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MAINTAINING BALANCE OF POWER – COURT'S ENTERTAINMENT OF INTERIM RELIEF APPLICATIONS AFTER CONSTITUTION OF ARBITRAL TRIBUNAL

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Introduction

Over the past few years, Indian courts have actively taken a pro-arbitration stance and emphasised on minimum judicial interference in arbitral processes or awards. Recently, the Supreme Court of India in Arcelor Mittal Nippon Steel India Ltd v Essar Bulk Terminal Ltd[1], has further clarified the scope of the courts' power to "entertain" and adjudicate applications for interim relief, when the arbitral tribunal has been constituted during the pendency of parties' applications for interim relief before the court.

The Supreme Court held that once an arbitral tribunal is constituted, the court could not entertain, take up for consideration or apply its mind to an application for interim relief under Section 9 of the (Indian) Arbitration and Conciliation Act, 1996, (Act) except in cases where the remedy under Section 17 of the Act is rendered inefficacious. However, if the date of the Section 9 application before the court precedes the constitution of the arbitral tribunal, the court may adjudicate the Section 9 application, in certain circumstances. The present article provides a quick snapshot of the Supreme Court's verdict.

Background Facts

Arcelor Mittal Nippon Steel India Limited/ Appellant (Arcelor) and Essar Bulk Terminal Limited/ Respondent (Essar) entered into an agreement for cargo handling at Hazira Port (Agreement). Article 15 of the Agreement provided that all disputes arising out of the Agreement would be settled in accordance with the provisions of the Act. Subsequently, certain disputes arose between the parties and the arbitration clause in the Agreement was invoked. Meanwhile, both Arcelor and Essar sought interim relief under Section 9 of the Act before the Commercial Court in Surat, Gujarat on 15 January 2021 and 16 March 2021, respectively (Interim Relief Applications). The Commercial Court heard the Interim Relief Applications and reserved the matter for orders on 7 June 2021 (Order).

While the judgement was still reserved, the High Court of Gujarat constituted a three-member arbitral tribunal to resolve the disputes between the parties. Basis this, Arcelor filed an interim application, praying for reference of the Interim Relief Applications filed by the parties, to the newly appointed arbitral tribunal. However, by an order dated 16 July 2021, the Commercial Court dismissed the said interim application. This was

[1] Civil Appeal No. 5700 of 2021 (Judgment dated 14 September 2021).

challenged by Arcelor before the High Court of Gujarat. However, the High Court also dismissed the challenge and held that the Commercial Court has the power to consider whether the remedy under Section 17 of the Act is inefficacious and pass necessary orders under Section 9 of the Act. Arcelor challenged the High Court's order before the Supreme Court, which was disposed of vide the present judgment under discussion.

Issues

The two issues framed by the Supreme Court are:

i. Whether the court has the power to entertain an application under Section 9(1) of the Act, once an arbitral tribunal has been constituted and if so, what is the true meaning and purport of the expression "entertain" in Section 9(3) of the Act?

i. Whether the court is obliged to examine the efficacy of the remedy under Section 17, before passing an order under Section 9(1) of the Act, once an arbitral tribunal is constituted?

Since the decision of the Supreme Court interprets Section 9(3) of the Act, the provision is reproduced below for convenience:

"(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."

Arguments by the Parties

Arcelor argued that once the arbitral tribunal has been constituted, the Commercial Court cannot proceed further with entertaining the Interim Relief Applications, owing to Section 9(3) of the Act. Section 9(3) is a measure of negative Kompetenz-Kompetenz and it restricts the role of the court once the arbitral tribunal has been constituted. It was argued that the term 'entertain' under Section 9(3) of the Act, meant not just admitting for consideration but also the entire adjudication process, until passing of an order on merits. Accordingly, Arcelor argued that even if the Order was reserved, the Commercial Court's conduct was against the mandate of Section 9(3) of the Act, since the Commercial Court was entertaining the Interim Relief Applications at a time when the arbitral tribunal was in existence.

Essar argued that Section 9(3) of the Act would not be attracted as the Interim Relief Applications were fully heard on merits, entertained, and reserved for orders on 7th June 2021, before the constitution of the Arbitral Tribunal on 9th July 2021. According to Essar, the term 'entertain' meant "admit into consideration" or "admit in order to deal with". It was further argued that Section 9(3) of the Act was neither non-obstante nor an ouster clause, such that it would render the courts coram non judice, immediately upon the constitution of the Arbitral Tribunal. Lastly, Essar argued that a lot of judicial time, cost and resources of the parties had been spent in agitating the Interim Relief Applications, and thus, the purpose of arbitration would be frustrated if the Interim Relief Applications were to be relegated to the arbitral tribunal.

The Supreme Court's view

With respect to Issue (i), the Supreme Court held that the expression "entertain" in Section 9(3) of the Act means to consider, by application of mind to the issues raised. The court entertains a case when it takes a matter up for consideration. The process of consideration could continue till the pronouncement of judgment. Thus, in terms of Section 9(3), once the arbitral tribunal is constituted and is in seisin of the dispute between the parties, the court cannot take up an application under Section 9 of the Act for consideration, unless the remedy under Section 17 is inefficacious.

In the present case however, the Supreme Court agreed with Essar's submission that the intent behind Section 9(3) cannot be to turn back the clock and require a matter already reserved for orders, to be considered afresh by the arbitral tribunal under Section 17 of the Act. Thus, it was clarified by the Supreme Court that the bar of Section 9(3) of the Act would not operate, once an interim relief application had already been entertained and taken up for consideration, as in the instant case, where the hearing has been concluded and judgment had been reserved.

With respect to Issue (ii), the Supreme Court held that when an application has already been taken up for consideration and is in the process of consideration or has already been considered, the question of examining whether remedy under Section 17 is efficacious or not, would not arise. The requirement to conduct the exercise arises only when the application is being entertained and/or being taken up for consideration by the arbitral tribunal.

Thus, in the present case, the Supreme Court held that since the application under Section 9 of the Act had already been entertained and considered by the Commercial Court, it was not necessary for the Commercial Court to consider the efficacy of relief under Section 17 of the Act.

Conclusion

In conclusion, the Supreme Court has confirmed that prioritisation of the arbitral tribunal over courts can be partial and limited, when the legislation so provides. Through this decision, the Apex Court has carefully balanced the arbitral procedure in the hands of both courts and arbitral tribunals.

Section 9(1) provides for clear stages where parties may approach a court for interim measures. This may be: (a) before the commencement of arbitral proceedings, (b) during arbitral proceedings or (c) at any time after the making of an arbitral award, but before it is enforced in accordance with Section 36 of the Act. If the interim relief application has already been entertained, i.e., the order is reserved or judgement is pronounced, it would mean that immense time and resources have been spent on it. Thus, it would not be viable to then send the case for fresh consideration before the arbitral tribunal. However, where the interim relief application, although filed, is yet to be considered by the court and meanwhile, the arbitral tribunal gets constituted, the courts must not take up the interim relief application, basis the bar under Section 9(3) of the Act.

Regardless, the Supreme Court held that even if an application under Section 9 had been entertained before the constitution of the tribunal, the court retains discretion to direct the parties to approach the arbitral tribunal. If necessary, while making such reference, it may pass a limited order of interim protection, particularly when there has been a long gap between the hearings such that a party's application has to practically be heard afresh, or the hearing has just commenced and is likely to consume a lot of time.

- Rajat Jariwal (Partner), Shruti Khanijow (Principal Associate) & Saniya Mirani (Associate)

For any queries please contact: editors@khaitanco.com