



Interim measures by court and arbitral tribunal under arbitration and conciliation act, 1996: An Overview

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Abstract

ADR has four facets to commend it: Speed, Finality, Cheapness and Justice. Arbitration process starts when parties to agreement fail to amicably resolve their disputes or differences and aggrieved party issues a notice for referring the dispute/claim to the arbitrator. A plain reading of the Section 9 indicates that a party may before or during the arbitral proceedings or at any time after making of the arbitral award but before it is enforced in accordance with Section 36, may apply, to the Court for interim measures of protection. Section 9 is available even before the commencement of the arbitration. It need not be preceded by the issuing of notice invoking the arbitration clause. This is in contrast to the power given to the arbitrators who can exercise the power u/s 17 only during the currency of the tribunal. Once the mandate of the arbitral tribunal terminates, Section 17 cannot be pressed into service. This paper analyse the concept of interim measures by Court and Arbitral Tribunal under the Arbitration and Conciliation Act.

Keywords: arbitration, tribunal, court, interim measures, conciliation

Introduction

Alternative Dispute Resolution (ADR) is now the most accepted method of dispute resolution in the US, UK, Canada, Australia and several other countries. According to a survey about 80% of the litigants prefer ADR methods in these countries and not more than 20% cases go to the national courts. ADR has four facets to commend it: Speed, Finality, Cheapness and Justice. Negotiation, Mediation, Conciliation and Arbitration are the four basic methods of resolving a dispute under ADR system. The Arbitration and Conciliation Act, 1996 contains provisions regarding arbitration and conciliation, which are two major methods under the ADR. The Act has been enacted on the line of UNCITRAL model law of International Commercial Arbitration.

Arbitration is a form of alternative dispute resolution is a technique for the resolution of disputes outside the courts,

- Where the parties to an dispute refer it to one or more person
- By those decisions they agree to be bound.

“It is a resolution technique in which a third party reviews the evidence in the case and imposes decision that is legally binding for both sides and enforceable. Arbitration is often used for the resolution of commercial disputes, particularly in the context of international commercial transaction [1].”

The Act provides autonomy to the parties in various matters and has reduced the intervention of court to the minimum. However, the courts can intervene to give effect to various matters as permitted by the Act. One such situation is to grant interim measures of protection as contemplated by Section 9.

Arbitration Procedure

“Arbitration process starts when parties to agreement fail to amicably resolve their disputes or differences and aggrieved party issues a notice for referring the dispute/claim to the arbitrator (Section 21). After the arbitral Tribunal is

constituted, claimant will state facts of his case submit his claim and seek relief. Respondent will file his counter claim or his defence to the claim. Arbitrator passes an award on completion of arbitration proceedings.

Award under Arbitration:

As per definition of arbitral award appearing in Section 2(e), an arbitral award includes an interim award within its ambit. Section 31(6) provides that the arbitral tribunal may, at any time during the proceedings make an interim award on any matters with respect to which it may make a final award. The sections that deal with interim relief are Section 9 and Section 17. Both these are compared for ascertaining the ground reality of these measures [2].”

Interim measure by the court u/s 9 of the 1996 Act

A plain reading of the section 9 indicates that a party may before or during the arbitral proceedings or at any time after making of the arbitral award but before it is enforced in accordance with Section 36, may apply, to the court for interim measure of protection. Prayers for interim measures of protection may include:

- *The preservation, interim custody or sale of any goods, which are the subject matter of the arbitration agreement.*
- *Securing the amount in dispute in the arbitration*
- *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.*
- *Interim injunction or the appointment of a receiver.*

- *Such other interim measures 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* ^[3].”

Power to Grant Anton Piller Order

Anton Piller Order is an ex-parte interlocutory mandatory injunction, which orders the defendant to allow the plaintiff to enter his premises for the purpose of searching for, inspecting and seizing property or documents infringing the plaintiff rights. However, such orders are passed by a court with circumspection because powers are of considerable magnitude.

Power to Grant Mareva Injunction

“The value of power to grant Mareva injunction is to prevent a third party from disposing of any asset or removing it from the jurisdiction of the court so as to defeat the claim of the plaintiff. The court has power to pass orders of attachment of property before award for securing the amount where the same is subject matter of dispute. The content of the power would be same as the power exercised by the court under order 38 Rule 5 of the Code of Civil Procedure wherein appropriate cases the court can order attachment of the assets of a party to survive till judgement is passed in the matter ^[4].”

Interim Measures by the Arbitral Tribunal u/s 17 of the 1996 Act

“If the arbitration agreement does not prohibit, Arbitral Tribunal at the request of a party, may order the other party to take such interim measures of protection as it may deem necessary in respect of subject matter of dispute. It is very strange that Section 17 although permits Arbitral tribunal to pass interim order, it does not give any power to Tribunal to enforce its order. Also there is no section in the new Arbitration Act which ensures enforcement of interim orders passed by the Tribunal or to treat interim order as an enforceable decree like that of final award. In other words, the power of the tribunal is limited and any interim award necessarily has to merge with the final award for attaining enforceability ^[5].”

At what stage the court can pass interim order

Section 9 is available even before the commencement of the arbitration. It need not be preceded by the issuing of notice invoking the arbitration clause. This is in contrast to the power given to the arbitrators who can exercise the power u/s 17 only during the currency of the tribunal. Once the mandate of the arbitral tribunal terminates, Section 17 cannot be pressed into service.

Circumstances preventing court from granting interim relief

“If the interim relief prayed for u/s 9 would amount to granting final relief frustrating the arbitration proceedings such a relief cannot be granted by the court ^[6].” *“While several interim measures of protection can be ordered under section 9, the section is not meant for interlocutory orders for the production of documents* ^[7].” *“When the claim is for money, the sale of materials cannot be ordered as an interim relief. However, it is submitted that an order of interim measure of protection can be passed by a competent court for sale of property where such*

property forming the subject matter of the dispute is perishable in nature ^[8].”

“The benefit of section 9 cannot be availed of by a party, which has no intention to appoint the arbitral tribunal. The provision cannot be availed by a party for restraining the other party from approaching the arbitral tribunal ^[9].” *“For seeking interim relief u/s 9, subsistence and existence of a valid agreement is a pre-condition.”*

“An interim injunction cannot be granted, when many technical and engineering details are involved ^[10].” *“Financial constraints are not a ground for restraining the recovery of arrears* ^[11].” *“An injunction cannot be issued against the encashment of a bank guarantee, where the respondent beneficiary is a big public sector corporation. If the award goes against the respondents, it could not be difficult to realise the money* ^[12].”

Salient features of section 9 and section 17

“Section 9 and 17 both deal with the interim measures of protection. It is relevant to note that these two provisions do not conflict with each other. Section provides for interim measures by the court whereas section 17 deals with providing interim measures by the tribunal. Though the power available under section 17 is narrower than vested in court, the exercise of power by the court under section 9 is no way controlled by the power exercisable by the arbitral tribunal under section 17. A juxtaposition of the two provisions reveals that there are two notable distinctive features of these provisions. First the power of the court can be exercised either before or during the arbitral tribunal or even thereafter upon making of the arbitral award, but before it is enforced in accordance with section 36. The power of arbitral tribunal, on the other hand, to order an interim measure of protection, is exercisable only during pendency of the arbitral proceedings before it, because the proceedings terminate upon a final arbitral award or on an order passed under sub section 2 of section 32.

Secondly unlike under section 17 of the act, where the arbitral tribunal is empowered at the request of the party to order a party to take an interim measure of protection in the respect of a party to order a party to take interim measure of protection in respect of the subject matter of the dispute, the power of the court under section 9 is in respect of the matters specified in clause (i) and (ii). The measures on the other hand which are contemplated under section 9 are wider in their ambit because they go beyond a mere direction by the court to a party to take an interim measure of protection. Furthermore, section 9 provides that the court shall have the same power for making orders as it has for the purposes of and in relation to the proceedings before it.

Equally while interpreting the provisions of section 9; regard must be had to the general object of the act which is to restrict judicial intervention in the arbitral proceedings. In keeping with that object, section 5 postulates that notwithstanding anything contained in any other law for the time being in force, in matters governed by that part, no judicial authority shall intervene except where so provided in the part. Recourse to section 17 is an enabling additional recourse and is not in substitution of section 9 of the act. The power of the court under section 9 enables it to pass appropriate orders notwithstanding pendency of arbitral proceedings. It is relevant to note that the power of the arbitral tribunal under section 17 is confined to the subject matter of the dispute, while

this is not the case with the court under section 9. Section 9 (2) (e) specifically empowers the court to order interim measures of protection which it considers just and convenient ^[13].”

Is parallel application u/s 9 as well as u/s 17 possible?

“The Court can exercise power under section 9 to grant interim measures even during the pendency of application under section 17 before the arbitral tribunal. Remedy available to a party under section 17 is an additional remedy and is not in substitution of section 9 ^[14].”

Considerations while granting relief u/s 9

“The Court will generally take into account the following considerations while granting interim relief under section 9:

1. The party applying for interim relief must establish a prima-facie case.
2. The balance of convenience should be in its favour.
3. The party will suffer irreparable loss or injury if the interim measure is denied to it.
4. The exercise of discretion has to be in beneficial manner depending upon the circumstances of each case ^[15].”

Applicability of Section 9 where seat of arbitration is outside India

Sub section (2) of section 2 provides in a clear and unambiguous language that Part I shall apply where the place of Arbitration is in India. However, it has been held that “where the arbitration took place at London, held that Part I also applies to International Commercial Arbitration conducted outside India ^[16].” Similar view was again taken in the case of “Olex Focas Private Limited vs. Skoda export co. Ltd. ^[17]”. “An application for interim measures can be made to Court in India, whether or not the arbitration takes place in India before or during the proceedings. The apex court has observed that Part I of the Act also applies to International Commercial Arbitrations, which take place out of India, unless the parties by agreement express or implied exclude it or any of its provisions ^[18].”

Interim measure u/s 9 and u/s 17 are distinguishable

1. **Party autonomy** – the powers excisable by the ‘arbitral tribunal’ under section 17 are subject to party autonomy whereas the provisions of section 9 are mandatory and not fettered by party autonomy.
2. **Period** – the power of the court can be invoked at any time after the ‘arbitration agreement’ comes into existence, prior to the commencements of the arbitration proceedings, during the arbitration proceedings throughout and up to the time of making the award up to the enforcement of the award under section 36. on the other hand the power of the arbitral tribunal up to the time of termination of the arbitration proceedings.

Before	During	After
After entering into the contract up to the commencement of arbitral proceedings.	During arbitration proceedings up to the termination of the mandate of the arbitrator.	At any time between the making and enforcement of arbitral award.

3. **Invocation** – the power of the arbitral tribunal to order interim measures of protection is not ex officio. A party can invoke this jurisdiction only by making a request to the

arbitral tribunal, unless otherwise agreed by the parties. The power of the court under section 9 can be invoked by a party by making an application to it. In practice, there is little difference between ‘application’ and ‘request’. The word ‘request’ appears to be permissive of an oral request as well, though in practice, such is rarely made and much less entertained.

4. **Range of interim measures of protection-** the interim measures under section 9 are far wide ranging and more effective than those under section 17. The interim measures of protection have been specified under section 9 while the tribunal has been given the power to order such measures as it may consider necessary in respect of subject matter of the dispute.
5. **Effect on parties and non parties-** the interim measures ordered by the court may affect not only the parties to the arbitration agreement but also third parties as well. The measures ordered by the tribunal will affect only the parties to the dispute and not the third parties.
6. **Competence-** there are some interim measures of protection which can only be granted by a court and not by the tribunal. For instance, the court can authorize any person to enter upon any land or building in possession of any part or authorize inspection and search of such property against his wishes, while the tribunal has no such power.
7. **Enforceability-** the orders of the court are enforceable under coercive machinery of the code of civil procedure 1908 while there is no provision in the act for enforcement of the orders of the tribunal ^[19].”

Appeals against interim orders

Sub-section 1(a) of section 37 provides that an appeal shall lie from the order of the court granting or refusing to grant any measure under section 9. The appeal shall lie in the same court to which appeal lies from the original decrees. Sub-section 2(b) of section 37 provides that an appeal shall lie to a court from an order of an arbitral tribunal granting or refusing to grant an interim measure under section 17. However this provision does not override the provisions of article 133 of the constitution of India and an appeal will lie to the Supreme Court if the provisions of article 133 are otherwise complied with.

Conclusion

It is submitted that lacunas in the provisions of interim measures should be set right by legislative initiation. “The system of dual agency for providing relief needs to be abolished or otherwise some enforcement mechanism be provided for enforcement of the interim measures of protections ordered by the Arbitral Tribunal. Only when a party is not able to get relief from the arbitral tribunal, it should be allowed to knock the doors of the Court. This will be in line with the objectives of the Act to minimise the intervention of the Court in arbitral proceedings ^[20].”

“While drafting arbitration clause, one should keep in mind whether the arbitral tribunal should be given the power to grant interim relief or not. If arbitration clause provides for such power to arbitral Tribunal, then one need not approach the court for such relief. But there exists a doubt about its enforceability, if it is not complied with by the party. Courts can be approached only if interim relief as prayed is refused u/s 37(2)(b) but not for enforcing the interim relief granted by the arbitrator ^[21].”

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