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ARBITRATION AND INTERIM ORDERS :: ENTANGLEMENT OF THIRD PARTIES

A Introduction

1. Under the Arbitration and Conciliation Act, 1996, an amended upto date (for short “**Arbitration Act**”), two adjudicatory Authorities/ Bodies, i.e. the Hon’ble Courts as well as Arbitral Tribunal possess the power to pass interim orders. [Section 9 and Section 17 of the Arbitration Act].

2. The powers to issue interim orders in favour of and against the parties to the Arbitration proceedings is somewhat clear.

3. The questions arise as to whether orders can be passed against third parties, who are not parties to Arbitration proceedings and/or signatories to the Arbitration Agreement.

4. The position of law gets more entangled when it is well settled position that no Arbitration can take place between the un-related non-signatories to the Arbitration Agreement in respect of the disputes. [*S. N. Prasad, Hitek Industries (Bihar) Limited-vs-Monnet Finance Limited*; (2011) 1 SCC 320]

B Purpose of Interim Orders under Section 17 of Arbitration Act passed by the Ld. Arbitral Tribunal

1. The purposes of the interim orders are only to maintain ‘status quo’ till the disposal of the Arbitration proceedings.

2. The interim orders passed by the Ld. Arbitral Tribunal loses its operation once the Award is passed by the Ld. Arbitral Tribunal.

3. The basic objective of passing an interim order under Section 17 is to either to preserve, safeguard and/ or protect the subject property till the disposal of Arbitration proceedings.

4. Section 17 of the Arbitration Act categorically specifies that ‘a party’ can apply for interim protection.

5. Section 2(1)(h) of Arbitration Act states that the ‘party’ shall mean ‘party’ to an Arbitration Agreement.

6. Section 17, empowers the Ld. Arbitral Tribunal to issue interim Order for :-

a Appointment of guardian, etc. of minor

b For preservation of the subject matter of the Dispute

c For securing the amount in Dispute

d For detention, preservation and inspection of any property or thing, which is the Subject matter of the Arbitration Proceedings.

e Interim injunction or appointment of an Receiver

f Any other interim measure as is just and convenient

7. Thus, from the bare reading of the Section 17, it can be inferred that :-

a Interim measures, as conceived by the Legislature, are only to be limited to the Arbitration Agreement between the parties.

b The intention is more so clear by the use of the words that only party to the Arbitration proceedings can apply for interim protection

c No rights/ powers given to the Ld. Arbitral Tribunal to interfere in the rights of the third parties

d Reason being the Ld. Arbitral Tribunal is the creature of the Arbitration Agreement between the parties and not authorized to jeopardize the rights of third parties.

e The interim measure can be issued against third party, only in case, the third party were to be a person claiming under the party to the Arbitration Agreement.

8. The interim measures as enunciated under Section 17 of the Arbitration Act are akin to those in Section 9 of the Arbitration Act. [*Yusuf Khan –vs- Prajita Developers Pvt. Ltd. & Anr*; (2019) SCCOnline Bom 505]

9. In *Shoney Sanil v. Coastal Foundations (P) Ltd.*; [AIR 2006 Ker 206], the Hon’ble Kerala High Court while expressly setting aside the interim injunction against a third party under Section 9 of the Arbitration Act has



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categorically held the grant of such injunction to be an abuse of process. The relevant para is as follows:-

“Section 9 of the Act contemplates issuance of interim measures by the Court only at the instance of a party to an arbitration agreement with regard to the subject-matter of the arbitration agreement. This can be only as against the party to an arbitration agreement, or, at best, against any person claiming under him. The writ petitioner is a third party auction purchaser in whose favour is a sale certificate, followed by delivery of possession. He cannot therefore be subjected to proceedings under Section 9 of the Act, initiated on the basis of an alleged arbitral agreement between the respondents.”

¹⁰ The Hon’ble High Court of Gauhati in **Brahmaputra Realtors (P.) Ltd. v. G.G. Transport (P.) Ltd.**; [(2013) 6 Gau LR 14] has held that the interim measures can be only against the ‘party’ to the Arbitration Agreement, or at the best to the third party (ies) claiming under them but not to any other unrelated third party who enjoys an independent right.

¹¹ Infact the Hon’ble Supreme Court in **Firm Ashok Traders v. Gurumukh Das Saluja**; [(2004) 3 SCC 155] has held at para 13 that the “a person not party to an arbitration agreement cannot enter the court for protection under Section 9.” [Also relied upon by Hon’ble High Court of Guahati in **SREI Infrastructure Finance Ltd. v. Bhageeratha Engineering Ltd.**; (2009) 6 Gau LR 828]

¹² However in **Gatx India Pvt. Limited-vs-Arshiya Rail Infrastructure Limited & Anr**; [2014 SCCOnline Del 4181] the Hon’ble Delhi High Court has held that:-

- Power to issue interim order is not confined to only party to Arbitration
- Two methods/ types according to which the injunction orders can be passed against third parties are one, which affects the third party incidentally and other that affects it directly. The Hon’ble Court held that while the former can be issued while the latter, i.e., interim order directly affecting third parties should be sparingly issued.
- Observation that “An injunction, or order of attachment with respect to the properties belonging to/monies owed to a party to arbitration, but in hands of a third party for/on behalf of the said party, is effectively a relief against the said party, which incidentally affects the third party.”

- Thus the order restraining payment by third party to the ‘*party in arbitration*’ can be passed.

- The said order though challenged in Appeal before the Hon’ble Division Bench in FAO(OS) No. 435 of 2014 was disposed vide order dated 05.12.2014 in view of the settlement between the parties.

C Conclusion

¹ No conclusive precedent by the Hon’ble Supreme Court as to whether interim injunction orders can be issued against Third parties who are not parties to the Arbitration Agreement.

² However, settled position that interim orders can be issued against the third parties who are ‘*claiming through party in arbitration*’. For example, the new owner of the disputed property whose title is derived from the ‘*party in Arbitration*’.

³ No interim orders can be issued against totally un-related party, since the same shall also be unjust and against equity, more so when such third party can neither invoke interim protection under Arbitration Act nor participate in the Arbitration proceedings

⁴ But as categorized by the Hon’ble High Court of Delhi, interim orders can be passed against third party which only incidentally affects the rights of the third party. For example, restrain order from payment of decreed amount owed to the ‘*party in arbitration*’ by the third party.

⁵ To conclude, in the event any interim order is passed against Third Party, such party no doubt suffers irreparable injury since the right to file an Appeal under Section 37 of the Arbitration Act is not available to it.

⁶ Though taking into consideration the gross miscarriage of Justice by Ld. Arbitrator, the affected third party may prefer a Writ Petition under Article 226 of the Constitution, as was done in **Shoney Sanil v. Coastal Foundations (P) Ltd.**; [AIR 2006 Ker 206].

⁷ Either way, it is strongly in the interest of the affected third party to file Caveat before the necessary court, such that the interest of the third party can be adequately safeguarded , as and when the execution/ enforcement is filed by the party in arbitration in whose favor the interim order has been passed.