



Interim measures by the court and arbitral tribunal: A critical study in the light of new amendments

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Abstract

The present research paper seeks to make a comparative study of the interim measures ordered by the court and the arbitral tribunal under section 9 and section 17 of the Arbitration and Conciliation Act, 1996 in the light of recent amendments introduced by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) (w.r.e.f. 23-10-2015). The paper also analyzes whether the arbitral tribunal has come at par with the court in theory only or in practice too. The legislative and judicial trends have also been examined in the conceptual and applied aspects.

Keywords: court, arbitral tribunal

1. Introduction

The provisional or interim measures and remedies in arbitration proceedings are required because in modern scenario the arbitral proceedings are as adversarial in nature as any traditional litigation system may be. A party to the dispute, during the dispute, always wants to protect his interest in property- be it movable or immovable by taking a well-timed action so that the opposite party can't play any trick or commit any damage to properties. Section 9 of the Act is an exception to the general rule contained in Section 5 in as much as the former definitely empowers the Civil Court concerned to pass suitable orders on the subject and with respect to matters specified therein. The provisions regarding interim measures are made under S.9^[1] of the Act. It is the discretionary power of the court. Thus Arbitration and Conciliation Act, 1996, under Section 17 gives parties power to approach arbitral tribunal for seeking interim measures. The arbitral tribunal, after Amending Act of 2015 has power to grant all types of interim measures under Section 17 which the Court is authorized to grant under section 9 of the Act.

2. Interim measures by court

Section 9(1)^[2] of the Arbitration and Conciliation Act, 1996 provides for Interim measures etc. by Court that a party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court- (i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or (ii) for an interim measure or protection in respect of any of the following matters, namely:- (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; (b) securing the amount in dispute in the arbitration; (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of

any party or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence; (d) interim injunction or the appointment of a receiver; (e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it. [(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.]^[3] [(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.]^[4]

Section 9 (1) provides that a party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36. It means where the time for making an application to set aside the award u/s 34 has expired or such application having been made, it has been refused, then, the award shall be enforced under CPC in the same manner as if it were a decree of the court.

An application can be made to grant interim measures for specified purposes i.e.

- 1) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
- 2) for an interim measure or protection in respect of any of the following matters, namely:-
 - a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
 - b) securing the amount in dispute in the arbitration;
 - c) the detention, preservation or inspection of any property or thing which is the subject-matter of the

dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

- d) interim injunction or the appointment of a receiver;
- e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

Section 9(2) provides that the arbitral proceedings shall be commenced within a period of ninety days from the date of “S. 9(1) Order” where the Court passes an order for any interim measure under Section 9(1) before the commencement of arbitral proceedings.

Section 9(3) provides that that the Court shall not entertain an application for interim measure once the arbitral tribunal is constituted, unless it finds circumstances that may render the remedy provided under section 17 inefficacious. The intention of the Legislature is to make arbitration proceedings rapid and effective by limiting the involvement of Courts in an arbitration proceeding.

In *Sundaram Finance Ltd. Case* ^[5] Supreme Court held that the word ‘before’ in S.9 means before the arbitral proceedings commence, as under section 21 and therefore it would not be necessary to give notice of invoking the arbitration clause to the other party. Also held that if an application is so made, the court will first have to be satisfied that there exists a valid arbitration agreement and the applicant intends to take the dispute to arbitration. Only when the court satisfies itself of such an intention of the applicant, it shall have the jurisdiction to pass interim measures.

This case was referred by Delhi High Court in *M/s Buddha Films Private Limited Case* ^[6]. In *Baba Arya Case* ^[7] it was held that relief under section 9 cannot be granted where the dispute does not arise from the breach of terms of agreement or from their non-compliance.

3. Interim measures ordered by arbitral tribunal

Section 17 provides that (1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to the arbitral tribunal— (i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or (ii) for an interim measure of protection in respect of any of the following matters, namely:— (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; (b) securing the amount in dispute in the arbitration; (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to

be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence; (d) interim injunction or the appointment of a receiver; (e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it. (2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were an order of the Court.”^[8]

i) Not present in old law

Interim measures regarding the dispute may be taken at the request of a party unless otherwise agreed by the parties. It is important to note that there was no such provision under the old Arbitration Act, 1940 ^[9]. The power to make orders for interim measure vested only in courts; therefore, this new provision and further amendments in Section 17 are welcome steps towards arbitral tribunal empowerment.

ii) Interim measures: Concept

Interim Measures are granted during the pendency of arbitration proceeding of a dispute and are usually in the form of injunctions, specific performance, pre-award attachments etc. By definition, ‘interim reliefs’ are temporary or interim in nature and are granted in advance of the final award of the dispute by the arbitral tribunal. Another thing that is significant to note is that the tribunal can order to discontinue a thing for the protection of subject matter. The use of the word ‘injunction’ is calculatingly discouraged and avoided because the power to issue injunction concerns to realm of the court ^[10].

In *M.D. Army Welfare Housing Organization Case* ^[11] few important features of Old Section 17 were laid down: (i) The tribunal power is restricted and it cannot order for anything outside the scope of reference or arbitration agreement. (ii) The court can make orders only when a request is made by the party. (iii) The direction of tribunal should relate only to protection of subject matter. (iv) The directions can only be aimed at a party to the arbitration. Persons other the parties cannot be directed and attached to the liability of protecting the subject matter ^[12]. (v) The orders under Section 17 are appealable under Section 37 (2) of the Act.

iii) Interim measures

Section 17(1) provides that the tribunal can issue orders to provide for protection of subject matter at the request of parties. A party may apply to the arbitral tribunal for such procedural, evidentiary, conservatory or interim measures during the arbitral proceedings or at any time after the making of the arbitral award. The only condition is that a party should apply to arbitral tribunal before the award is enforced in accordance with section 36. It is to be noted that the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it. A party can approach the tribunal for the appointment of a guardian for a minor or person of

unsound mind for the purposes of arbitral proceedings^[13]. An interim measure of protection^[14] can also be sought in respect of any of the following matters, namely:—

- a) The preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
- b) Securing the amount in dispute in the arbitration;
- c) The detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
- d) Interim injunction or the appointment of a receiver;
- e) Such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient.

In *Jammu Forest Co. Case*^[15] it was held that an interim award is made to be effective during the course of arbitration until the final award is made. In *Larsen and Toubro Ltd Case*^[16] it was decided that since the warranty period had expired the Bank Guarantees therefore could not be encashed. The Apex Court in Para 37 of the judgment reported as *Salem Advocate Bar Association Case*^[17] has observed that it is high time that actual costs are imposed. In fact the Apex Court in the case of *U.P. Coop. Federation Case*^[18] has held that courts are in fact entitled to impose interests on the costs which are awarded.

Delhi High Court observed in *Denel Case*^[19] that in the present case, considering the fact that respondent No. 1 has been unnecessarily forced into this litigation, inasmuch as, all that had been asked for in the first instance was only an extension of the Bank Guarantees and not encashment thereof, and also keeping in mind that similar prayers of the petitioner were rejected earlier by the Arbitration Tribunal, the court deems it fit that the respondent No. 1 should file an affidavit of its authorized officer for the fees, it has paid to its advocates for these cases. The affidavit shall be supported by the certificates of the fees of the counsel that they have received and are entitled to receive in terms of an existing commitment the fees payable for these cases. Such affidavit and costs stated therein duly supported by the certificate of the advocates shall be the costs in favor of the respondent and against the petitioner. The necessary affidavit is to be filed within four weeks.

iv) Status of section 17 order

The New Section 17(2) provides that any order issued by the arbitral tribunal for grant of interim measures shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 in the same manner as if it were an order of the Court. However, these orders are subject to any orders passed in an appeal under section 37.

No power to enforce or judicial enforcement of orders made by tribunal within same section or other section had been provided under the old Section 17 before substitution and it was mere a toothless tiger. This was a crucial error because

the Arbitration law in Canada and Scotland specifically provides that the order of an arbitral tribunal takes form of an award or interim award and it will be enforceable like an award. In this regard the Apex Court in *Sundaram Finance Case*^[20] and in *M.D. Army Welfare Housing Organisation Case*^[21] observed that though section 17 of the Act provided the arbitral tribunal a power to pass interim orders, but the same could not be enforced as an order of a Court.

The Amending Act 2015 has substituted section 17 by a new section which ensures that an order passed by an arbitral tribunal under section 17 will now be deemed to be an order of the Court and shall be enforceable under the Code of Civil Procedure, 1908. Moreover, once the arbitral tribunal is constituted, all applications seeking interim measures would now be directed to it and not the Court. Section 9(3) provides that the Court shall not entertain an application for interim measure once the arbitral tribunal is constituted, unless it finds circumstances that may render the remedy provided under section 17 inefficacious.

4. Concluding observations

Section 17 is analogous to Section 9 of the Arbitration and Conciliation Act, 1996. However, the two provisions differ in following features: (1) Power to order interim measures by court under Section 9 is open and unlimited whereas under the old section 17 the words “unless otherwise agreed by the parties” qualified and adjusted the power to order by the arbitral tribunal but now the amendments to Section 17 empowers the arbitral tribunal with the same powers as that of a court under Section 9. The only difference that remains is that powers under Section 17 can only be availed after the constitution and commencement of formal functioning of arbitral tribunal. (2) The court can make orders for interim measures under Section 9 as the words in Section 9 suggest “before, during and after” the arbitration proceedings but before the award is enforced in accordance with Section 36. A party can approach the court for interim measures of protection even before the arbitration proceedings begin or even before the appointment of arbitrator and it is not necessary that the arbitral proceedings must be pending or at least a notice to invoke arbitral clause must be given before filing an application under Section 9^[22]. Whilst, the arbitral tribunal can make orders for interim measures under Section 17 as the words in Section 17 suggest “during and after” the arbitration proceedings but before the award is enforced in accordance with Section 36. (3) The arbitral tribunal could ask for appropriate security under the old Section 17(2) in reference to the measures ordered under the old Section 17(1). The phrase “appropriate security” includes: Preservation, Protection, Recording of evidence, Protection of trade secrets, Protection of proprietary information, Stabilization of the relationship of the parties, Use or maintenance of machines; and Safe custody of subject matter of dispute. Now, there is no such mention in Section 9 and 17.

5. References

1. Section 9 is based on Article 9 of the Model Law. Section 9 is also analogous to Section 41(b) of the Act, 1940.
2. Section 9 re-numbered as sub-section (1) thereof by Act 3 of 2016, Sec. 5 (w.r.e.f), 2015.

3. Ins. By Act 3 of 2016, Sec. 5 (w.r.ef. 23-10-2015)
4. Ins. By Act 3 of 2016, Sec. 5 (w.r.ef. 23-10-2015)
5. Sundaram Finance Ltd. v. NEPC India Ltd. (1999) 2SCC 479: AIR 1999 SC 565
6. M/s Buddha Films Private Limited v. PrasarBharti, 2001 Arb. W.L.J. 449 (Del): AIR 2001 Delhi 241.
7. Baba Aryav. Delhi Viduyat Board 2002 Arb. W.L.J. 508(Del):2001 (3) Arb. LR 547 (Del.)
8. Subs. By Act 3 of 2016, Sec. 10, for Section 17 (w.r.e.f. 23-10-2015). Section 17, before substitution, stood as under: "17. Interim Measures ordered by arbitral tribunal.-(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. (2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1)."
9. A party could start proceedings under the 1940 Act in court by presenting an application under Section 20 for the appointment of an arbitrator. Then, side by side, a party could present an application for interim relief under the second schedule and Section 41(b) of 1940 Act. The new law does not have any similar provision as Section 20. Section 9 or Section 17 are also not similar to Section 41 (C) and the second Schedule. Please see M/s Sundaram Finance Ltd. v. N.E.P.C. India Ltd., AIR 1999 SC 565
10. Anand Prakash v. Asstt. Registrar Co-operative Societies, AIR 1968 All 22.
11. ¹M.D. Army Welfare Housing Organization v. Sumangal Services, (P) Ltd., AIR 2004 SC 1344
12. However, the agent, representatives or delegates of the party may bear the responsibility of protecting the subject matter.
13. Arbitration and Conciliation Act, 1996; Section 17(1)(i)
14. Arbitration and Conciliation Act, 1996; Section 17(1)(ii)
15. Jammu Forest Co. v. State, AIR 1968 J & K 86
16. Larsen and Toubro Ltd. v. Maharashtra State Electricity Board and Ors. AIR 1996 SC 334
17. Salem Advocate Bar Association v. Union of India (2005) 6 SCC 344.
18. U.P. Coop. Federation v. Three Circles (2009) 10 SCC 374
19. Denel (Proprietary) Ltd. v. Union of India (UOI) and Anr. (Decided on 22.03.2010 by DELHC)
20. M/s. Sundaram Finance v. M/s. NEPC India Ltd., AIR 1999 SC 565
21. M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd., AIR 2004 SC 1344
22. M/s. Sundaram Finance v. M/s. NEPC India Ltd., AIR 1999 SC 565. See also Globe Cogeneration Power Ltd. v. Sri Hiranyakeshi Sahkari Karkhane Niyamit, AIR 2005 Kant 94.