppee Lavalin N.V. v. Ken-Ren Chemicals & Fertilizers Ltd.* [(1995) 1 AC 38 : (1994) 2 WLR 631 : (1994) 2 All ER 449 : (1994) 2 Lloyd's Rep 109 (HL)] Lloyd's Rep at p. 116 : (All ER pp. 459j-460a)

"[T]here is plainly a tension here. On the one hand the concept of arbitration as a consensual process, reinforced by the ideal of transnationalism leans always against the involvement of the mechanisms of State through the medium of a municipal court. On the other side there is the plain fact, palatable or not, that it is only a court possessing coercive powers which can rescue the arbitration if it is in danger of foundering,…"

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15. The question was considered in *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.* [1993 AC 334 : (1993) 2 WLR 262 : (1993) 1 All ER 664 (HL)]. The trial Judge in that case took the view that he had the power to grant an interim mandatory injunction directing the continuance of the working of the contract pending the arbitration. The Court of Appeal thought

that it was an appropriate case for an injunction but that it had no power to grant injunction because of the arbitration. In further appeal, the House of Lords held that it did have the power to grant injunction but on facts thought it inappropriate to grant one. In formulating its view, the House of Lords highlighted the problem to which an application for interim relief like the one made in that case may give rise. The House of Lords stated at AC p. 367 : (All ER p. 690g-h)

"It is true that mandatory interlocutory relief may be granted even where it substantially overlaps the final relief claimed in the action; and I also accept that it is possible for the court at the pre-trial stage of a dispute arising under a construction contract to order the defendant to continue with a performance of the works. But the court should approach the making of such an order with the utmost caution, and should be prepared to act only when the balance of advantage plainly favours the grant of relief. In the combination of circumstances which we find in the present case I would have hesitated long before proposing that such an order should be made, even if the action had been destined to remain in the High Court."

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18. The approach that at the initial stage, only the existence of an arbitration clause need be considered is not justified. In Siskina (Cargo Owners) v. Distos Compania Navieria SA (The Siskina) [1979 AC 210 : (1977) 3 WLR 818 : (1977) 3 All ER 803 (HL)] Lord Diplock explained the position : (All ER p. 824f-g)

"A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependant on there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened, by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction."

He concluded : (All ER p. 825a-b)

> "To come within the sub-paragraph the injunction sought in the action must be part of the substantive relief to which the plaintiff's cause of action entitles him; and the thing that it is sought to restrain the foreign defendant from doing in England must amount to an invasion of some legal or equitable right belonging to the plaintiff in this country and enforceable here by the final judgment for an injunction."
>
> [emphasis added]

17. It is apparent from the above that the powers of the court to order interim measures of protection under Section 9 of the A&C Act are wide and are not confined solely to orders that can be passed under Order XXXIX Rules 1&2 of the Code of Civil Procedure, 1908. However, the court would be guided by the principles underlying the said Code. Clearly, such orders would also extend to granting the relief, if such relief is admissible on admitted facts.

18. In the present case, the learned counsel for the appellant does not dispute that the appellant is obliged to remove the tower on termination of the licence. The respondent has also averred that non-removal of the tower is causing damage and harm to its property. In these circumstances, the measure of protection required would entail mandatory injunction to remove the tower from the premises to ensure that the respondent does not continue to suffer any loss or damage.

19. Insofar as the directions to deposit the arrears of license fee is concerned, clearly, there is no cavil that the same falls within the scope of Section 9 of the A&C Act, as it is to secure the respondent of his claims.

20. In view of the above, we find no grounds to interfere with the impugned order. Needless to state that the impugned order shall not

prejudice the appellant from advancing such contentions as advised before the Arbitral tribunal nor preclude the Arbitral Tribunal from making such award as it considers fit, in accordance with law.

21. The appeal is, accordingly, dismissed with costs quantified at ₹50,000/-. The costs shall be deposited with Delhi High Court Legal Services Committee within a period of two weeks from date. Pending applications are also disposed of.

VIBHU BAKHRU, J

TEJAS KARIA, J

MARCH 06, 2025
'gsr'

Click here to check corrigendum, if any