

Powers of the Arbitrator under the Arbitration and Conciliation (Amendment) Act, 2015 to decide issues with respect to fraud

There is no specific provision in the Arbitration and Conciliation Act, 1996 (for short “**1996 Act**”) enumerating or defining the powers of an arbitrator. However, the same can be inferred from various provisions of the Act. But now after the promulgation of the Arbitration and Conciliation (Amendment) Ordinance, 2015 which received assent from the president and became an Act and was notified in the Gazette of India on 1 January 2016, the said powers have been widened.

Powers of Arbitrator under the Amendment Act 2015:

1. Interim Measures Ordered by Arbitral Tribunal

Section 9-

Sub-section (3) has been added to section 9 stating that, once the arbitral tribunal has been constituted, the Court shall not entertain an application under the said section, unless the Court finds that the remedy under section 17 would not be efficacious.

Section 17- The powers of the Court to grant interim measures on matters set out under sub-clause (a) to (e) of section 9(ii) have now been extended to the tribunal under section 17. Therefore, the tribunal shall now have the same powers to make orders for interim measures as the Court.

It further provides that an order of the arbitral tribunal under section 17 shall be deemed to be an order of the Court and shall be enforceable under the Code of Civil Procedure, 1908 (“CPC”), in the same manner as if it were an order of the Court

Effect of the Amendment on powers

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- Once the tribunal has been constituted, parties will have to approach the tribunal under section 17 for interim measures and will not be permitted to approach the court under section 9. Courts can only entertain such an application if it is convinced that an order of the tribunal will not be efficacious. An order of the arbitral tribunal granting interim measures can now be enforced by courts as if it was an order of the court. Even though the powers to order interim measures were available to the arbitral tribunal under the 1996 Act, but it did not have the tooth of enforceability.

2. Application for setting aside arbitral award

Amendment of Section 34 relating to grounds for challenge of an arbitral award, to restrict the term 'Public Policy of India' (as a ground for challenging the award) by explaining that only where making of award was induced or affected by fraud or corruption, or it is in contravention with the fundamental policy of Indian Law or is in conflict with the most basic notions of morality or justice, the award shall be treated as against the Public Policy of India.

Effect of the Amendment on powers

- The award passed by the arbitrator cannot be challenged easily. In determining whether an award is in conflict with the public policy of India, courts are not to enter into a review of merits.

3. Referring Parties to Arbitration

Section 8- The amendment to sub-section (1) states that a judicial authority before which an action is brought in a matter which is subject of an arbitration agreement shall refer the parties to arbitration upon an application made by a party to the

arbitration agreement or any person claiming through or under him, not later than the date of submitting his first statement on the substance of the dispute, unless it finds that prima facie no valid arbitration agreement exists.

This reference has to be made notwithstanding any judgment, decree or order of the Supreme Court or any Court.

Effect of the amendment on powers

- The amendment empowering the Court to refer the matter to arbitration notwithstanding any judgment, decree or order of the Supreme Court or any Court is vague and could be problematic. It is not clear whether this is intended to negate the effect of certain decisions which had questioned the arbitrability of disputes involving allegations of fraud such as:
 - In ***N. Radhakrishnan vs. Maestro Engineers***¹, the court observed that while there are provisions in the 1996 Act and judgments which provide for stay of suits in favour of arbitration, it only applies where the arbitrator is competent to deal with the dispute (for instance disputes which do not involve serious questions of law or complicated questions of fact, adjudication of which depends on detailed oral and documentary evidence). The Supreme Court, on the issue of arbitrability of disputes involving allegations of fraud, held that: “...since the case relates to allegations of fraud and serious malpractices on the part of the respondents, such a situation can only be settled in court through furtherance of detailed evidence by either parties and such a situation can not be properly gone into by the Arbitrator”.
 - In ***Bharat Rasiklal v. Gautam Rasiklal***², the Supreme Court observed “Existence of a valid and enforceable arbitration agreement is a condition precedent before an arbitrator can be appointed under Section 11 of the Act. When serious allegations of fraud and fabrication are made, it is not possible for the Court to proceed to appoint an arbitrator without deciding the said issue which relates to the very validity of the arbitration agreement.”
 - Some of the High Courts have also tried to distinguish between serious issues of fraud and a mere allegation of fraud. It has been held by the courts that in cases which allegation of fraud is prima facie supported by evidence / serious fraud, the arbitral tribunal shall have no jurisdiction, while in cases where fraud is merely alleged, the arbitral tribunal shall have jurisdiction (for instance – ***RRB Energy Limited v. Vestas Wind System and Ors***³).
 - In ***Swiss Timing Ltd. vs. Commonwealth Games 2010 Organizing Committee***⁴ it was held it was necessary to clarify that allegation of fraud does not make a dispute non-arbitrable and held that the judgment in Radhakrishnan is per incuriam and, therefore, not good law.

Section 16 of the 1996 Act dealt with the competence of arbitral tribunal to rule on its jurisdiction. The 246th Law Commission Report observed that “The issue of arbitrability of fraud has arisen on numerous occasions and there exist conflicting decisions of the Apex Court on this issue”. Therefore the Law Commission recommended to remedy this by way of amendments to the said section by providing insertion of sub-section (7) stating that “*The arbitral tribunal shall have the power to make an award or give a ruling notwithstanding that the dispute before it involves a serious question of law, complicated questions of fact or allegations of fraud, corruption etc.*”. However it has not been accepted.

¹ (2010) 1 SCC 72

² 2012 (2) SCC 144

³ 219 (2015) DLT516

⁴ (2014) 6 SCC 677

Therefore, it now entirely depends on the courts to interpret Section 8 as to whether fraud is arbitrable or not. Giving effect to the expression “notwithstanding any judgment, decree or order of the Supreme Court or any Court” it can be inferred that courts will observe that fraud is arbitrable. The Amendment to Section 8 under the Arbitration and Conciliation (Amendment) Act, 2015 nullifies the exceptions drawn by the Judiciary, however, the effect of amendments are still to be seen.