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Is The Remedy Under Section 9 of India's Arbitration and Conciliation Act, 1996 Available Post-Award to the Losing Party?

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Similar to Article 9 of the UNCITRAL Model Law (the "Model Law"), Section 9 of India's Arbitration and Conciliation Act, 1996 ("the Act") entitles the parties to arbitration proceedings to obtain interim relief from courts. However, there is one major difference between these two provisions. Article 9 of the Model Law allows parties to obtain interim relief from the courts at two stages, i.e. (i) before the commencement of arbitration proceedings and (ii) during the course of arbitration proceedings. On the other hand, in addition to the two stages mentioned above, Section 9 of the Act also entitles parties to obtain interim relief from Indian courts after the arbitral award is made but prior to its enforcement. Section 9 of the Act itself does not bar *any party* from approaching the court to seek interim measures under any given situation. However, recent court judgments have consistently held that after the arbitral award is made, only the winning party in the arbitration proceedings ("successful party") is entitled to obtain interim reliefs from the courts, whereas, the losing party in the arbitration proceedings ("unsuccessful party") is not entitled to seek any remedy under Section 9. This approach of the courts gives rise to a debatable issue which is currently pending for the consideration of the Supreme Court of India in *Home Cares Retail Marts Pvt. Ltd.* v. *Haresh N. Sanghavi* (SLP (C) No. 29972 of 2015). This post highlights the important judgments given by various High Courts regarding this issue and then briefly analyses whether an unsuccessful party in the arbitration proceedings should be entitled to seek a remedy under Section 9 of the Act.

Key Judgments Highlighting This Issue

The Bombay High Court delivered the landmark judgement on the issue in *Dirk India Pvt. Ltd.* v. *Maharashtra State Power Generation Company Ltd.* (2013) ("Dirk India"). In this case, a Division Bench of the Bombay High Court observed that after an arbitral award is made, interim relief can only be sought to safeguard the fruits of the proceedings until the enforcement of the award. It further held that the purpose of providing interim relief after the passing but before the enforcement of the arbitral award is to secure its value for the benefit of the party that seeks the enforcement of the award. Thus, after the award is made, the remedy under Section 9 can only be obtained as a step-in aid of enforcement of the arbitral award. On the aforesaid basis, it held that as the unsuccessful party in the arbitration proceeding has no right over the subject matter of the dispute at the stage of enforcement, such party is not entitled to seek any remedy under Section 9

of the Act. The Bombay High Court followed *Dirk India's* rationale in *Windworld India Ltd.* v. *Enercon Gmbh and Ors.* (2017) and *Home Care Retails Pvt. Ltd.* v. *Haresh N. Sanghavi* (2015), and the Delhi High Court in the recent case of *Technimont Pvt. Ltd.* v. *ONGC Petro Additions* (2020).

Another important point for consideration regarding this issue is whether a party whose claims are partly rejected and partly accepted in the arbitral award would be entitled to obtain interim relief from the Court under Section 9. The Delhi High Court addressed this issue in *Nussli Switzerland Ltd.* v. *Organizing Committee Commonwealth Games* (2014) where it was held that a party whose claims are partly rejected and partly accepted in the arbitral award, will not be entitled to seek interim relief under Section 9 if the amount of its claims subsume into a larger amount awarded in favor of the opposite party. This judgment impliedly clarifies that after the award is made, only the parties whose claims are pending for enforcement against the opposite party, i.e., the successful party, would be entitled to seek the remedy provided under Section 9.

Analysis

While it seems that High Courts have largely agreed with each other on the availability of interim relief following the passing of an arbitral award, there are additional factors that these judgments have not factored in.

Firstly, as already stated, Section 9 of the Act itself entitles '*any party*' to obtain interim relief from the Court at three stages, i.e. (i) before the commencement of arbitration proceedings; (ii) during the course of the arbitration proceedings; and (iii) after the arbitral award is made but prior to its enforcement. The term '*party*' has been defined under Section 2(1)(h) of the Act as a '*party to an arbitration agreement*'. Hence, applying the literal rule of interpretation of statutes, all parties, i.e. the successful and the unsuccessful parties, are equally entitled to approach the Court to avail the remedy provided under Section 9 at any stage. The text of Section 9, thus, draws no distinction between the rights of the successful and the unsuccessful party in the arbitration proceedings to seek interim relief from the Courts. Therefore, so long as Court finds merit in the Section 9 application filed by an unsuccessful party in the arbitration proceedings, the courts may grant appropriate relief to the unsuccessful party even after the arbitral award is made.

Secondly, the courts should not incapacitate themselves from granting interim relief in favor of the unsuccessful party in cases where the relief sought creates no negative impact on the rights of the successful party over the subject matter of the dispute. For instance, in *Wind World (supra)*, the interim relief sought by the unsuccessful party under Section 9 was the continuation of confidentiality of certain documents during the pendency of the Section 34 application filed before the court for setting aside the arbitral award. However, the Bombay High Court placed reliance on *Dirk India (supra)* and dismissed the application. It is pertinent to mention that in *Wind World (supra),* the Court failed to notice that the aforesaid relief sought by the unsuccessful party did not create any hindrance on the rights of the successful party over the subject matter of the dispute. Such reliefs are preventive measures that ensure the protection of the unsuccessful party's rights, in case the arbitral award is set aside by the Court. Therefore, in such situations, there can be no justified reason to completely prevent the Courts from granting interim relief in favor of the unsuccessful party.

Lastly, while hearing an application for setting aside an arbitral award under section 34 of the Act, when a Court orders a stay on the enforcement of the arbitral award during the pendency of such application, the unsuccessful party may be entitled to obtain interim relief from the court under Section 9. Section 36 of the Act states that courts must have due regard to the provisions of the Code of Civil Procedure 1908 ("CPC") while granting a stay on the enforcement of the arbitral award. As per the provisions of the CPC, the courts have to be satisfied that there exists a prima facie case, irreparable harm, and balance of convenience in favor of the Petitioner before granting the interim relief on any order/decree, etc. Therefore, once the court is satisfied that the aforesaid pre-conditions are fulfilled in the case filed for setting aside the arbitral award by the unsuccessful party, the remedy under Section 9 may be made available to the unsuccessful party. One instance that highlights the aforesaid proposition is when a court grants a stay on the enforcement of the arbitral award on being satisfied that the unsuccessful party has made out a prima-facie case on the ground of fraud. In such a case, it is essential to protect the rights of the unsuccessful parties by providing them with the remedy under Section 9 even after the making of the arbitral award, in order to protect the subject matter of the dispute during the pendency of the Section 34 petition.

Concluding Remarks

In the light of the above, it can be argued that the power of the Courts to grant interim measures under Section 9 should extend to both the parties, i.e. successful and the unsuccessful party in the arbitration proceedings, at any amongst the three stages provided under Section 9 of the Act. An outright restriction on the Court's power to provide any interim measure to an unsuccessful party in the arbitration proceedings is neither a feasible precedent nor the intention of the legislature. However, the Courts should provide the Section 9 remedy to the unsuccessful party only in exceptional cases and ensure that Section 9 is not used as a tool to abuse the process of law.

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