International Journal of Innovative Research and Advanced Studies (IJIRAS)
Volume 9 Issue 11, November 2022

ISSN: 2394-4404

Judicial Pronouncements Concerning Interim Measures Of Protection In Arbitration

V. Kavya

Student, BBA, LLB,
School of Law, Amity University, Noida, India

***Abstract:** Parties to a Dispute often find it necessary to seek interim measures of protection in order to safeguard their substantive rights before the commencement of arbitral proceedings or during the pendency of the arbitration but prior to the final resolution of the dispute.*

Section 9(1) of the Arbitration and Conciliation Act, 1996 (the "Act") empowers parties to an arbitration agreement to seek interim measures of protection by applying to a Court of competent jurisdiction before or during arbitral proceedings or at any time after making of the arbitral award, but prior to the enforcement of the arbitral award.

In terms of section17 of the Act,. Interim measures of protection is ordered by Arbitral Tribunal 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.

In catena of judgments, courts have ruled that a party can approach a Court against an interim order in arbitral proceedings only if the order is appealable under Section 37 of the A&C Act; and that in all other cases, the party has to wait for the conclusion of the arbitral proceedings and the rendition of the arbitral award.

If the parties' arbitration agreement, including any arbitration rules, so permits, applications for interim measures can be granted by an emergency arbitrator before a regular tribunal has been formed.

*In the case of **M. Ashraf v. Kasim V.K.** (2018), the High Court of Kerala had held that the courts should hear an application for interim relief before the arbitral award's enforcement, keeping in mind that it is when an arbitral tribunal has lost its functionality. A person cannot approach a court seeking interim relief during the arbitral proceedings until and unless they are able to prove that situations are such that make it necessary for the court to intervene.*

*In the case **Smt. Baby Arya v. Delhi Vidyut Board** (2001), the High Court of Delhi had held that a party could also apply for interim protection in situations wherein there is an infringement of the terms and conditions of the arbitration agreement. The Court further laid down the prevention of equity, fair play and principles of natural justice as the remaining grounds for the application of interim protection. Subsequently, the High Court of Gujarat had also reiterated the same approach in the case **Vishal v. Kataria** (2010).*

*The **Amendment Act, 2015**, amended the Arbitration Act by inserting two subsections to Section 9. Sub-section-2, the first insertion, provides that where a court grants an interim relief before the initiation of arbitral proceedings, the proceedings will begin within ninety days from the date of the grant of such relief.*

Sub-section 3, the other insertion, states that a court shall not hear an application made by any person concerning the arbitration agreement seeking an interim relief after the constitution of the arbitral tribunal unless the court finds that the relief granted by the arbitral tribunal is not effective in the prevailing circumstances. Thus, this provision is of an exceptional nature.

*An arbitral tribunal can pass any of the above-stated interim measures against either party to the dispute. However, as was held by the Supreme Court in the case **MD Army Welfare Housing Organization v. Sumangal Services (P) Ltd.** (2003), it cannot furnish them against a third party.*

The provisions under Sections 9 and 17 are of considerable importance to larger public. The remedy of interim relief as enshrined in the Arbitration and Conciliation Act that they provide is a life saviour for many people as it grants expeditious relief. It safeguards people against the breach of their rights and unnecessary troubles. But there is a problem that at times causes the essence of arbitration to come to a standstill. Section-17 has a limited application, in the sense that there are several instances wherein the grant of interim relief by the arbitral tribunal fails to satisfy the parties. In such cases, the aggrieved party tend to move the courts to get their grievances solved. It is, with all probability, the major issue with the existing arbitration mechanism in India. Though the judiciary and the legislature have been actively making efforts to resolve the same, it will take some more time to cover this remedial measure. In the meanwhile, arbitration in India is growing by the day at faster pace. On the whole from across the country has been positively responding to this alternative dispute resolution mechanism. It is the benefits that accrues for the public that reduces the intensity of the problems that come with it.

Keywords: Arbitration, Interim measures, Section 9, Section 17, Tribunal

I. INTRODUCTION

Arbitration is the most preferred legal remedy by everyone for the amicable resolution of commercial disputes. There are many reasons for the same. To enumerate a few, this mechanism provides the parties with a sense of freedom and comfort that they do not experience while arguing in the courts. The arbitration procedure allows parties to appoint an arbitrator of their choice, to obtain a faster solution to the problem than the usual litigation process, and to be able to

discuss the issues confidentially. The interim measures of protection clause of Arbitration also comes with procedural safeguards that protect the rights of the parties from a potential breach. These are the interlocutory or interim measures.

There are many instances wherein one party adopts tactics to delay the arbitral proceedings. There have also been such instances where they try to violate the other party's rights in order to emerge victorious in the battle of arbitration. In situations like these, interim measures come to use. They provide the aggrieved with the chance to take the help of the courts to keep safe their rights and avoid intentional acts from interfering with the arbitral proceedings. So what exactly are these interim measures? How do they work, and under which circumstances? Who grants them as per Arbitration Act? This paper gives answer to these very questions, particularly in respect of the interim measures by the courts.

II. A BRIEF HISTORY OF ARBITRATION IN INDIA

Before averting on to the interim measures in arbitration, let's get to know a little about what arbitration is and how it came to India. Arbitration is a mechanism that seeks to resolve disputes arising out of a legal relationship between two or more people without judicial interference. In India, it first acquired statutory status in the late 1890s, with the establishment of the Indian Arbitration Act, 1899. However, it was very technical to understand. Later on, it got replaced by the Arbitration Act, 1940. But it too had its limitations. It only dealt with the domestic cases of arbitration. When globalization made its entry in India, international transactions began to increase at a rapid pace. As a result, the Arbitration and Conciliation Act, 1996, came up, rescinding the former Act of 1940. Founded on the UNCITRAL Model Law on Commercial Arbitration, 1985, the Arbitration and Conciliation Act deals with all kinds of domestic and international arbitration in India. As mentioned earlier, the interim measures tend to safeguard the rights of the parties and avoid wrongful interference in arbitral proceedings. The Arbitration Act lays out the interim measures under Section 9 and Section-17, respectively.

III. INTERIM MEASURES BY COURTS

Section 9 of the Act empowers the courts to furnish interim measures against either party to a particular dispute. The courts can grant interim measures of protection as and when they think it fit to do so. Section 9 loosely draws inspiration from the Article 9 of the Model Law, but it differs substantially from the international provision. Article 9 states that the parties to the arbitration agreement cannot move to the courts for interim protection. On the other hand, Section 9 provides that the parties can request such a grant by the courts. They can apply for the same before or after the initiation of the arbitral proceedings. But even during these prescribed periods, the interim protection must mandatorily relate to the subject matter of the arbitration agreement. It must originate from the terms and conditions of the same. If not, then the order so passed shall be void. Grant of interim relief is dependent on the discretion of the courts. There are no set standards for the same.

The parties also have the option to apply for the interim protection even post the rendering of the arbitral awards, but just before their enforcement. In the case of M. Ashraf v. Kasim V.K. *(2018)*, the High Court of Kerala had held that the courts should hear an application for interim relief before the arbitral award's enforcement, keeping in mind that it is when an arbitral tribunal has lost its functionality. A person cannot approach a court seeking interim relief during the arbitral proceedings until and unless they are able to prove that situations are such that make it necessary for the court to intervene.

IV. RELIEFS SOUGHT FROM COURTS

Sub-section-1(ii) of Section 9 states that the courts can accord interim reliefs in such circumstances as following:-

- ✓ For the preservation, custody or the sale of goods concerning the arbitration agreement;
- ✓ For appointing a guardian for a minor or a person who is of unsound mind;
- ✓ For securing the amount involved in the dispute;
- ✓ For the conservation, detention or protection of the property or thing that forms the subject matter of the arbitration agreement;
- ✓ Such an interim measure as the court may deem fit and necessary;
- ✓ For appointing a recipient or interim injunction.

A. JUDICIAL INTERPRETATION OF THE GROUNDS FOR GRANT OF INTERIM RELIEF

In the case Smt. Baby Arya v. Delhi Vidyut Board *(2001)*, the High Court of Delhi had held that a party could also apply for interim protection in situations wherein there is an infringement of the terms and conditions of the arbitration agreement. The Court further laid down the prevention of equity, fair play and principles of natural justice as the remaining grounds for the application of interim protection. Subsequently, the High Court of Gujarat had also reiterated the same approach in the case Vishal v. Kataria *(2010).*

B. RELIEF BEFORE ARBITRAL PROCEEDINGS

The Amendment Act, 2015, amended the Arbitration Act by inserting two subsections to Section 9. Sub-section-2, the first insertion, provides that where a court grants an interim relief before the initiation of arbitral proceedings, the proceedings will begin within ninety days from the date of the grant of such relief.

C. GRANT OF INTERIM RELIEF IN EXCEPTIONAL CASES

Sub-section 3, the other insertion, states that a court shall not hear an application made by any person concerning the arbitration agreement seeking an interim relief after the constitution of the arbitral tribunal unless the court finds that

the relief granted by the arbitral tribunal is not effective in the prevailing circumstances. Thus, this provision is of an exceptional nature.

In the case of Bhubaneswar Expressways Pvt. Ltd. v. NHAI *(2019)*, the constitution of the tribunal became insignificant because it lost its functionality when one of the parties backed out from the agreement to arbitrate. The High Court of Delhi had held herein that the interim relief granted by the tribunal was thus ineffective, and it directly implies that the court can most definitely entertain the petition filed by the other party under Section 9.

D. APPEALS FROM ORDERS PASSED BY COURTS

A party to the dispute can appeal from an order passed by a court granting or refusing to grant interim relief under Section 9 as per the provision in Section 37(1)(b).

V. INTERIM MEASURES BY TRIBUNALS

Section 17 of the Arbitration Act provides arbitral tribunals with the power to furnish interim measures. Article 17 of the Model Law is the basis of Section 17. Article 17 states that an arbitral tribunal can take any such step to provide interim relief to the parties on their request, as it may satisfy the tribunal that the dispute in question necessitates the same. Whereas, Section 17 provides that either party can apply to the arbitral tribunal for an interim measure before or after the arbitral awards' delivery. But it must be before their enforcement.

A. RELIEFS SOUGHT FROM TRIBUNALS

It is essential to know that this particular provision has gone through some significant changes introduced by the 2015 Amendment to the Act. Earlier, the tribunals could grant interim reliefs under any circumstances. In short, the scope of the application of this provision was broader back then. After the amendment was placed, several limitations came on to the implementation of the same. Now, there's a much-needed clarity on the kinds of relief allowable by the tribunals. Sub-section 1(ii) of Section 17 states that the tribunals can accord interim reliefs in such circumstances as the following:

- ✓ For the preservation, custody or the sale of goods concerning the arbitration agreement;
- ✓ For securing the amount involved in the dispute;
- ✓ For the preservation, detention or protection of the property or thing that forms the subject matter of the arbitration agreement;
- ✓ Such an interim measure as the tribunal may deem fit and necessary;
- ✓ For appointing a recipient or interim injunction;
- ✓ For appointing a guardian for a minor or a person who is of unsound mind.

Sub-section-2 of Section-17 affirms that any order passed by the tribunal that delivers any of these interim measures will be equivalent to an order passed by a Court. It will be enforceable under the Code of Civil Procedure, 1908, in the same manner as an order passed by the court.

B. NO INTERIM RELIEF AGAINST THIRD PARTY

An arbitral tribunal can pass any of the above-stated interim measures against either party to the dispute. However, as was held by the Supreme Court in the case MD Army Welfare Housing Organization v. Sumangal Services (P) Ltd. *(2003)*, it cannot furnish them against a third party. The apex court had said that the arbitral tribunals are not the courts of law. Their jurisdiction limits to just the agreement over which the dispute has occurred. Therefore, they cannot perform judicial functions and deliver judicial orders. They can act only against the involved parties. Any third person does not come under their ambit. In cases where a party seeks interim relief against a third party, they have to advance to the court for the same.

C. APPEALS FROM ORDERS PASSED BY TRIBUNALS

As per Section 37(2), a party to the dispute can appeal from an order passed by an arbitral tribunal:

- ✓ Granting or refusing to grant interim relief under Section-17;
- ✓ Approving the plea referred to in Section 16(2).
- ✓ How do measures given by the Courts and the tribunals differ from one another

The distinction between the interim measures by the courts and the tribunals would be fully evident by giving them a read. Nevertheless, let's delve into it anyway. It was the Supreme Court that first clarified the difference between Section 9 and Section-17 of the Arbitration Act. In the case Firm Ashok Traders and Anr. Etc v. Gurumukh Das Saluja And Ors. Etc. *(2004)*, the Court had stated that Section-17 would be operable only when the arbitral proceedings are still pending. The powers granted by this provision may overlap with that of Section 9. But in situations wherein the arbitral proceedings are yet to start or are over, the parties have to approach only the courts for seeking interim relief.

VI. CONCLUSION

The provisions under Sections 9 and 17 are of considerable significance. The remedy of interim relief that they provide is a life saviour for many. It safeguards people against the breach of their rights and unnecessary troubles. But there is a problem that at times causes the essence of arbitration to hinder. Section-17 has a limited application, in the sense that there are several instances wherein the grant of interim relief by the arbitral tribunal fails to satisfy the parties. In such cases, they tend to move the courts to get their grievances solved. It is, with all probability, the biggest issue with the existing arbitration mechanism in India. Though the judiciary and the legislature have been actively making efforts to resolve the same, it will take some more time to cover this journey. In the meanwhile, arbitration in India is growing by the day. Everyone from across the country has been positively responding to this alternative dispute resolution mechanism. It is the benefits it yields for the public that reduces the intensity of the problems that come with it. Putting a time frame for

enforcements of Interim measures of protection will ensure speedy enforcement by Courts using the Courts normal mechanism of enforcement and force of compliance.

The Arbitrator can utilize his powers of granting costs against the adverse party and also he can draw adverse inferences if his orders are not complied with.

The efficacy of Arbitration as a dispute resolution method is ultimately dependent on the power of an Arbitral Tribunal or a Court to order Interim Measures to protect the parties' rights and on such orders being effectively utilized through speedy enforcement. In order to achieve this, there is an urgent need to amend the ACA especially by addition of provisions relating to enforcement, continuous training and sensitization of the Judges to make them more Arbitration friendly, Fast track enforcement in the Courts, granting of more powers to the Arbitral Tribunal to grant peremptory orders ex-parte and more use of Arbitrator's discretionary powers.

It goes without saying that for the Arbitration process to be optimally effective, it must use the assistance of the Courts. Luckily, this supportive role has been recognized by the Court in it's recent decisions where Courts are now more co-operative, confident and less circumspect.

REFERENCES

[1] http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Interim_Reliefs_in_Arbitral_Proceedings.pdf

[2] http://www.legalservicesindia.com/article/2176/Interim-Measures-under-Arbitration,-Conciliation-Act.html

[3] https://www.barandbench.com/columns/interim-relief-by-courts-in-an-arbitration-the-battle-of-Section 9

[4] https://www.mondaq.com/india/arbitration-dispute-resolution/981212/powerplay-between-the-courts-and-arbitral-tribunals-scope-of-Section 9-and-17-of-the-arbitration-conciliation-act

IJIRAS