

# THE UNSOLVED CONUNDRUM: POST-AWARD INTERIM MEASURES GRANTED BY COURTS UNDER SECTION 9 OF THE ARBITRATION AND CONCILIATION ACT, 1996

by Anuli Mandlik

Year IV, Rizvi College, Mumbai

## Introduction

Interim relief to be granted by the Court, before and during the arbitration proceedings is mentioned under Section 9 of the United Nations Commission on International Trade Law's Model Law<sup>1</sup> ["UNCITRAL"] and was also a provision in the Arbitration and Conciliation Act, 1940. However, Section 9 of the Arbitration and Conciliation Act, 1996 ["Arbitration Act"]<sup>2</sup> states that interim measures can be granted, before, during as well as after the passing of an award but before the enforcement of the same under Section 36 of the Arbitration Act.

By the 2015 amendment of the Arbitration Act, interim measures after the passing of an award can also be granted by the Arbitral Tribunal under Section 17 of the Arbitration Act<sup>3</sup>. However, according to Section 32 of the Arbitration Act, the Arbitral Tribunal becomes *functus officio* after the award has been passed, making this provision incongruent and absurd. Subsequently, it was omitted by the 2019 amendment.

## Grant of post-Award reliefs under Section 9: Award Debtor or Award Creditor?

The Hon'ble Supreme Court has remained completely silent on the issue of who has the *locus standi* to file a petition for reliefs under Section 9 of the Arbitration Act after an award has been passed. Relevant landmark judgments of the Supreme Court such as *Hindustan Construction Co. Ltd. v Union of India*<sup>4</sup> and *McDermott International Inc v Burn Standard Co. Ltd.*<sup>5</sup> make no mention of the scope of a Section 9 petition and its applicability in a post-award scenario.

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<sup>1</sup> Model Law on International Commercial Arbitration 1985 (United Nations Commission on International Trade Law [UNCITRAL]) [1985] UN Doc A/40/17, Annex I, s 9.

<sup>2</sup> The Arbitration and Conciliation Act 1996, s 9.

<sup>3</sup> The Arbitration and Conciliation (Amendment) Act 2015, s 17.

<sup>4</sup> *Hindustan Construction Co Ltd v Union of India* AIR 2020 SC 122.

<sup>5</sup> *McDermott International Inc v Burn Standard Co. Ltd* (2006) 11 SCC 181.

In *Hindustan Construction Co. Ltd. v Union of India*, the Supreme Court struck down Section 87 of the Act, which granted an automatic stay on an arbitral award once a Section 34 petition was filed. Additionally, it was held that an award cannot be modified by the courts, it can either be wholly admitted or dismissed. Further, in *McDermott International Inc v. Burn Standard Co. Ltd*, while stressing on the supervisory role of the Courts in arbitral proceedings, it was stated that “*Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired*”. Both the apex court judgements fail to set out a definitive position on the unresolved question of scope and applicability of post-award interim reliefs.

Several High Courts have set the law in this regard however, vastly contrasting views expressed on the subject again render the issue unresolved.

#### *Bombay High Court*

The learned division bench of the Hon’ble Bombay High Court in the case of *Dirk India Pvt. Ltd. v Maharashtra State Electricity Generation Co. Ltd.*,<sup>6</sup> [“**Dirk India**”] while expressing that interim reliefs after the passing of an order are “*to secure the property, goods or amount for the benefit of the party which seeks enforcement*”, effectively stated that only the successful party, procuring the award could seek for reliefs post-arbitration. In this case, the losing party filed an application under Section 34 of the Arbitration Act to set aside the arbitral award, but it failed in the same. The learned division bench stated that Court interference at a stage where not only an award was passed but also the application of Section 34 of the Arbitration Act was rejected, would reduce the sanctity and efficacy of arbitration as a means of alternate dispute resolution.

In *Home Care Retails Pvt. Ltd. v Haresh N. Sanghavi*,<sup>7</sup> Hon’ble Justice R.D. Dhanuka stating he is bound by *Dirk India* reiterated that if the claims of a petitioner have been rejected by the arbitrator in the final Award, he cannot seek interim relief under Section 9 of the Arbitration Act. Several judgements such as *Wind World (India) Ltd v Enercon Gmbh*<sup>8</sup> and *Oil and Natural Gas Corp. Ltd. v Consortium of Sime Darby Engineering Sdn. Bhd. and Swiber Offshore Construction Pte. Ltd.*,<sup>9</sup> followed the law set in *Dirk India*.

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<sup>6</sup> *Dirk India Pvt Ltd v Maharashtra State Electricity Generation Co Ltd* [2013] 7 Bom CR 493.

<sup>7</sup> *Home Care Retails Pvt Ltd. v Haresh N. Sanghavi*, Appeal (L) No. 701 of 2015 in Arb. Petn. No. 1403 of 2015.

<sup>8</sup> *Wind World (India) Ltd v Enercon Gmbh* 2017 SCC OnLine Bom 1147.

<sup>9</sup> *Oil and Natural Gas Corp Ltd v Consortium of Sime Darby Engineering Sdn. Bhd. and Swiber Offshore Construction Pte. Ltd* 2018 SCC Online Bom 6034.

### *Karnataka High Court*

In *Padma Mahadev and Ors. v Sierra Constructions Pvt. Ltd.*,<sup>10</sup> the Respondent was in the process of dissipating its assets which formed the subject matter of the ongoing application under Section 34 of the Arbitration Act. The Hon'ble Karnataka High Court while relying heavily on *Dirk India* explicitly held that pending a Section 34 petition, the unsuccessful party cannot take recourse to interim reliefs.

### *Gujarat High Court*

In *Gail India Ltd. v Latin Rasayani Ltd.*,<sup>11</sup> the learned single judge bench of the Gujarat High Court while disagreeing with the Bombay High Courts' views in *Dirk India*, held that no distinction is made against a successful party and an unsuccessful party under Section 9 of the Arbitration Act. Therefore, post Award relief is available to both the award creditor and award debtor.

### *Delhi High Court*

An interesting question was posed before the Hon'ble Delhi High Court in *Nussli Switzerland Ltd. v Organizing Committee Commonwealth Games*,<sup>12</sup> wherein the Court had to decide the scope of post-arbitration under Section 9 of the Arbitration Act. In this case, a party's claims were mainly rejected but accepted in part in the final award. Section 34(2)(iv) of the Arbitration Act empowers the courts to partially set aside awards but there is no provision on whether such a party has any *locus standi* to file for interim reliefs. The Court while interpreting the language of the Section held that the power conferred to grant post reliefs “does not mean that the legislative intent was to vest an all-embracing, all-pervading power in favour of any party, irrespective of it being the losing party”. It further held that since the claim of the losing party subsumes into the larger amount awarded in favour of the opposite party, the application for post Award reliefs was not maintainable. Further, the learned single judge bench in *Technimont Pvt. Ltd. and Ors. v ONGC Petro Additions Ltd.*<sup>13</sup> also held that a losing party in an arbitration cannot seek post-Award reliefs under Section 9 of the Arbitration Act.

## **Scope and extent of reliefs under Section 9 post Award**

According to Section 34 (3) of the Arbitration Act, after an arbitral award is passed, the award-debtor has three months to appeal and file an application for setting aside the arbitral award. These three

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<sup>10</sup> *Padma Mahadev and Ors v Sierra Constructions Pvt Ltd* 2021 (2) AKR 648.

<sup>11</sup> *Gail India Ltd v Latin Rasayani Ltd* 2014 SCC OnLine Guj 14836.

<sup>12</sup> *Nussli Switzerland Ltd v Organizing Committee Commonwealth Games* 2014 (4) ArbLR 196 (Delhi).

<sup>13</sup> *Technimont Pvt Ltd and Ors v ONGC Petro Additions Ltd* (2020) VAD 77 (Delhi).

months can be misused by the unsuccessful party by alienating, dissipating, transferring or destroying their assets. Therefore, the purpose of interim reliefs post Award is to ensure that the subject matter of the arbitration is duly secured. In *Dirk India*, it was held that when an interim measure is sought after the arbitral Award, its objective is to “safeguard the fruit of the proceedings until the eventual enforcement of the Award”.

However, it is necessary to set a limit as to what the court can grant as interim measures under Section 9 after the arbitration proceedings are completed, especially in cases where Order 21 of the Civil Procedure Code [“CPC”]<sup>14</sup> reliefs are sought in a Section 9 petition. Order 21 of the CPC talks about the execution of decrees and orders. Some litigating parties misuse Section 9 as a means to virtually execute the Award and interdict the rights of the Award-Debtor. Further clarification on this matter was provided by the Delhi High Court in *SMJ-RK-SD(JV) v National Highways Authority of India*<sup>15</sup>, as more particularly discussed below.

Section 36 of the Arbitration Act states that an award is enforceable only when no objections are filed. In *Delta Construction Systems Ltd. v Narmada Cement Co. Ltd.*,<sup>16</sup> the Bombay High Court held that after the award is passed it does not automatically become a decree, the unsuccessful party has a chance to challenge it under Section 34 or correct it under Section 33, thereby, stating that an Award cannot be executed without giving an opportunity to object. In *SMJ-RK-SD(JV) v National Highways Authority of India*, a Section 34 application was pending before the court to set aside the arbitral Award. During the pendency of such an application, the award-creditor filed a Section 9 petition whereby, he sought to withdraw the Award amount citing “extreme hardships in absence of liquidity” and offering to furnish a matching bank guarantee in exchange. The learned single judge bench of the Delhi High Court held that the main purpose of Section 9 is to secure by interim measures the subject matter of dispute and not use it as a loophole to procure the award during the pendency of objections. Further, the Court held that Section 9 cannot be invoked to circumvent Section 36 of the Arbitration Act. Therefore, the Section 9 petition was dismissed.

However, in *Sampson Maritime Ltd. v Hardy Exploration and Production (India) Inc.*,<sup>17</sup> the award-holder filed a Section 9 petition seeking Order 38 Rule 5 of CPC reliefs, while a Section 34 application was pending

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<sup>14</sup> Civil Procedure Code 1908, Order 21.

<sup>15</sup> *SMJ-RK-SD(JV) v National Highways Authority of India* (2009) 164 DLT 655.

<sup>16</sup> *Delta Construction Systems Ltd. v Narmada Cement Co Ltd* (2002) 1 Mah LJ 684.

<sup>17</sup> *Sampson Maritime Ltd v Hardy Exploration and Production (India) Inc* 2017 (2) CTC 48.

adjudication. Under Order 38 Rule 5 of CPC, a party may be called upon to furnish security. The Court distinguished a Section 9 petition from an Order 38 Rule 5 application and an Order 21 application. The Hon'ble Madras High Court held that when an application is filed under Order 38 Rule 5, it is prior to the announcement of the judgment and therefore the rights of the parties are yet to be crystallized. However, after the passing of an award, the rights of the parties then stand crystallized whereby, the plaintiff and respondent come to be the award creditor and the award debtor. The Court held that securing the subject matter of the award under Section 9 while a Section 34 application is pending is a right of the award-creditor. Further, the Court observed that this right is irrespective of the award-debtor's intentions or actions to defer the award. Thereby, directing the award-debtor to deposit 100% of the award amount as an interim relief.

In *Centrient Pharmaceuticals India Pvt. Ltd. v Hindustan Antibiotics Ltd.*,<sup>18</sup> a Section 34 application was pending for adjudication in the Court but no stay was imposed on the execution of the award. The award-creditor sought Section 9 interim reliefs despite being able to file a Section 36 application for the enforcement of the award. In this case, Justice G. S. Kulkarni of the Bombay High Court held that when an award is enforceable under Section 36, the award-holder cannot take recourse under Section 9, thereby limiting the scope of Section 9. Further, in *C.S.S. Corp Pvt. Ltd. v Space Matrix Design*<sup>19</sup>, the learned Single Judge bench of the Madras High Court held that post-award Section 9 reliefs can be granted to the award-holder but only in cases where there are averments that the award-debtor is displaying obstructive conduct to defeat the award.

However, the Delhi High Court in *Power Mech Projects v SEPCO Electric Power Construction Corp.* has expressed contrasting views. In this case, the learned Single Judge bench directed the award-debtor to deposit 100% of the award amount under Section 9 as a pre-condition for hearing of the Section 34 petition on merits. Thereby, granting Section 9 reliefs to the award holder while the award was enforceable under Section 36.

In *National Shipping Co. of Saudi Arabia v Sentrans Industries Ltd.*,<sup>20</sup> the Bombay High Court while granting Section 9 post-award reliefs, held that conditions under Order 38 Rule 5 of CPC are not necessary to be satisfied. It was held that Section 9(ii)(b) can be granted to a party seeking protection only if there is an imminent need owing to the intention or attempts of the award-debtor to defeat the award. It

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<sup>18</sup> *Centrient Pharmaceuticals India Pvt. Ltd v Hindustan Antibiotics Ltd* (2019) SCC OnLine Bom 1614.

<sup>19</sup> *C.S.S. Corp Pvt Ltd v Space Matrix Design* 2012 (1) CTC 225.

<sup>20</sup> *National Shipping Co of Saudi Arabia v Sentrans Industries Ltd* 2004 (1) ArbLR 409.

was further held that provisions of the CPC would not be applicable *stricto sensu* and shall only be guiding principles.

It should be noted that directing a party to furnish security while a Section 34 is pending in Court, effectively results in the temporary execution of the award for the award debtor. Therefore, in some cases, there exists a possibility of this rendering the filing of a Section 34 application redundant.

Prior to the 2015 amendment of the Arbitration Act, a Section 34 application would automatically stay the arbitral award and would render it unenforceable under Section 36. This was the case in *Essar Oil Ltd. v United India Insurance Co. Ltd.*<sup>21</sup>, whereafter the passing of an arbitral award a Section 34 application was filed by the award-debtor. The learned division bench of the Gujarat High Court quashed the impugned order that directed a well-to-do company to furnish a bank guarantee under Section 9(ii)(b) of the Arbitration Act. The Court held that when the Award is unenforceable, a financially sound company cannot be asked to furnish a bank guarantee, merely because it is incurring a loss unless there are allegations that the company is trying to defeat the award by dissipating the assets.

## **Conclusion**

As evident from the conspectus of judgments set out above, there exist vastly contrasting views amongst the high courts regarding issues related to post-award reliefs under Section 9, leading to dubiety. Several high courts have vehemently opposed the granting of post-award reliefs to award-debtors while some high courts have stated that directing deposit of securities as interim reliefs under Section 9 is nothing short of a right bestowed upon the award-holder. Since arbitration is no longer an alternate means of dispute resolution, rather it has become a default clause in any agreement, the Hon'ble Supreme Court must remove practical defects from the Arbitration Act.

Any further delay in providing clarity on this issue is likely to have disastrous consequences, not only for the parties involved but also for the general standing of arbitral proceedings. As mentioned in *Dirk India*, it is necessary to maintain the sacredness and sanctity of the procedure of arbitration. The unwarranted interference of the Courts, after the arbitral procedure has concluded will prove to be impractical.

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<sup>21</sup> *Essar Oil Ltd v United India Insurance Co Ltd* 2015 (3) GLH 28.

It is the need of the hour to lay down appropriate guidelines regarding the admissibility and scope of post-award Section 9 reliefs. Failing which, the party dissatisfied with the award, has an opportunity to in effect, virtually start litigation afresh. This will result in frustration of the award, rendering the entirety of the arbitral proceedings futile and redundant.

The tolerance by courts towards exploitation of the legal loopholes and the prolongation of the current state of affairs will discourage parties from pursuing arbitration. Therefore, there is a pressing requirement for legislative guidelines to be laid down providing some much-needed clarity to put this issue to rest, absent which, the faith and relevance of this means of Alternate Dispute Resolution may be lost.