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Interim Protection by Arbitral Tribunal and Civil Court – Scanned through the Arbitration & Conciliation (Amendment) Act 2015

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Abstract:

Interim protection, a phenomenon in arbitration and a subject matter of divergent interpretations, w.r.t. the stage at which the same can be sought, the forum at which it can be sought, the effectiveness of the forum, applicability of such protection to international commercial arbitration and differing judicial interpretations, drew attention of law makers and culminated into the Arbitration and Conciliation (Amendment) Act 2015. This paper is an attempt to scan through the amendment from interim protection perspective, in the light of extant law and evolving realities.

1. Introduction

Interim protection is nothing but risk management. Normally, consequent upon a commercial transaction, any issue between the parties is attempted to be sorted out through negotiations. A breakdown of negotiations takes the dispute to the next level that is courts. It is a time consuming, costly and sometimes patience exhausting path. This forms the genesis of settlement of disputes through alternative disputes resolution i.e. other than through courts. Arbitration and conciliation are important constituents of this mechanism. Arbitration is a process in which a neutral third party (arbitrator) awards a decision after hearing both the parties. Normally, in an arbitration, initiator of redressal, also called plaintiff or applicant in civil courts is an aggrieved party. Between the date when dispute has arisen and the date when the award is enforced, there is a period of uncertainty besides apprehension that the status quo of the property/goods/amount etc., a subject matter of dispute, may undergo change. It is to address such likelihood that a judicial firewall is sought to be thrown around them in varied configurations, till the final award is enforced. This, in common parlance, is called interim protection.

2. Arbitral Tribunal & Court

The two terms 'arbitral tribunal' and 'court' frequently used in the paper have been defined in the Arbitration and Conciliation Act 1996. The former has likelihood of being confused with other tribunals constituted under Article 323A or 323B of the Constitution of India. As against these tribunals, which are established by acts of Parliament, arbitral tribunal¹ signifies sole arbitrator or a panel of arbitrators appointed under the Arbitration and Conciliation Act 1996. The 'court'² under the Arbitration and Conciliation Act 1996 is principal civil court or high court with original jurisdiction. Consequent upon the Arbitration and Conciliation (Amendment) Act 2015, the relevant court in the case of international commercial arbitration, would be the High Court only having original ordinary jurisdiction.

3. Types of Interim Protection

The interim protection in disputes which are subject matter of arbitration falls into the following two categories:

- Interim protection by civil court (Section 9)
- Interim protection by arbitral tribunal (Section 17)

The arbitral tribunal and the civil court are the two for a under Section 17 and Section 9 respectively, enjoined upon to grant interim protection to the party moving an application before them. Whereas an application under Section 17 is moved before the arbitral tribunal, the similar move is made before the appropriate court under Section 9. There is exclusivity and overlap of jurisdiction of the arbitral tribunal and court to some extent for grant of interim protection. The desirability of Section 9, notwithstanding Section 17 emanates from the fact that Section 17 operates only during the existence of the arbitral tribunal. During that period, the power

¹Section 2(1)(d) The Arbitration and Conciliation Act, 1996.

²Section 2(1)(e) The Arbitration and Conciliation Act, 1996.

conferred on the arbitral tribunal under Section 17 and the power conferred on the court under Section 9 overlaps. So far as the period prior to arbitral tribunal and post arbitral award is concerned the appropriate forum for seeking interim protection is court only. The issue of before and during the arbitral proceedings has been elaborately deliberated upon by Hon'ble Supreme Court in their judgement dated 13.01.1999,³ as under:

“The material words occurring in Section 9 are "before or during the arbitral proceedings". This clearly contemplates two stages when the Court can pass interim orders, i.e., during the arbitral proceedings or before the arbitral proceedings. There is no reason as to why Section 9 of the 1996 Act should not be literally construed. Meaning has to be given to the word "before" occurring in the said Section. The only interpretation that can be given is that the Court can pass interim orders before the commencement of arbitral proceedings.....Section 9 of the said Act corresponds to Article 9 of the UNCITRAL Model Law which is as follows: It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.....This article recognises, just like Section 9 of the 1996 Act, a request being made before a court for an interim measure of protection before arbitral proceedings..... To put it differently the arbitration proceedings can commence and continue notwithstanding a party to the arbitration agreement having approached the court for an order for interim protection. The language of Section 9 of the 1996 Act is not identical to Article 9 of the UNCITRAL Model Law but the expression "before or during arbitral proceedings" used in Section 9 of the 1996 Act seems to have been inserted with a view to give it the same meaning as those words have in Article 9 of the UNCITRAL Model Law. It is clear, therefore, that a party to an arbitration agreement can approach the court for interim relief not only during the arbitral proceedings but even before the arbitral proceedings. To that extent Section 9 of the 1996 Act is similar to Article 9 of the UNCITRAL Model Law. The court may exercise its power to grant an interim injunction before there has been any request for arbitration or the appointment of arbitrators, provided that the applicant intends to refer the dispute to arbitration in due course.”

4. Constituents of Interim Protection by Civil Court

Civil court is empowered to grant interim protection of interest in regard to subject matter of arbitral proceedings in respect of the following:

- Preservation/custody/sale of goods, which are subject matter of the arbitration.
- Securing amount in dispute.
- Preservation/detention/inspection etc. of property which is subject matter of the arbitration.
- Interim injunction.
- Any other interim measure court thinks just and convenient.

5. Stages of Interim Protection by Court

Interim protection can be sought at any of the following three stages:

- Before arbitral proceedings
- During arbitral proceedings
- After arbitral award but before enforcement.

Section 21 of the Arbitration and Conciliation Act, 1996 envisages commencement of arbitral proceedings on the date on which a request for that dispute, to be referred to arbitration, is received by the respondent. Thus the moment request for arbitration is received by the other party, application can be moved in the court and the court is empowered to grant interim injunction even before appointment of an arbitrator. It can be sought subsequent thereto also. In case due to any reason, whatsoever, interim protection has not been applied for at any of the first two stages, the same can be sought even after award is made, but not enforced. The arbitral award has mandate of law akin to judgement of court and is enforceable as a decree of the court⁴. An arbitral award transforms itself into a decree enforceable under the Code of Civil Procedure, 1908 upon satisfaction of any of the following two conditions:

- The time period for filing application for setting aside award has lapsed.
- Application for setting aside award was filed but refused by court.

Thus the stage prior to which interim protection can be sought is enforcement of award. It is prior to the stage when arbitral award transforms into a decree, that interim protection can be granted by court. Grant of interim protection being purely discretionary power of court, the applicant is required to make out a case on the face of it and demonstrating that irreparable economic loss would be caused if protection is not granted.

6. Interim Protection by Arbitral Tribunal

Arbitral tribunal which could be a single arbitrator or a panel of arbitrator is also empowered to grant interim protection. Section 17 of the Arbitration and Conciliation Act 1996 provides that the arbitral tribunal may, order a party to take any interim measure of protection or provide security for the measure in regard to dispute. It is axiomatic that before making a request to the arbitral tribunal, the same has to be in existence. This is surely a stage subsequent to the request to the party for referring the dispute to arbitration having been received by the other party. The arbitral tribunal has not been endowed with power of civil court under the Section to have its orders of interim protection enforced.

³Sundaram Finance Ltd. V NEPC India Ltd. (1999)2SCC479

⁴Section 36 The Arbitration and Conciliation Act, 1996.

As per the Arbitration and Conciliation Act 1996, the arbitral tribunal is empowered by Section 17 to make orders amounting to interim measures. The corresponding provision was not available in the predecessor Act of 1940. However interim protection was available through court as per Section 18 of the Arbitration Act 1940 which stipulated that at any time after the filing of the award, upon satisfaction of laid down criteria, the court may pass such interim orders as it deems necessary. The Interim protection through court was envisaged only after award has been filed in court and the court is satisfied that a party has taken or is about to take steps to defeat, delay or obstruct the execution of any decree that may be passed.

In the Arbitration and Reconciliation Act 1996, the power to grant interim protection has been enjoined upon the arbitral tribunal. But such power can be exercised during the period when arbitral tribunal is in existence. Section 17 is invoked by party to the dispute upon application filed before the arbitral tribunal. Hence the question of interim protection by arbitral tribunal does not arise under the following situations:

- Prior to its existence
- After the arbitral tribunal has given award.

In nutshell, prior to the constitution of arbitral tribunal or after the award having been made, the arbitral tribunal does not get jurisdiction to grant interim protection, which falls within the exclusive jurisdiction of court.

7. Interim Protection by Arbitral Tribunal and the Arbitration and Conciliation (Amendment) 2015 Act

With the coming into force of the Arbitration and Conciliation (Amendment) Act 2015, the position w.r.t. Section 17 has undergone change. The Arbitration and Conciliation (Amendment) 2015 Act, effective from 23.10.2015 while elaborately elucidating illustrative areas of interim protection under Section 17 by the arbitral tribunal on the analogy of similar protection envisaged under Section 9 by court, has enlarged the jurisdiction of arbitral tribunal.

The position, hitherto existing as per the Arbitration and Reconciliation Act 1996 has undergone expansion with the 2015 amendment. Now interim protection can be sought from the arbitral tribunal even after making of award but before its enforcement. Section 17 has been made more elaborate. The clause (i) and (ii) with sub clause (a) to (e) of clause (ii), as existing in the extant Section 9 of the Arbitration and Reconciliation Act 1996 have also been positioned in Section 17. Another significant amendment is that Section 17(2) has been inserted below newly enshrined Section 17(1). It stipulates that the order issued by arbitral tribunal 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. Thus during and after the arbitral proceedings, the powers of the arbitral tribunal and court have been equalized whereas before arbitral proceedings, it is till the exclusive domain of court to grant interim protection.

Section 21, as already brought out above clearly enunciates that the date of receipt of request by the other party for the dispute to be referred to arbitration technically marks the commencement of arbitral proceedings. However, consideration by arbitral tribunal will have meaningful significance only when arbitral tribunal stands constituted. Section 17 enjoins upon arbitral tribunal power to grant interim protection. Hence the expression before arbitral proceedings does not refer to a stage prior to the party sending request for the dispute to be referred to arbitration. It is period between such request received by the other party and the constitution of arbitral tribunal. The period from constitution of arbitral tribunal and thereafter up to the date when award is given by the arbitral tribunal may be categorized as period of arbitral proceedings in practical sense of the term.

8. International Commercial Arbitration and the Arbitration and Conciliation Act 1996

The Arbitration and Conciliation Act 1996 covers both domestic arbitration as well as international commercial arbitration. The long title that precedes preamble of the said act sets out the purpose of the act as an act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. As per Section 2(7) of the act an arbitral award made under this Part (refers to Part I containing Section 2 to 43) shall be considered domestic award. The Arbitration and Conciliation Act 1996 is in four Parts. Part I titled 'Arbitration' containing Sections 2 to 43 has applicability where the place of arbitration is in India. This has been specifically provided in Section 2(2) of the said Act as 'this Part shall apply where the place of arbitration is in India.' The international commercial arbitration as defined in Section 2(1) (f) of the said act implies arbitration where at least one party is not an Indian national as against domestic arbitration, where both the parties are Indian nationals. There has not been substantive change in Section 2(1)(f) containing definition of international commercial arbitration in the Arbitration and Conciliation (Amendment) Act 2015 as compared to the Arbitration and Conciliation Act 1996.

9. Interim Protection and Landmark Judgments on International Commercial Arbitration

The applicability of Section 9 i.e. interim protection in regard to international commercial arbitration has been interpreted differently at different times. Extracts of some of the landmark judgements of Hon'ble Supreme Court are indicated here under:

*Bhatia International v Bulk Trading S.A. and Anr*⁵. Hon'ble Supreme Court in the three judge bench judgement dated 13.03.2002 observed and held that "To conclude we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsory apply and parties are free to deviate only to the extent permitted by the derivable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or

⁵(2002)4SCC105

rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply.”

*Bharat Aluminium Co. v Kaiser Aluminium Technical Services Inc*⁶. Hon'ble Supreme Court in the fivejudge bench judgement dated 06.09.2012 observed and held that “With utmost respect, we are unable to agree with the conclusions recorded in the judgments of this Court in Bhatia International (supra) and Venture Global Engineering (supra). In our opinion, the provision contained in Section 2(2) of the Arbitration Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India. Similarly, no suit for interim injunction simplicitor would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India.

10. International Commercial Arbitration and the Arbitration and Conciliation (Amendment) Act 2015

With the Arbitration and Conciliation (Amendment) Act 2015, a proviso has been inserted below Section 2(2). The proviso makes, inter alia, the interim protection applicable to international commercial arbitrations even if the seat of arbitration is outside India. It, therefore, restores the pre Bharat Aluminium Co, position or in other words Bhatia International position w.r.t. interim protection. Section 2(2) reads “This Part shall apply where the place of arbitration is in India” and the proviso inserted vide the Arbitration and Conciliation (Amendment) Act 2015 reads as “Provided that subject to an agreement to the contrary, the provisions of Sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of Section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II of this Act.”.

11. Concluding Remarks

Interim protection has time reference. It outlives its significance and currency once the arbitral award is enforced. It is interregnum period which is a phase of internal turmoil, assuaged by arbitral tribunal and court. Immediately after making a request to the other party to refer the dispute to arbitration, the aggrieved party is equipped with right to move an application to civil court under Section 9 for interim protection. The appointment of arbitrator(s), called arbitral tribunal sets forth another forum for interim protection. When the arbitral tribunal is constituted, the aggrieved party may move an application to arbitral tribunal under Section 17 for interim protection. When an arbitral award is made but not yet enforced, the aggrieved party has an option again to move an application for interim protection before arbitral tribunal or court. Consequent upon the Arbitration and Conciliation (Amendment) Act 2015, the orders of arbitral tribunal granting interim protection are orders of Court and enforceable under Code of Civil Procedure, 1908.

12. Disclaimer

The views expressed in this paper are those of the author and co-author and do not constitute legal advice or the official views of the Ministry of Railways, Government of India.

13. References

- i. Section 2(1) (d) The Arbitration and Conciliation Act, 1996.
- ii. Section 2(1) (e) The Arbitration and Conciliation Act, 1996.
- iii. Sundaram Finance Ltd. V NEPC India Ltd. (1999)2SCC479
- iv. Section 36 The Arbitration and Conciliation Act, 1996.
- v. (2002)4SCC105
- vi. (2012) 9 SCC 552

⁶(2012) 9 SCC 552