HIGH COURT OF GUJARAT

TECNIMONT ICB PVT LTD
Versus
AFCONS INFRASTRUCTURE LTD & 2 ORS

Date of Decision: 30 August 2013

Citation: 2013 LawSuit(Guj) 2205

Hon'ble Judges: R D Kothari

Eq. Citations: 2014 1 GLR 470

Case Type: First Appeal

Case No: 2191 of 2013

Subject: Civil, Contract

Editor's Note:
Code of Civil Procedure, 1908 - Order 39 Rule 3 - Act interim injunction - Provision of rule 3 of order 39 are mandatory, ex parte ad interim injunction can be granted in exceptional circumstances - As a rule notice should be issued to other side before granting such mandatory injunction and ex parte injunction may be granted if the Court has reason to believe that is such injunction is refused, object of granting injunction would be defeated - Trial Courts order set aside - Appeal allowed

Acts Referred:
Code Of Civil Procedure, 1908 Or 39R 3, Or 43R 1(r)
Specific Relief Act, 1963 Sec 14(1)(c), Sec 41, Sec 14(1)(b), Sec 14(3)

Final Decision: Appeal allowed

Advocates: Mihir Joshi, S I Nanavati, Saurin A Mehta, Gabriel, Nidhi Mudgal, V D Nanavati, S N Soparkar, Percy Kavina, Nandish Chudgar, Hardik Mehta, Nanavati Associates, Ajay R Mehta

Cases Referred in (+): 29

R. D. Kothari, J.

[1] Admit. Learned advocate Mr. Nandish Chudgar waives service of notice for the respondent, who appears on the basis of the Caveat. With the consent of learned counsels for the parties, the matter is taken up for final hearing at the admission stage.

[2] The appellant challenges issuance of adinterim ex parte injunction order by the learned 3rd Additional District Judge, Bharuch.

[3] Broadly stated, respondent No.2, Oil and Natural Gas Corporation ["ONGC" for short] had engaged the appellant to set up PP & PE Plant at Dahej Bharuch. The appellant, in turn, has entered into contract with the respondent No.1. It is subcontract. It was submitted that the project undertaken by the appellant via this contract with ONGC is of Rs. 2000 Crores, while the subcontract with respondent No.1 is of about Rs. 100 Crores. The said subcontract for part of PP & PE Plant was said to have been entered into on 24.11.2011. Thereafter, on 19.7.1913, the appellant had terminated the said subcontract with respondent No.1. It appears that to resolve the differences, a joint meeting was held on 6.8.2013. Much of the arguments by the learned advocates for the parties centers around the minutes of the meeting dated 6.8.2013. In the said meeting, parties had considered continuing or reviving of the contract with respondent No.1. On 12.8.2013, respondent No.1 filed an application before the District Court, Bharuch under Section 9 of the Arbitration Act, which was registered as Misc. Civil Application No. 141/2013. In that application, the trial Court, after considering the material placed on record and considering the submissions of the learned advocate for the applicant, was pleased to pass the following operative order below Exh.40 ;"

> ORDER
>
> Exparte adinterim injunction is granted till dt. 19.8.2013.
>
> Opponents are hereby restrained by the injunction order as prayed in Para 32(a) & (b).
>
> Urgent process be issued on payment of urgent PF.
>
> Applicant is directed to comply the provisions of O. 39 r. 3(a) and (b) of CPC"

[4] Paragraphs 32 (a) & (b) of the application read thus:

> "(a): The Hon'ble Court be pleased to grant injunction restraining opponent No.1, their servants, agents or anybody acting through opponent No.1, from creating any obstruction, hindrance and/or nuisance in the applicant's work as per subcontract

Nos. 1 & 2, till the arbitral Tribunal is not appointed and arbitral Tribunal passes an award.

(b): The Hon'ble Court be pleased to restrain opponent No.1 from entering into any arrangement and/or implementing arrangement with any third party with respect to work as stated in subcontract Nos.1 & 2 and the Hon'ble Court may also be pleased to restrain opponent No.1 from completing the work of Project by themselves and/or through any third party the work which is envisaged by subcontract Nos.1 & 2, till the arbitral Tribunal is appointed and the arbitral Tribunal passes an award."

[5] Granting of above adinterim ex parte injunction by the learned trial Court is under challenge herein by filing the present appeal under Order 43 Rule 1(r) of the Code of Civil Procedure.

[6] Heard learned Senior Advocate Shri Mihir Joshi for the appellant and learned Senior Advocate Shri S.N.Soparkar for respondent No.1.

[7] Shri Joshi submitted that the learned trial Court has granted prayers (a) & (b) without granting prayer (c), while in effect it amounts to granting of prayer (c) also. In the circumstances of the present case, it was not open for the trial Court to grant prayer (c). Secondly, it was submitted that granting of prayers amounts to granting of relief of mandatory nature. The relief as granted, though has appearance of relief in negative form or relief of prohibitory nature, in essence and in effect, it is a relief of mandatory nature. In the facts and circumstances of the case, adinterim ex parte relief of mandatory nature ought not to have been granted. Thirdly, it was also pointed out by the learned Senior Advocate Shri Joshi that the trial Court has proceeded on erroneous basis that contract is subsisting between the parties. Shri Joshi further submitted that the order under appeal is in clear violation of the proviso to Order 39 Rule 3 of CPC. It was submitted that the said proviso clearly lays down to issue a notice to the opposite party. It is only in those cases where object of granting injunction is likely to be defeated by delay, the Court may grant injunction without issuing notice. However, in that case also, the Court is required to record reasons. In the present case, it was submitted that the Court has issued order in clear violation and breach of provision to Order 39 Rule 3.

7.1 Shri Joshi has also submitted that the relief claimed by respondent No.1 cannot be enforced specifically in view of Section 14(1) (b)&(c) of the Specific Relief Act. Section 41 of the Specific Relief Act was also referred to and relied on. It was submitted that since the contract was in the nature of determinable, the same cannot be specifically enforced.

7.2 Lastly, relying on the case laws, it was submitted by Shri Joshi that the learned trial Court has committed serious error of law and facts in granting adinterim ex pate injunction.

[8] On the other hand, learned Senior Advocate Shri Soparkar submitted that the learned trial Court has passed the order after properly considering the material on record and has committed no error of law or fact in passing the impugned order. Shri Soparkar has drawn attention of the Court to pages Nos. 644, 645 & 647 of the compilation of the paperbook.

Shri Soparkar has placed reliance mainly on Page No.645 (minutes of the meeting). By drawing attention of the Court to the items and points discussed during the meeting held between the parties, it was submitted by Shri Soparkar that the close reading of all these points discussed in the meeting would clearly give an impression that the contract is subsisting and it should be borne in mind that the parties held meeting after and despite termination of contract.

8.1 Learned Senior Advocate Shri Soparkar further submitted that respondent No.1 has, only as an abundant caution, challenged the order of termination of contract. It was submitted that if the respondent had approached the Court without specific challenge to the termination then, when it comes to granting of relief, the respondent may face with a query that since the respondent had not challenged the termination, no relief in that regard can be granted. Explaining the pleadings in this regard, it was submitted that it was in order to meet with the possible arguments of opponent, the respondent has made assertion with regard to termination. It should not be read as "admission" on the part of the respondent that the contract is terminated.

8.2 Referring to subsection (3) of Section 14 of the Specific Relief Act, Shri Soparkar has submitted that subsection (3) of Section 14 of the Specific Relief Act specifically carves out that exception and enforcement of said contract is permissible under the Act.

8.3 Shri Soparkar has drawn attention of the Court to the relevant caselaws to which reference may be made in a moment. In reply to the submissions of learned advocate Shri Soparkar, learned advocate Shri Joshi had elaborated on the point that the applicantrespondent has made assertion in petition consistent to the fact of termination of contract. Shri Joshi has assailed the order of the trial Court as unsustainable. On the other hand, learned Senior Advocate Shri Soparkar has submitted that it is an error within the jurisdiction and unless the appellant makes

out a case that the order of the Court is without jurisdiction, this Court should not interfere with it.

[9] The reasons recorded by the learned trial Court for granting ex parte adinterim injunction are thus:

"9. Considering the arguments of Learned Advocate Mr. Thakkar, and considering provisions of Clause 26 of the Agreement, and further documents regarding notice, correspondence, and original record, it prima facie appears that the prima facie case and balance of convenience is in favour of the applicant. In my view, as per the documents on record, 85% work is completed by the applicant and if contract work is canceled by the opponents, in such circumstances, irreparable loss would be caused to the applicant. Further more, the meeting was held on 6/8/2013. It transpires that two months time will be given to main contractor and main contractor has to fix the date of order before 9/8/2013. In such circumstances, I am of the view that the balance of convenience, irreparable loss and prima facie case is in favour of the applicant. Further more, the question of delay between the applicant and opponents will be determined by the arbitrator. But at this juncture, if the contract is canceled by the applicant, in such circumstances, irreparable loss would be caused to the applicant. If the contract work is completed by the applicant, then there is no damage to the opponents. So far as bill amount and payment is concerned, it will be determined by the arbitrator. Hence, I pass the following order."

[10] It would appear that mainly two points weighed with the learned trial Court, viz. (i) the applicantrespondent has completed 85% work, and (ii) termination of contract is not in accordance with law and it is in violation of Clause 26 of the contract.

[11] At this stage, before offering comments, reference may be made to the caselaws relied on by the learned advocates for the parties.

[12] In support of the submission that the ex parte adinterim relief granted in the present case is mandatory in nature, learned Senior Advocate Shri Mihir Joshi has drawn attention of the Court to the decisions in the cases of (1) State Bank of Patiala and others vs. Vinesh Kumar Bhasin, 2010 4 SCC 368, (2) Dorab Cawasji Warden v. Coomi Sorab Warden and ors., 1990 2 SCC 117, (3) Inhouse Productions Pvt.Ltd. Rep.by its General Manager vs. Meediya Plus, Rep.by its Partners Mr. Girija Swamy & Ors., 2005 3 ArbLR 52 (Madras), (4) Best Sellers Retail (India) Pvt. Ltd. vs. Aditya Birla Nuvo Ltd. & Ors, 2012 6 SCC 792.

12.1 In support of the submission that the contract is not specifically enforceable, Shri Joshi has placed reliance on the decisions in the cases; (1) Indian Oil

Corporation Ltd. v. Amritsar Gas Service and Ors., 1991 1 SCC 533, (2) Star India Ltd. v. Arup Borah and Ors., 2003 2 ArbLR 202, (3) Royal Orchid Hotels Limited v. Ferdous Hotels Pvt. Ltd.(4) Avents Pastuer S.A. v. Cadila Pharmaceuticals Ltd., 2003 1 GLH 191, (5) Envision Engineering vs. Sachin Infa Enviro Ltd.. and Ors., 2002 3 GLR 2227, (6) Sushil Kumar Agarwal vs. Kalidas Sadhu, 2009 AIR(Cal) 174, (7) Vipin Bhimani vs. Sunanada Das., 2006 AIR(Cal) 209.

12.2 While making submissions on Section 9 of the Arbitration Act, 1986, Shri Joshi has drawn attention of the Court to the decisions in the cases of (1) Percept D mark (India) (P) Ltd. v. Zaheerkhan and Anr., 2006 4 SCC 227, and (2) Adhunik Steels Ltd v. Orissa Manganese and Minerals Pvt.Ltd., 2007 7 SCC 125.

12.3 In support of the submissions based on Order 39 Rule 3 of the Code of Civil Procedure, Shri Joshi has placed reliance on the decisions in the cases; (1) Nautamswami Guru Vasudev vs. Haribhai Nanjibhai Bhimani, 2003 1 GLH 560, (2) Percept Picture Company Private Limited v. Shree Karma Production Pvt. Ltd. and Ors., 2008 1 GLH 598, (3) Three I Infotech Consumer Services Ltd. vs. Gujarat Narmada Valley Fertilizers Co.Ltd. & Ors., 2010 1 GLR 264, (4) State of Orissa and Others vs. Orissa Oil Industries Limited & Ors, 1982 AIR(Ori) 245, (5) Amiya Prosad v. BejoyKrishna, 1981 AIR(Cal) 351, (6) P. Chidambaram v. Joint Civil Judge, Narol, 1986 AIR(Guj) 17, (7) Jaisu and Co.M/s, 1986(1) GLR 334, (8) Gujarat State Petroleum Corporation v. Gujarat Gas Co., 1997 2 GLR 1765, and (9) Suzlon Nergy Ltd. vs. Vishal Plastomer Pvt. Ltd., 2007 4 GLR 3274.

[13] In support of the submission made on behalf of respondent No.1 by learned Senior Advocate Shri Soparkar that in case of discretionary order passed by the trial Court, appellate Court should not interfere with that order, Shri Soparkar has placed reliance on the decisions in the cases of (1) Esha Ekta Apartments CHS Ltd., and Ors, v. The Municipal Corporation of Mumbai and Anr., 2012 AIR(SC) 1718, (2) Wander Ltd. & Anr. v. Antox India Pvt. Ltd., 1990 Supp1 SCC 727, (3) N.R. Dongre v. Whirlpool Corporation, 1996 5 SCC 714, (4) Jasoda Indralal Vadhva v. Hemendrabhai Kakulal Vyas & Ors., 2009 2 GLH 437, (5) M/s. Dandi Salt Pvt. Ltd., vs. M/s. Indo Brine Industries Limited, unreported judgment of this Court in Appeal from Order No. 7/2012 decided on 15.2.2012 [Coram : Honourable Ms. Justice Sonia Gokani], (6) Matrix Telecom Pvt. Limited v. Matrix Cellular Services Pvt. Limited, 2011 3 GLR 1951, (7) Bhavnesh Mohanlal Amin v. Nirma Chemical Works Limited, 2005 2 GLH 585.

13.1 In support of the submission that contract in the nature of construction can be specifically enforced and in this regard subsequent events that has taken place can be considered, reliance was placed on K.M.Jaina Beevi and ors. vs. M.K.Govindaswami, 1967 AIR(Mad) 369.

[14] In reply to the appellant's submission on the order passed in contravention of Order 39 Rule 3 CPC, reliance was placed on the unreported judgment of this Court in Lincoln Pharmaceuticals Ltd v. Troikaa Pharmaceuticals Ltd. Appeal from Order No. 95/2012 decided on 23.3.2012 (Coram : Honourable Mr. Justice J.C.Upadhyaya].

[15] Though the learned Senior Advocates for the parties have made submissions also touching to merits of the case, plea of violation/ contravention of Rule 3 of Order 39 CPC may be considered first. Broadly the discussion is confined to that point only.

[16] Proviso to Order 39 Rule 3 reads thus:

> "Provided that, where it is proposed to grant an injunction 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 injunction would be defeated by delay, and require the applicant
>
> (a) XXX XXX XXX
>
> (i) XXX XXX XXX
>
> (ii) XXX XXX XXX
>
> (iii) XXX XXX XXX
>
> (b) XXX XXX XXX"

[17] Order 39 Rule 3 is considered by this Court in quite some cases. In Nautam Swami Guru Vasudev's case , dispute involved was relating to appointment of Acharya, Swaminarayan Temple, Vadtal. Earlier, one suit was filed wherein interim relief was granted and Acharya was prevented from acting as an Acharya. Appeal against that interim order was admitted by this Court, but this Court had not passed any interim order. Thereafter, in another Suit filed by another plaintiff, the trial Court had granted injunction to the effect that defendant No.1 shall not act as an Acharya and defendant Nos.2 to 9 shall not give any duty to defendant No.1, ."The appeal preferred against that order before this Court was allowed. One of the main grounds for allowing the appeal was "mandatory requirement of Order 39 Rule 3 was not complied with by the trial Court".

> Similarly in Percept Picture Co.Pvt.Ltd's case , the trial Court had passed an ex parte adinterim order in favour of the plaintiff on 24.12.2007. It appears that interim relief prayed for was for restraining the defendant from screening, exhibiting etc. the Film "Hanuman Return". This Court in appeal against that order has observed that from 15.8.2007, the defendant had started giving advertisement

about said Film. It was also observed that the plaintiff had knowledge of making of Film by the defendant. However, the plaintiff had waited. The Court had passed ex parte adinterim injunction on 24.12.2007 when the Film was due to release on 28.12.2007. It was held that the trial Court ought to have issued show cause notice to be made returnable before 28.12.2007. It was observed that returnable date was so fixed (17.01.2008) that the plaintiff may not get chance to argue the matter before the trial Court prior to returnable date. This Court while allowing the appeal has recorded that no satisfaction as envisaged in Order 39 Rule 3 CPC is recorded by the trial Court. This Court in that case had placed reliance on Shiv Kumar Chadha vs. Municipal Corporation of Delhi & Ors., 1993 3 SCC 161(paras 32 33).

In Three I Infotech Consumer Services Ltd.'s case , grievance was made regarding violation of copyright. This Court allowing the appeal and setting aside the order passed below Exh.5, has held that issuance of notice is must when the interim injunction of mandatory nature is granted by the Court.

In Jaisu and Co. M/s. Case , this Court has held that Rule 3 of Order 39 CPC is very wholesome provision intended to achieve a laudable purpose. Unless in a case where irreparable damage is likely to be caused by not issuing injunction, the Court shall, in all cases, direct notice to be given to the opposite party.

In Suzlon Nergey Ltd. case , this Court has held that order of the trial Court granting ex parte adinterim injunction without giving notice and without recording reasons for dispensing with notice is liable to be set aside. Further, this Court in Gujarat State Petroleum Corporation Ltd.'s case , has taken the similar view. So also, the High Court of Orissa State of Orissa and Others vs. Orissa Oil Industries Limited & Ors, 1982 AIR(Ori) 245 and High Court of Calcutta, Amiya Prosad v. BejoyKrishna, 1981 AIR(Cal) 351 has taken the similar view on Order 39 Rule 3.

[18] The principal submission of learned Senior Advocate Shri Soparkar on Order 39 Rule 3 is two fold; (i) It is not jurisdictional error. In other words, the order in breach of the provisions of Order 39 Rule 3 is an error within the jurisdiction, and (ii) clear, explicit and specific compliance of Rule 3 of Order 39 is not required and if by implication the same is complied with or if it appears that the Court is conscious of the said provision, then the same can be said to be sufficient compliance.

18.1 Shri Soparkar has drawn attention of the Court to Lincoln Pharmaceuticals Ltd.'s case in this regard. In that case, grievance was regarding violation of patent right and the Court had granted ex parte adinterim relief. The appeal against the said order was dismissed by this Court. Learned advocate for the respondent has drawn attention of the Court to paras 16 & 17. In that case, order was passed in

Suit for accounts and other reliefs filed under the Patent Act. Though there is reference to Order 39 Rule 3, this observation/holding would show that Order 39 Rule 3 was not in issue in that case. "It has been submitted that if while granting exparte adinterim injunction order, if Court fails to record reasons, the plaintiff should not be made to suffer. However, as stated above, since in the instant case, the fact is not that the trial Court committed breach of the provisions contained under Order 39 Rule 3 of the CPC, it is not necessary to go into the above aspect of the matter".

[19] In the present case, if we refer the impugned order, it would appear that neither in para 9 nor elsewhere in the order the Court has referred Rule 3 of Order 39 CPC. In absence of any reference,not to speak of reasons,in the order for dispensing with issuance of notice under Rule 3 of Order 39, it cannot be said that the Court was conscious of this provision. One may concede that to ask for specific and clear reference in the order of the trial Court to Rule 3 of Order 39, may sound unreal or academic. In those cases, wherein there is no compliance to Order 39 Rule 3 in the order, and absence of reference is not frowned upon, the facts of the case itself would suggest or the reasons given by the trial Court in support of issuance of adinterim injunction would go to show that delay caused in issuance of notice would defeat the purpose of issuance of injunction. In short, in the present case, the respondent can hardly support the order on the plea that there is implied compliance to Rule 3 of Order 39.

[20] The above referred cases of this Court would show that this Court has consistently taken the view that Order 39Rule 3 is mandatory and its noncompliance would vitiate the order.

[21] The other objections of the learned Senior Advocate Shri Soparkar that passing of an order by the Court in breach of Rule 3 Order 39 is an error within the jurisdiction. It was submitted that such order cannot be regarded as outside or beyond the jurisdiction of the Court. Therefore, assuming that compliance to Rule 3 Order 39 is not possible to infer from the impugned order, such error by itself would not vitiate the order. If the Court has not acted beyond or outside its jurisdiction, then in the circumstances of the case, this Court, at this stage, should not interfere with the order under challenge in this appeal. Relying on the decision in Patel Jasmat Sangaji v. Gujarat Electricity Board, 1982 GLH 463, it was submitted that Division Bench of this Court has laid down that only in "rarest of rare cases" the appeal Court should interfere with issuance of ex parte adinterim injunction.

[22] In order to consider this submission little closely, brief reference to facts may be made. As stated above, the arguments of the learned advocates for the parties

centered around the minutes of the meeting held between the parties on 6.8.2013. It appears that in the said meeting about seven points were taken up for consideration by the parties. In fact, withdrawal of termination of contract notice with immediate effect was also one of the issues. The learned advocates for the parties have placed emphasis on Point Nos.2 & 5. They are quoted hereunder:

> "2. In case of withdrawal of termination notice which is subject to the terms to be mutually agreed between Tecnimont & Afcons, the total quantity work as claimed by Afcon and certified by Tecnimont and if required, by EIL/OPaL, shall be paid (for past due bills) for by Tecnimont within ten days. Further running bill will be paid as per contract conditions.
>
> 5. It is agreed that Afcons will complete balance work within 2 months after removal of last hold by that TICB which is expected by date 'A'. 'A' will be communicated to EIL/OPaL by Tecnimont on 09/08/2013, 17.00 Hrs.
>
> Till the clearance of punch points, Afcons will continue to remain with required manpower without any extra cost to Technimont".

[23] Attention of the Court was also drawn to the endorsement made at the end of the minutes qua Point 5, on behalf of the respondent to the effect that, "objecting, without extra costs". While, the appellant has placed a note to the effect that "Point 5 remains as it is and say of the respondent is not possible to accept."

[24] Shri Soparkar has submitted that a bare reading of the minutes of the meeting would go to show that withdrawal of termination of contract was under consideration. In view of this development, learned trial Court has not committed any error in taking into consideration the subsequent development. It was submitted that representatives of all the parties were present in the meeting and therefore, points taken up for discussion in the meeting should be given sufficient weightage.

[25] It is not possible to agree with the aforesaid submission of Shri Soparkar. The contract was terminated on 19.7.2013. It is true that in the meeting held on 6.8.2013, parties had discussed about withdrawal of termination notice, but the discussion is not the decision. It is nobody's case that termination is withdrawn in that meeting. Here lies the point. If the contract is of determinable nature, then it cannot be specifically enforced and, therefore, no interim relief in that regard can be granted. But, if the contract falls within the expression stated in Section 14(3), then the same can be enforced specifically. Persuasive argument of the learned Senior Advocate Shri Soparkar that the case may fall under section 14(3) and the same is sufficient for the Court to hold that the applicant has arguable case has a point. The provision as to determinable nature of contract which can not be specifically enforced is hedged by

making some kind of contract referred to in Section 14(3) specifically enforceable. Assuming that the Court has not committed any error in taking prima facie view that the case falls under section 14(3), the other side has a remedy either to appear before the same Court or to file an appeal under Order 43 Rule 1(r) CPC. Exercise of discretion by the trial Court slightly changes the nature of question, namely, from the question whether the case falls under section 14(1) or 14(3) to the question that even it falls under section 14(1), is it not error within the jurisdiction ? more about this little later. In short, it cannot be denied that minutes of meeting by itself cannot infuse life into the contract which is terminated.

[26] In this context, it may be stated that most of the submissions advanced by learned Senior Advocate Shri Joshi for the appellant, viz. the relief granted by the learned trial Court is, in substance, mandatory in nature; it is erroneous assumption that contract is subsisting between the parties, that contract is determinable and, therefore, not specifically enforceable, are such objections that the same can be urged before the trial Court in response to issuance of notice by the trial Court. Strong case on merits, if the appellant has, the same can be shown to the trial Court instead of rushing to this Court. It is only in an exceptional kind of cases bypassing of normal course of approaching the trial Court, should be considered proper. There is quite some force in the submission that the appellant could have raised all these objections before the trial Court. That the present case cannot be said to be of the kind of "rarest of rare cases".

[27] Passing of an order by the Court in breach of Rule 3 of Order 39 opens door for the opposite party to approach the appeal Court. In this regard, it may be noted that by now it is settled law that appeal against ex parte adinterim order is maintainable. If such appeal is maintainable and if Rule 3 of Order 39 is mandatory, then how the approaching of the appeal Court by the opposite side/party can be faulted with ? In the present case, it is true that most of the objections raised by the learned advocate for the appellant on merits are of such a nature that the appellant could have raised those objections before the trial Court. But note may be taken of rushing to the Court by the respondent. In the meeting held on 6.8.2013, it was agreed that the respondent will complete the work within two months after removal of last hold by the appellant by 9.8.2013, 17.00 hours. Unless the appellant removes the last hold, the respondent cannot proceed to take up the work. Explaining "hold", it was submitted that it is a kind of restrain and requirement of compliance of a technical nature. It is not a formal. It was pointed out that unless the appellant does some specific act/acts in that regard, the hold will continue. If the appellant does not lift the hold, the respondent cannot work. It was submitted that the provision for removal of "hold" implies much more than ceremonial or customary provision.

[28] The respondent has filed an application before the District Court being CMADC/ 141/2013 on 12.8.2013. 10.8.2013 and 11.8.2013 were holidays. Why the respondent did not wait till the appellant takes steps in pursuance to the meeting. One may not be wrong in inferring that the respondent may have reasonable apprehension that the appellant would not remove the last hold. Taking recourse to the order of the Court for the work for which parties to the contract had decided in the meeting that the work would be activated at the instance of one of the parties by removal of hold, is perhaps incorrect interference with the contract.

[29] The learned trial Court has given two reasons in support of its order. The say of the respondent that 85% work is completed has weighed with the learned trial Court. Explaining the nature of work and scope of the project, it was pointed out that unless the work, as agreed upon is completed, it would be of no use to the appellant. To say that the respondent has completed 85% work is misleading. The socalled completion of 85% work is of no use and consequence to the appellant. It was submitted that even if 2% work is left incomplete by the party, then such incomplete work would be of no use to the appellant. It was pointed out by learned Senior Advocate Shri Joshi that the situation is very peculiar, while the work of the appellant may be held up on account of inactiveness and work left incomplete by the respondent, on the other hand, the subcontract entered into with the respondent compared to the overall project undertaken by the appellant under the main contact is insignificant in proportion. The agreed period to complete the work by the respondent has expired since long. In the circumstances, the submission that 85% work is completed is misleading is attractive submission.

[30] The second point weighed with the trial Court is that the contract is not terminated in accordance with clause 26. In this regard, attention of the Court was drawn to clause 26 and the notice of termination given to the respondent and also to some of the correspondence between the parties (pages 195 and 277 etc. of the paperbook). This ground is not of such a nature that party can claim interim relief. There is substance in the submission that whether the notice for termination of contract is legal or not, takes backseat when such contract is not specifically enforceable. That the remedy for the respondent is to seek damages.

[31] Order 39 Rule 3 CPC is not complied with in the present case. It is held to be mandatory by this Court in the abovereferred cases. In the present case, there is nothing on record to show that issuance of notice would have weakened the case of the respondent or would have caused prejudice to him. To issue notice is a rule and to issue injunction without issuance of notice is an exception which is to be resorted to in a case where the Court would find that the object of granting injunction would be defeated by delay. In the present case, it is not possible to say that if the Court had

issued show cause notice, then the other side would have so altered the position by that time that it would have defeated or frustrated the object.

[32] It was also submitted by learned Senior Advocate Shri Soparkar that failure to comply Order 39 Rule 3 in the order is mistake on the part of the Court and, therefore, no party should be left to suffer on account of act or mistake on the part of the Court. This submission was advanced also in the case of Three I Infotech Consumer Services Ltd's case and this Court had negatived this plea (para26). I respectfully agree with that view.

[33] Patel Jasmat Sangji's case also cannot help much to the respondent. It would not be proper to read the authority as laying down the test that only in rarest of rare cases the appeal court should interfere with the ex parte adinterim order. It would not be correct to read it as laying down "test". It may be borne in mind that the Court observes so in response to the submission made by the learned advocate that holding the appeal against an ex parte adinterim order to be maintainable would open the gets for flooding the appeal Court with appeals. Disagreeing with this apprehension, the Court has held that in "normal cases", appellate authority would loath to entertain such appeals. In my opinion, "rarest of rare" ought not to be read as "test" because much depends upon the facts and circumstances of the given case. It is also to be borne in mind that placing it at such high pedestal that the statutory remedy remaining unaccessible is also unrealistic and not practical.

[34] In this regard, it is also important to note that the learned Senior Advocate Shri Joshi has pointed out that taking this "test" literally would mean that every order of the trial Court would be immune from challenge. Against this, again, learned Senior Advocate Shri Soparkar has submitted that in reality it is possible to comment and criticise any order or document. That every defendant would be aggrieved and it is possible to assail any order as bad. There is substance in the submission of Shri Soparkar also. The trouble is the medium with which we have to deal with, i.e. words/language, is imperfect medium. There is perpetual scope for improvement. All the same, both the extremes should be avoided. Balance has to be struck. Ticklish cases would be on borderline cases only. The well known fact of myriad circumstances and unforeseeable situation situation would deter any Court to lay down the test. It can safely be said that ultimately special facts and circumstances, if any, would tilt the balance.

[35] The above discussion answers the submission of learned Senior Advocate Mr. Soparkar that error is within the jurisdiction and, therefore, this Court should not interfere. In a sense, debate of jurisdictional error is not called for in the present case because this is not a writ proceedings and remedy of appeal is provided under CPC,

and compliance to Order 39 Rule 3 is mandatory. Further, the scope of jurisdictional error is so widened in Anisminic's case, (1969) 2 AC 147, that Tribunal or Court that has jurisdiction, at the initial stage may commit jurisdictional error in so many ways including "by misconstruing the decision making power". The party, who invokes jurisdiction of the Court and prays for ex parte adinterim order, runs risk of such order being short lived. It may be borne in mind that at that stage there would be only one side story before the Court. The complete picture the Court can had only after the other side places their say on record. It is for this purpose, the provision of issuance of notice is envisaged. It is only in those cases when the facts and circumstances speaks for itself that such as demolition of alleged illegal construction wherein say of the plaintiff is that his construction is legal or such like cases of highhanded action on the part of the authority wherein the Court would be justified in taking the view that "delay would defeat the object of granting injunction".

[36] It may be stated that rival submissions made with equal vehemence on many aspects of the case, such as, factum of termination of contract, unenforceable nature of contract, relief granted is in the nature of mandatory relief etc., have not been dealt with elaborately herein, as CMA 141/2013 is pending and parties may make submissions on merits of the case before the learned trial Court. I may also add that I have decided the appeal mainly by considering violation of Order 39 Rule 3 CPC. Learned trial Court would consider and decide the application of the respondent in accordance with law, without being influenced, in any way, by the observations made herein in discussion for considering the present appeal.

[37] In the present case, the Court has committed serious error in granting ex parte adinterim injunction in disregard of the proviso to Rule 3 of Order 39 of the Code of Civil Procedure.

[38] In view of the above discussion, interference of this Court is called for. The Appeal is allowed. The order of the trial Court is set aside.

[39] As the main appeal is allowed, Civil Application No. 8606/2013 does not survive and stands disposed accordingly.

[40] At the time of pronouncement of judgment, learned Senior Advocate Shri S.I.Nanavati seeks permission to delete the respondent Nos.2 & 3, as in the opinion of the learned advocate, they are formal party. Learned Senior Advocate Shri Percy Kavina for the respondent disagrees with the submission of Shri Nanavati. In the facts of the case, permission to delete respondent Nos.2 & 3 is granted. Respondent Nos.2 & 3 stand deleted.

[41] Learned Senior Advocate Shri Kavina prays for stay of operation of this order. Mr.Kavina submits that the situation prevailed during the hearing of the appeal should continue at least for two weeks. Learned Senior Advocate Shri S.I. Nanavati for the appellant opposed this prayer/request. Shri Nanavati submits that once the appeal is allowed, staying of operation of the order would amount to continuance of order passed by the trial Court and, therefore, the said request should not be granted. Secondly, it was submitted on the basis of information that the learned trial Court has passed an order on 19.8.2013 extending the stay of operation of the order impugned in this appeal till 31.8.2013, subject to passing of the order by this Court. During the course of hearing of this appeal, any specific interim order was not passed by this Court. It was upon the consensus and oral undertaking given by the respondent that they would not ask for work permit till the hearing of the appeal, no interim order pending hearing of the appeal was passed. Since no interim order pending hearing of the appeal was passed, I do not think/consider it proper to stay the operation of this order. Under the circumstances, the prayer made by learned Senior Advocate Mr. Kavina is rejected.