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INTERIM MEASURES OF PROTECTION UNDER THE INDIAN ARBITRATION PROCEEDINGS

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ABSTRACT

The scheme of the UNCITRAL Model Law on International Commercial Arbitration promotes the resolution of arbitral disputes with least interference of the Court. That said, the Model Law also prescribes the option to parties to approach the Court or the Tribunal (based on its constitution) to seek interim measures under Article 9 and 17. The party may apply to appoint a guardian for a minor or person of unsound mind, apply for interim injunctions or seek preservation, sale or inspection of the goods/ property involved in the dispute under Section 9 and 17 of the Indian Arbitration Act. Therefore, the purpose of these sections is intended to protect the interests of the parties in case of any urgency/contingency arising during the pendency of the arbitral process. The present article shall address and analyse the provisions with regards to interim measures in the Indian Arbitration Act. Thereafter, the author intends to analyse the contemporary issues that have arisen with regards to these sections. The author opines that it is the right time to strike the proverbial hammer, as the iron is hot, with regards to making India a hub for international arbitration. This strike should be through moulding the mindset of Courts with regards to their interference in the process concerning interim measures.

Introduction

§ 9 of the Indian Arbitration Act, analogous to Article 9 of the UNCITRAL Model Law, codifies the right of a party to approach a Court before or during arbitral proceedings (before the enforcement of the award), to seek various remedies pertaining to the arbitration. Essentially, parties choose to apply under § 9, if the tribunal is yet to be appointed and the remedy is necessary, or the Tribunal has been appointed¹ but it may not render the relief sought. Similarly, § 17 of the Act provides for application to the Tribunal seeking interim measures for protection. These remedies have been codified and comprehensively cover the situations that may require the Court's interference and exercise of jurisdiction. The remedies that are available to the parties are:

¹Ameya Vikram Mishra & Satya Jha, Scope of Section 9(3) of the Arbitration Act: The Supreme Court Clarifies, IndiaCorpLaw (2021), <https://indiacorplaw.in/2021/11/scope-of-section-93-of-the-arbitration-act-the-supreme-court-clarifies.html> (last visited Apr 20, 2022).

1. For Appointment of guardian for a minor or person of unsound mind for the participation in arbitral proceedings.
2. For protection, preservation, custody or sale of the impugned goods.
3. For ordering security over the impugned amount of money impugned in the arbitration.
4. For preservation, detention or inspection of property involved.
5. For interim injunctions.
6. For appointment of receiver.
7. For other remedies that may appear just and convenient.

With this background, this article shall analyse the provisions pertaining to interim reliefs and protection in the Indian Arbitration Act. This examination will encompass firstly, a description of the reliefs that a party may apply for under Section 9 and 17. Thereafter, this article will address the various criticisms that have imputed to the sections. Lastly, the author will conclude by asserting solutions to the issues that have arisen with respect to its application.

Interim Measures Of Protection

Analysing Section 9: Interim Measures By The Court

Urgency is a very natural possibility in subject matters concerning arbitration. The entire rationale behind this section is to alleviate situations which require immediate action by the party(s), and hence, the action of the Court.² The same is reflected in the *Travaux* of the UNCITRAL Model Law Drafting Committee.³ Section 9, hence provides option to parties (the word used is ‘*may*’) to approach the Court in order to seek certain interim measures as prescribed. The requirement is to file an application specifying the remedy which is sought. The underlying *caveat* here is that only parties may approach the Court with respect to seeking remedy under this section.⁴ Obviously, the Court will not address the substantive questions of the dispute, reserving those for the arbitrator.⁵

Further, the Courts in India, owing to various decisions, were perplexed as to at what stage or what time of the proceedings, can the party approach the Court to seek interim measures. However, this issue has been

²FRANCIS RUSSELL, RUSSELL ON ARBITRATION, 429-430(23rd ed., 2007).

³*Ibid.*

⁴Ayushi Dubey and Yash Jain, Interim Relief against Third Parties under the Arbitration Act: A Never-Ending Saga, IndiaCorpLaw (2021), <https://indiacorplaw.in/2021/10/interim-relief-against-third-parties-under-the-arbitration-act-a-never-ending-saga.html> (last visited Apr 22, 2022).

⁵316th meeting, Travaux préparatoires: UNCITRAL Model Law on International Commercial Arbitration (1985) 443, available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/316meeting-e.pdf> (last visited Apr 20, 2022).

settled by the Supreme Court in *Sundaram Finance Ltd. v. NEPC India*,⁶ wherein the Court has held that the party may apply to the Court at the following times:

- Before the Arbitral proceedings is commenced.
- During pendency of arbitral proceedings [see condition in Section 9(3)].
- At any time after making of the award, before its enforcement.

Requirements Of Section 9

The section mandates a two-pronged requirement: 1) there ought to be *existence* of an arbitration agreement [the Court need not consider its validity]⁷ and 2) that the Court must be convinced as to the requirement of interim relief, for justice in the impugned matter. If both these prongs are fulfilled, the Court may grant the interim relief as had been sought by the applicant party. Further considerations are the general principles that are required to be taken care of with regards to injunctive relief: i.e. *prima facie* case, presence of irreparable injury & balance of convenience are to be fulfilled, for the court to grant injunction to a party. It is also pertinent to note that the party will have to apply to the **Courts of the Seat** to seek interim reliefs.⁸

The scope of enquiry of the Court under Section 9 is settled; the Court does not have to entertain or consider the merits of the main matter. The Court will only consider whether interim relief is accrued in the matter in favour of the applicant party and refer substantive questions of merits to the arbitral tribunal. By considering merits of the case under Section 9 application, the Court will go against settled law of *Patel Engineering*⁹, *Adhunik Steels*¹⁰ and several other leading judgements.¹¹

Analysing section 17: Interim Reliefs by the Tribunal

As mentioned, this section, in terms of the remedies it provides, is substantially similar to Section 9. A party may apply to the Tribunal to seek the remedies as prescribed, and such application ought to be made during the arbitral proceedings.¹² Herein, once the tribunal makes an order, the party would have to enforce this interim order/award as a decree of the Court under the Code of Civil Procedure.¹³ Parties however, may choose to reduce the scope of this section by providing in the arbitration agreement, that interim reliefs shall

⁶*Sundaram Finance Ltd. v. NEPC India*, AIR 1999 SC 565. See also *Ashok Traders v. Gurumukh Das Saluja*, AIR 2004 SC 1433.

⁷*Vidya Securities Ltd. v. Comfort Living Hotels P. Ltd.*, AIR 2003 Delhi 214. See also *Agajit Jaiswal v. Karmajit Singh Jaiswal*, (2007) 4 Arb LR 300.

⁸NISHITH DESAI ASSOCIATES, *Interim Reliefs in Arbitral Proceedings Powerplay between Courts and Tribunals*, January 2020, 14.

⁹DR. PC MARKANDA, LAW RELATING TO ARBITRATION AND CONCILIATION, 319 (LexisNexis eBook, 9th ed.).

¹⁰*Adhunik Steels Ltd. v. Orissa Manganese and Minerals Pvt. Ltd.*, AIR 2007 SC 256.

¹¹*Arvind Construction Co. Pvt. Ltd. v. Kalinga Mining Corpn*, AIR 2007 SC 2144. See also *Shree Ram Mills Ltd. v. Kalpataru Construction Overseas Pvt. Ltd.*, (2006) 1 Arb LR 229.

¹²Indian Arbitration Act, § 17(1).

¹³Indian Arbitration Act, § 17(2).

not be sought from the Tribunal by parties.¹⁴ Further, it goes without mentioning, that the order of interim nature passed by the Tribunal will be replaced or supplemented by the final order of the Tribunal.

Variances In Application Of Section 9 And 17: Remedies, Invocation And Enforcement

Overall, the broad remedies that may be sought by parties in Section 9 and 17 are similar, they differ in several primary factors;¹⁵ Section 17 orders are made by the Tribunal, and this section does not deal with the enforcement of such orders. In contrast, Section 9 orders are made by the Court and hence, are directly enforceable.¹⁶ Necessarily, another difference between the two provisions is that Section 17 can only be invoked *after* the constitution of the tribunal, while Section remedies can be claimed before and after commencement of the arbitration, until award is enforced.¹⁷ The power of the Court to grant interim measures cannot be ousted by the parties' agreement, because unlike Section 17, this provision does not begin with the preambulatory clause '*unless the parties otherwise agree*'.¹⁸

Contemporary Issues Arising Out Of interimreliefsin Arbitration

This section shall examine various conundrums that have arisen upon interpretations and application of the two sections of the Indian Arbitration Act. Due to the paucity of the space in the paper, two relevant issues have been analysed and written about: Section 9 application after constitution and Appeals from orders under Section 9 and 17.

Entertaining Section 9 Applications After Constitution Of The Tribunal

Essentially, the role of Court to grant interim remedies ceases after the tribunal has been constituted. This is because the tribunal takes up the jurisdiction to adjudicate the disputes between the parties, owing to the principle of party autonomy.¹⁹ Hence, the question arises as to whether the Court can entertain Section 9 applications once the tribunal has been constituted. The Court will not entertain an application under Section 9, if the Tribunal has been constituted as the appropriate remedy lies in Section 17. This law has been rightly

¹⁴Hairitha Finance Ltd. v. ATV Projects Ltd., (2003) 2 RAJ 582.

¹⁵ Arun Kapur vs Vikram Kapur, 2002 (61) DRJ 495.

¹⁶VOL.I, JUSTICE RS BACHAWAT, LAW OF ARBITRATION AND CONCILIATION, 283(LexisNexis, 6th ed).

¹⁷ Shree Bal Kishan Agarwal Glass Industries Ltd. v. Union of India, (2005) 3 Arb LR 489(All-DB).

¹⁸ Vertex Data Science Ltd. v. Powergen Retail Ltd., [2006] 2 Lloyd's Rep. 591.

¹⁹JUSTICE RS BACHAWAT, p.289.

adopted by various High Courts as well, to ensure limited interference once the tribunal has been appointed.²⁰ However, the Court may entertain an application under Section 9, after constitution, if the remedy sought will be inefficacious before the Tribunal.²¹ The Delhi High Court in *Benara Bearings & Pistons v. Mahle Engine Components*²² has further held that once tribunal has been constituted, and there is a Section 9 application pending, the Court was required to relegate it to the Tribunal instead of deciding upon the same.

Appeals From The Orders Under Section 17

Section 37 of the Arbitration Act provides that appeals lie from orders of the Arbitral Tribunal under Section 17, granting or refusing grant of any remedy as sought by the party. The subsequent question that arose was whether the Court-in-Appeal must apply standards of review prescribed for an arbitral award (as under Section 34 of the Act, analogous to the NY Convention) or should the standard be as an appeal and examined on pure merits.²³ Why this question is important is because it answers whether the Court has to keep a limited enquiry in such an appeal or undertake a full blown examination, when called on appeal.²⁴ It is pertinent to note that there is varying judicial authority on the issue.

In *Subhash Chander Chachra v. Ashwani Kumar Chachra*²⁵ the Delhi High Court has held that scope of enquiry is limited and hence, the applicable standard is those of an arbitral award. Whereas in²⁶, it has been held in favour of the latter, ordering Court's to examine the merits of the orders by the Tribunal. The former has been partially followed by the Supreme Court, implicitly, in *National Highways Authority of India v. Gwalior Jhansi Expressway*²⁷, where it set aside an order under appeal u/s 37(2)(b) to be violative of 'fundamental policy of Indian law', a ground to set aside awards. This position is also in line with the 246th Report of the Law Commission of India, which when recommending the amendments in 2015, provided the rationale of reducing the role of the

²⁰Manbhupinder Singh Atwal v. Neeraj Kumarpal Shah, 2019 GLH (3) 234.

²¹Indian Arbitration Act, § 9(3).

²²Benara Bearings & Pistons Ltd. v. Mahle Engine Components India Pvt. Ltd., 2017 SCC OnLine Del 7226.

²³Sharad Bansal, The Standard of Review of Interim Orders of an Arbitral Tribunal Seated in India: A Significant Step Towards Certainty, Kluwer Arbitration Blog (2018), <http://arbitrationblog.kluwerarbitration.com/2018/11/21/the-standard-of-review-of-interim-orders-of-an-arbitral-tribunal-seated-in-india-a-significant-step-towards-certainty/> (last visited Apr 21, 2022).

²⁴JUSTICE RS BACHAWAT, p.291.

²⁵Subhash Chander Chachra v. Ashwani Kumar Chachra, 2007 SCC OnLine Del 149.

²⁶Sanjay Gambhir v. BDR Builders and Developers Pvt. Ltd., 2016 SCC OnLine Del 5366.

²⁷National Highways Authority of India v. Gwalior Jhansi Expressway, 2018 8 SCC 243.

Courts in arbitration disputes.²⁸ Therefore, in my opinion, the law as it stands, should be for the Courts to review based on the standard of award review and not an appellate review, in order to save time and cost for the parties to the arbitration.

Conclusion

Based on the above analysis, certain observations stem up with regards to interim measures in arbitration disputes. *Firstly*, the Indian Arbitration Act substantively covers the varied situations that may give rise to urgent intervention or action during or before an arbitration. Hence, the remedies as provided under Section 9 and 17 are one of the important provisions which uphold the interest of the parties to the dispute. The parties may choose to apply to the Court or the Tribunal to preserve the subject matter, order its sale, injunct any party etc, through this. However, various issues have arisen with respect to the practical application of these sections. Application of the standard of review with regards to its appeal under Section 37 and entertaining the Section 9 applications after constitution of the tribunal are two contemporary issues, that have been trite. Certain suggestions that the author may provide with regard to the above lacunae:

1. The Courts must necessarily endeavour to reduce the interference with the arbitral process, in consonance with the 246th Report of the Law Commission of India. In doing so, it must limit its indulgence to only those cases of extreme urgency, where the remedy under Section is inevitably inefficacious.
2. Standard of review of appeal under Section 37 ought to be limited to the grounds as provided by the NY Convention (standard applicable to review of arbitral awards). This ensures that the Court does not examine the interim order under Section 9 or 17 as a full blown inquiry. Not only this save cost and time of the parties, but also save the precious time and indulgence of the Courts. Further, the arbitral process will essentially get streamlined and the agenda of getting interim measures under the Act will become more fruitful.

²⁸ Law Commission of India, 246th Report, 2014, Ministry of Law and Justice, Govt. of India, available at <https://lawcommissionofindia.nic.in/reports/report246.pdf> (last visited Apr 21, 2022).

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