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Gate No. 3, Fergusson College Campus, Pune - 411 004.
Tel. : (020) 3086 6400 E-mail : deslaw@despune.org
Website : www.deslaw.edu.in

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To,

Mr. Sudhir Tarote
Assistant Professor,
DES Shri. Navalmal Firodia Law College, Pune

Subject: Letter of Gratitude and Certificate of Publication

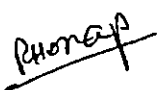
Greetings!

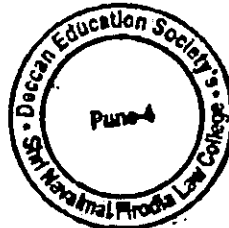
We are glad to inform and certify that the paper titled 'Power Of Court To Grant Interim Measures Of Protection Under The Arbitration And Conciliation Act, 1996: Amendment 2015 – A Missed Out Chance To Keep Parties On Track Of Arbitration', authored by you has been published in the Volume VI, April 2018, of the '*Fiat Justitia – let justice be done...*', ISSN 2320-2696. Kindly consider this as the certificate of publication in this regard. Thus, all the rights of the aforementioned author with regard to the publication of the aforementioned paper lie with the Journal however, other claims as to content lie with the author. This letter confers on the author an exhaustive right to claim credits over the aforementioned work at all forums.

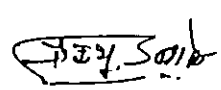
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Looking forward for the future association. Kindly, acknowledge the same.

Best Regards,


Editor-in-Chief
Dr. Rohini Honap
Principal




Co-editor
Mr. Sourabh Ubale
Assistant Professor

E-mail: fiatjustitia@deslaw.edu.in

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**POWER OF COURT TO GRANT INTERIM MEASURES OF
PROTECTION UNDER THE
ARBITRATION AND CONCILIATION ACT, 1996 :
AMENDMENT 2015 – A MISSED OUT CHANCE
TO KEEP PARTIES ON TRACK OF ARBITRATION.**

~ Mr. Sudhir Tarote

Parties chose arbitration mainly for speedy disposal of their dispute. India repealed Arbitration Act, 1940 because it allowed court intervention at almost every step of the arbitration proceedings. Arbitration and Conciliation Act, 1996 tried to curtail the court intervention and allowed minimal role to play only when there is express provision in that regard. This paper focuses on the role of court in granting interim measures of protection. Whether domestic or international, in arbitration, parties are keen to protect their interest; and provisions related to 'interim measure', especially courts role in it have always been looked at cautiously. While granting interim measure court is expected to ensure that arbitration will take place according to the agreement between the parties. This paper goes into the detailed analysis of concerned amended provisions to see how effective the amendment is and whether it has improved or worsen the interest of parties.

Introduction:

Arbitration, one of the alternative dispute resolution methods, has become a 'true alternative' to traditional courts. Maximum party autonomy, speedy disposal, binding decision, easy enforcement of award in foreign countries, and such other numerous features has made arbitration a better and hence a favourite alternative for resolving dispute. One fact must be understood at the outset, that except Court and arbitration, other methods do not provide interim measures and do not have many of the features which arbitration has.

Mediation and conciliation has a party autonomy but it lacks in providing binding decision. Mediator or conciliator, both are incapable of providing any interim measure, which is significantly available when parties opt for arbitration. Moreover, mediation and conciliation are meant for settlement, and hence any of the party can easily refuse to participate in the process. Unlike in arbitration, none of the party can be compelled to go through mediation or conciliation. On the other hand, once the arbitration agreement is entered into, participation in the

* Assistant Professor, DES Shri Navalmal Firodiya Law College, Pune

Power of Court to Grant Interim Measures of Protection

arbitration proceedings is binding on the parties. Reading section 5¹ of the Act with section 9² of the Code of Civil Procedure, 1908 (CPC) makes it clear that, Court has very limited role to play when parties chose arbitration over traditional Court. Valid arbitration agreement bars the jurisdiction of Court from adjudicating the dispute.

A Court gives a decision and also has power to issue interim orders, but it takes enormous time to decide and one more problem is that, decision of a court is very difficult to enforce outside the country. Party autonomy which is a distinctive feature of arbitration is absent in traditional court system. Therefore, disputants are inclined to prefer arbitration over the traditional Court for resolving their dispute.

Not only in arbitration, but in any dispute resolution system, a party sometime needs to take urgent steps such as to protect subject matter or evidence; or to bring an injunction; or to ensure compliance of final order by demanding security from opposite party. An efficient dispute resolution system must address a situation, where a party cannot wait till the dispute is finally adjudicated upon and wants a temporary solution to protect his interest. Measures made available in this regard are to continue until a specified time or until the further order and hence are known as 'interim measures'.

The object is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial.³

The grant of interim relief is a discretionary remedy and in exercise of judicial discretion in granting or refusing to grant, the court takes into consideration the following as guidelines:

1. Whether the person seeking interim relief has made out a *prima facie* case. This is *sine qua non*.
2. Whether the balance of convenience is in his favour
3. Whether the person seeking interim relief would suffer irreparable injury

¹ See s. 5 of the Act: Extent of judicial intervention— Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

² According to s. 9 of CPC, the Courts shall (subject to the provisions herein contained) have jurisdiction to try all Suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

³ Anand Prasad Agaralla v. Tarkeshwar Prasad and Ors., AIR 2001 SC 2367

The Arbitration Act") has conferred jurisdiction on arbitration tribunals. It provides two modes of dispute resolution. One may request for interim measures. The court's power is limited to the provisions of the Act. The recent amendments to the Act have provided for interim measures. Both are relevant for the analysis of the effectiveness of the arbitration process in the interest of the parties. The court's power to grant interim measures is exercised cautiously.

Interim Measures
Parties can apply for interim measures to an arbitration tribunal. In certain circumstances, the court may grant interim measures. Conciliation is provided for in the Model Law. The Arbitration Act (Amendment) 2015 has also amended the provisions relating to interim measures. Application for interim measures by parties to an arbitration agreement is provided for in section 17 of the Arbitration Act.

When such an application for interim relief is made, the court may grant such relief as it deems fit. The court's power to grant interim relief is limited to the provisions of the Arbitration Act.

⁴ One of the reasons for the utility of interim measures is that it prevents the court from intervening in the arbitration process. The Arbitration Act (Amendment) 2015 has provided for interim measures. Ranji Bhargava (P&H).

The Arbitration and Conciliation Act, 1996 (Act 3 of 2016) ("the Act") has considerably reduced the instances when Court can intervene in arbitration proceedings.⁴ One of the permitted instances where Court jurisdiction can be invoked is need of a party to get interim relief. It provides two options for interim measure. First, under section 9, a party may request for court assistance when arbitral tribunal is not yet formulated; second, under section 17, a request to an arbitral tribunal when it is constituted and is functional. This paper provides an overview of Court's power to grant interim relief and analysis concerned provisions. It is interesting to discuss especially on the backdrop of recent amendment in the Act in the year 2015.⁵ Section 9 and section 17, both are revamped by the amendment. Paper also goes into the detailed analysis of amended section 9 and concerned provisions to see how effective the amendment is and whether it has improved or worsen the interest of parties. Whether domestic or international, in arbitration, parties are keen to protect their interest; and provisions related to 'interim measure', especially courts role in it have always been looked at cautiously.

Interim Measure under section 9:

Parties can apply for interim relief either in a court under section 9 or to arbitral tribunal under section 17. Both the provisions lay down similar circumstances when an interim order can be passed. The Arbitration and Conciliation Act, passed in the year 1996, is based on the UNCITRAL Model Law. Thereafter, recently the Arbitration and Conciliation (Amendment) Act, 2015 is passed, which with other provisions of the Act also amended section 9 and section 17.

Application can be made under section 9 to a Court for interim relief only by parties to arbitration agreement. The existence of an arbitration agreement is *sine quo non* for the contracting parties to refer their dispute to arbitration and avail from the court any interim relief in terms of this section.

When such an application is filed, Court must see that applicant seeking interim relief is a party to arbitration agreement and relief sought is related to a dispute which comes within the preview of such an arbitration agreement.⁶ Allowing Court to order interim relief is not to

⁴ One of the reasons why Arbitration Act, 1940 had become redundant and almost lost its utility, is excessive interference of Court. The 1996 Act came with the promise of minimum court intervention.

⁵ The Arbitration and Conciliation (Amendment) Act, 2015 came into effect from 23rd October 2015.

⁶ *Ramji Bharanji v. Ambience Developers and Infrastructure Pvt. Ltd.*, AIR 2010 NOC 1031 (P&H).

obstruct arbitration proceedings or encroaching upon arbitrators' power. Here, court plays an important role to protect the interest of parties when arbitral tribunal is not yet constituted or to cover the gap where arbitral tribunal is incapable to provide any such relief. section 9(1) allows party to take recourse of court before as well as during arbitral proceedings.

The term 'before or during arbitral proceedings', used in this provision suggests that, a Court can pass interim order 'before arbitral proceedings' or 'after arbitral proceedings', and these words will have to be interpreted to mean that Court can pass interim orders before commencement of arbitral proceedings.⁷

Power of Court to grant interim relief is extended even when award is delivered, but has not been yet enforced. Arbitrators have their limitations to grant interim relief, because they are privately appointed by parties and do not possess all the powers which a Court has. This is the reason; Court can pass interim relief even during arbitration proceedings or after award is made but is still unenforced.

Scope and applicability of Section 9

The scope of section 9 is limited to request for an 'interim relief'. It only permits application for interim measures in clauses 9(1) (i) and 9(1) (ii) thereof. Thus, under this provision, neither a party can apply nor a court can grant any relief for stay of arbitral proceedings or to challenge the existence or validity of the arbitration agreement or the jurisdiction of the arbitral tribunals. All such challenges would have to be made before the arbitral tribunal.⁸

The power of court under this section, to issue interim orders, is guided by the underlying principles which govern the exercise of an analogous power in CPC.⁹ No special procedure is prescribed by the Act for dealing with an application for interim measure/order under this section and hence, the general rule that governs the court while considering the grant of interim measure/order at the threshold are attracted. This power cannot be totally independent of those principles. The exercise of the power cannot be carried out in an unchartered territory ignoring the basic principles of procedural law contained in CPC. The Principles laid down in CPC, for the grant of interlocutory remedies, must furnish a guide to the court when it determines an application under this section.¹⁰

⁷ East India Udyog Ltd. v. Maytas Infra Ltd., AIR 2015 AP 118

⁸ Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 10; AIR 2002 SC 1432

⁹ See s. 9(1) of the Act: "...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."

¹⁰ Nimbus Communications Ltd. v. BCCI, 2012 (4) Arb. LR 113 (Bom) (DB).

According to under section 9:

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¹¹ Harita Finance Ltd. v. S

¹² AIR 2004 SC 1433; (20

¹³ S. 9(3) "Once the ar application under sub-s not render the remedy p

According to Madras High Court, to invoke the jurisdiction of court under section 9:

1. There should be a dispute which had arisen with respect to the subject-matter of the agreement and referable to an arbitral tribunal.
2. There has to be a manifest intention on the part of the applicant to take recourse to the arbitral proceedings at the time of filing application under this section. The issuance of a notice in a given case is sufficient to establish the manifest intention to have the dispute referred to an arbitral tribunal.
3. The application can be entertained under this section before the court only if in a given case the subject-matter of the arbitration comes within its original civil jurisdiction, both pecuniary and territorial.¹¹

This is pertinent to note here that, arbitration agreement must be present before filing application under section 9 in the Court and the applicant must also be ready to follow arbitration agreement.

It was found in many cases that, jurisdiction of court under section 9 is being misused by the parties to delay or avoid arbitration proceedings. In *Firm Ashok Traders v. Gurumukh Das Saluja & others*,¹² the Supreme Court observed that, the party must be able to satisfy the Court that the arbitral proceedings are actually contemplated or manifestly intended and are positively going to commence within a reasonable time. What is reasonable time will, however depend on the facts and circumstances of each case and the nature of interim relief sought. In fact, the Court, before granting interim relief under section 9 should ask the party approaching the Court, as to when the arbitral proceedings are going to commence. If arbitral proceedings are not commenced within a reasonable time of an order under section 9, the relief allowed to the party shall cease to exist.

Applicability of section 9 has been narrowed down by newly added section 9(3)¹³. This provision is introduced to keep the parties on the track of arbitration and avoid their deviation towards Court for interim relief. It was observed that, though arbitral tribunal had power to issue interim orders, parties' inclination was towards the Court to get interim relief. For this approach, parties solely cannot be blamed, because even if similar

¹¹ *Harita Finance Ltd. v. ATV Projects India Ltd.*, 2003 (2) Arb. I.R 76 (Mad.)

¹² AIR 2004 SC 1433; (2004) 3 SCC 155.

¹³ S. 9(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."

Power of Court to Grant Interim Measures of Protection

powers were granted to arbitral tribunal, its enforcement was not as effective as of the Court order. So, when it is expected that parties shall avail arbitral tribunal's jurisdiction for interim relief, parties must be made assured of effective enforcement of tribunal's order. To achieve what is expected under section 9(3), and to strengthen the enforcement of arbitral order of interim relief, section 17 has also been amended by inserting new provision section 17(2)¹⁴. This provision, in true sense, has brought at par, the courts order under section 9 and arbitral tribunals order under section 17 at par.

This amendment has brought a welcome change and expectation is that, parties will prefer arbitral tribunal over Court, taking into account the speediness of the former.

Amended section 9 – A missed out chance

The interim measures which a court can grant through its order on the request of a party, are listed down under the section 9(1) (i) and (ii). It empowers the Court (for the purpose of arbitration proceedings) to pass orders for the preservation, interim custody or sale of any goods, and to order inspection of any property or thing which was the subject matter of the reference. It can authorize (for any of the aforesaid purposes) any person to enter upon any land or building in the possession of any party or authorize 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. The court also has the power to issue interim injunctions or appoint a receiver, secure the difference in amount in the reference or appoint a guardian for a minor or person of unsound mind for the purpose of arbitration proceedings.

Core of judgment in the *Firm Ashok Traders*¹⁵ has been given a statutory form by the year 2015 amendment, inserting a new provision in the form of section 9(2)¹⁶. Three things are important in this provision. First, section 9(2) is applicable only when a party approaches the Court before the commencement of arbitral proceedings. Second, and most importantly, it is implied in the provision, that applicant must comply

14 S. 17(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."

15 Supra note 10.

16 See s. 9(2): "Where, before the commencement of the arbitral proceedings, a Court passes an order of 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."

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with the arbitration agreement and must not question the arbitration agreement by filing parallel suit in the same or any other Court. It will be absurd to allow benefit of section 9, which of course is possible only by virtue of arbitration agreement, when applicant is hesitant to commence arbitration proceedings. Third, the provision expressly mentions a time limit, for commencing arbitration proceedings, of ninety days from the date interim relief order is issued. This provision is inserted with the purpose of discontinuing the misuse of Court jurisdiction. It is expected that, once interim relief is granted, parties shall commence the arbitration proceedings at the earliest. After getting the interim relief, it is responsibility of applicant party to show his willingness by initiating measures to begin with arbitration proceedings.

It is important to note here, that the time limit of 90 days, to commence the proceedings, in this provision is somewhat excessive and should have been reduced to 30 days only. To understand this, we have to look at the section 21¹⁷ and section 3¹⁸ of the Act. According to section 21, when one party receives the request from other party, that dispute has arisen, and he wants to refer it to arbitration, as agreed by both the parties in the arbitration agreement, arbitration is said to be commenced. Now 'receipt of written communication' is dealt by section 3, and the provisions under it suggests that, delivery of written communication is deemed to have been received when it is delivered to addressee by any of the modes given there under.

Conjoint reading of these two provisions make it clear that, to commence an arbitral proceedings is not so difficult and time consuming. Section 3(2) is worth to mention here to understand this point. As per the provision, the day communication is delivered; presumption is that, it is received by the other party. Now, in light of this, it can be said that, time line of 90 days is not justified and to comply with 'commencement term' under section 9, to keep interim relief valid, 30 days are sufficient

¹⁷ s: 21: Commencement of arbitral proceedings - "unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request of that dispute to be referred to arbitration is received by the respondent."

¹⁸ S. 3: Receipt of written communication-(1) Unless otherwise agreed by the parties, -

- (a) Any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address, and
 - (b) If none of the places referred to in clause (a) can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.
- (2) The communication is deemed to have been received on the day it is so delivered.
 - (3) This section does not apply to written communication on in respect of proceedings of any judicial authority.

enough. One more purpose to suggest this reduction in time limit is that, when arbitration proceedings are commenced, delay in further technicalities, such as appointment of arbitrator (if are not appointed till the time), actual conduct of arbitral proceedings etc. can be avoided. Nevertheless, if arbitration does not commenced within 30 days, as suggested, the present provision allows court to extend validity of interim relief. Such extension will be subject to court's satisfaction that, applicant of section 9 has no role to play in delaying the commencement and he has intention to comply it.

Mere commencement of arbitral proceedings does not guarantee that applicant will actually respect the arbitration agreement. After commencement, arbitration has numerous other steps required to be complied by parties. Many High Courts has expressed their concerned over such attitude of parties. A party who has no intention to ultimately refer the dispute to arbitration and seek final relief cannot be permitted to seek interim relief.¹⁹ Where the petitioner has taken no stem to even appoint an arbitrator even after having invoked arbitration clause five years back, would not be entitled to seek interim measure on this ground alone.²⁰ Year 2015 amendment was an opportunity to bind the applicant for clear responsibility towards arbitration agreement. Hence, another suggestion to improve effectiveness of this provision is that, along with the burden to commence arbitration proceedings, applicant shall also be kept under check to cooperate in expediting arbitration.

For this purpose, section 9 shall be amended and following sub-section shall be inserted, namely:-

"(2)(a) Where, interim order is issued, Court shall have power after 90 days from the date of such order, to annul the interim order if respondent complains of non-cooperation of applicant, at any of the stage of arbitral proceedings."

This suggested amendment will help curtail the misuse of section 9 and will also prove to expedite the arbitration.

Earlier, in the Arbitration Act, 1940, no appeal had been provided for an injunction granted by the courts. Now, by virtue of section 37(1)(b), order of granting or refusing to grant any measure under section 9 is appealable.

¹⁹ Apple Finance Ltd. v Fayathri Sugar Complex Ltd., 2004 (3) Arb LR 379 (Mad); Punj Llyod Ltd. v. Valentine Maritime (Mauritius) Ltd., 2008 (2) RAJ 422 (Del).

²⁰ Minochar @ Minoo Aspandiyar Irani v. Deenyar Sheriar Jeani, 2014 (4) Arb LR 444; AIR 2015 NOC 50 (Bom).

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²¹ Jabalpur Cable Net

²² M. Gurudas & Ors
& Anr., (2007) 12 S

It cannot be disputed that under section 9 the court has power to grant interim injunction or to take such other interim measure of protection as may appear to the court to be just and convenient. Thus an order refusing grant of an *ex parte* injunction can be appealed against under section 37(1)(a).²¹

Conclusion:

Section 9 confers power on Court to provide interim relief to a party only for the purpose of arbitration proceedings and with a view to protect the interest of the parties which otherwise cannot be protected or safeguarded by the arbitral tribunal. Court should take utmost precaution while granting relief, as purpose of this provision is not to obstruct the arbitration proceedings. Arbitration agreement between the parties is an agreement to exclude Court jurisdiction to decide dispute, and to submit it to arbitral tribunal for disposal. This does not strike off the role of court completely. Parties can approach court for interim relief.

Grant of an interim relief in regard to the nature and extent thereof depends upon the facts and circumstances of each case as no strait-jacket formula can be laid down. There may be a situation wherein the defendant/respondent may use the suit property in such a manner that the situation becomes irretrievable. In such a situation, interim relief should be granted.²² Application under section 9 suggests that applicant accepts that there is a final and binding arbitration agreement in existence. It is also implicit that a dispute must have arisen which is referable to the arbitral tribunal. It can be said that, application filed by an applicant under section 9 further contemplates that arbitration proceedings will take place between the parties. In order to give full effect to the words "before or during arbitral proceedings" occurring in section 9 it would not be necessary that a notice invoking the arbitration clause must be issued to the opposite party before an application under section 9 can be filed. The issuance of a notice may, in a given case, be sufficient to establish the manifest intention to have the dispute referred to arbitral tribunal, but a situation may so demand that a party may choose to apply under section 9 for an interim measure even before issuing a notice contemplated by section 21 of the said Act. 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.

²¹ Jabalpur Cable Network Pvt. Ltd. v. E.S.P.N. Software India Pvt. Ltd., AIR 1999 MP 271

²² M. Gurudas & Ors. v. Rasaranjan & Ors., AIR 2006 SC 3275; Shridevi & Anr. v. Muralidhar & Anr., (2007) 14 SCC 721.

Once it is so satisfied, the Court will have the jurisdiction to pass orders under section 9, giving such interim protection as the facts and circumstances warrant. While passing such an order and in order to ensure that effective steps are taken to commence the arbitral proceedings, the Court while exercising jurisdiction under section 9 can pass conditional order to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing the arbitral proceedings. What is apparent, however, is that the Court is not debarred from dealing with an application under section 9 merely because no notice has been issued under section 21 of the Act.

It is important to understand here, that Court's interim order shall not be detrimental to the power vested in the arbitral tribunal, and make it impossible for tribunal to resolve the dispute between the parties. Parties chose arbitration because it has ability to provide speedy resolution of dispute. The legislatures should be applauded, for showing courage to make arbitral tribunal's order equivalent to that of the Court order, and enforceable under the Code of Civil Procedure, 1908.²³ Year 2015 amendment has made efforts to remove few lacunae from the provision, the changes brought are welcomed, but above mentioned suggestions still scope for further improvement they could have improved it by inserting suggested provision. Section 8 empowers Court to refer parties to arbitration if valid arbitration agreement exists between the parties. This provision is essential to make arbitration as a binding process of dispute resolution. Problem here is that, neither section 8 nor section 9 provides for a solution to make parties to resolve their dispute through arbitration with fullest cooperation and commitment. This 2015 amendment in the Act could have expressly mentioned it in the above mentioned two provisions or by inserting a new provision to that effect. In present situation, as far as section 9 is concerned, the balance has to be sought by the Court between need of interim relief to a party and keeping parties on the track of arbitration.

23 Amended s. 17 brings interim order passed by arbitral tribunal at par with order passed by a Court

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