



## POWERS TO GRANT INTERIM RELIEF: UNTYING THE GORDIAN KNOT OF DISBELIEF

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### ABSTRACT

The author has attempted to shed light on a glaring conundrum in the Arbitration and Conciliation Act, 1996. The paper mainly focuses on certain provisions causing the said vexed question of law and discusses the legislative as well as the judicial approach towards the same. Lastly, the author calls for a cohesive action plan to overcome the discussed issues.

### INTRODUCTION

The genesis and further burgeoning of the Arbitration and Conciliation Act, 1996,<sup>1</sup> has been a long drawn out process. The Act, as it exists in its present form, has developed over the due course of time and each provision has been put in place (or amended) for effective administration of justice while amicably settling the disputes. The purpose of enacting the Act was to accelerate and stimulate the dispute resolution process, provide speedy justice to the parties, and sidestep the cumbersome process of litigation.<sup>2</sup> The Act was also enacted to fill up the cavities left by its predecessor, the Arbitration Act of 1940.<sup>3</sup> While the earlier piece of legislation was enacted in concordance with the aforementioned purposes as well, it was

deemed to be ineffective. Additionally, the Arbitration Act of 1940 only contained provisions regarding domestic arbitration and was silent on the aspects of international arbitration and enforcement of awards of such arbitral proceedings.<sup>4</sup> Thus, the present Act was also enacted to do away with the blind spots of the earlier Act. The Apex Court of India commented on the impotence of the earlier Act by stating that the arbitral proceedings were futile as majority of the decisions were challenged in courts, which made the “lawyers laugh and legal philosophers weep”.<sup>5</sup> The Supreme Court also emphasised on the desideratum to have a simple and constructive legislation which reduces the burden on the courts, while effectively rendering justice.<sup>6</sup> This rendered the required nudge to the legislature, to enact new norms.

The Act has enabled our country to adopt and establish a comprehensive Alternative Dispute Resolution (ADR) machinery. It fills up the lacunas left by its predecessor, as it contains provisions for domestic arbitration, international commercial arbitration as well as enforcement of awards of such arbitrations. The main purpose of the Act was to facilitate amicable dispute resolution while reducing the caseload on the courts. However, contrary to the intention of the legislature and various judicial pronouncement which reiterate on the same locus, the Act only purports to lighten the judicial load. As a matter of fact, the Act contains various provisions which arrange for

<sup>1</sup> Hereinafter referred to as “the Act”.

<sup>2</sup> Aditya Sondhi, ‘Arbitration in India: Some Myths Dispelled’, [2007], 19, Student Bar Review, 48, 48.

<sup>3</sup> The Arbitration Act 1940.

<sup>4</sup> A.K Ganguli, ‘THE PROPOSED AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT, 1996 – A

CRITICAL ANALYSIS’, [2003], 45, Journal of Indian Law Institute, 3, 3.

<sup>5</sup> M/s Guru Nanak Foundation v. M/s Rattan Singh & Sons, (1981) 4 SCC 634.

<sup>6</sup> Corporation of India v. Joginderpal Mohinderpal, (1989) 2 SCC 347.



judicial interference in the arbitration process.<sup>7</sup> This not only does it frustrates the legislative intent, it also goes against the substratum of the ADR mechanism.

### POSITION OF LAW

Intersection of arbitral and judicial powers can be observed in various segments of the Act. However, the key area, *inter alia*, is with regard to powers to grant interim relief/measures to the parties of the dispute. The interim relief is in the form of detention, preservation, or inspection of the property or the amount which forms the subject matter of the dispute, issuance of interim injunction, appointment of a receiver or any other relief which is deemed fit. While section 9 of the Act<sup>8</sup> grants aforementioned powers to the courts, section 17 of the Act<sup>9</sup> vests similar powers with the arbitral tribunal. There is, nevertheless, no mechanism laid down in the legislation to enforce the said interim measures under section 17. *Prima facie* there are two contemporaneous bodies having similar powers of granting the said interim relief. The question, therefore, arises as to which authority can exercise its powers and under which circumstances.<sup>10</sup>

The courts had the authority to exercise this power and entertain any application under section 9 before or during such arbitral proceeding are in session. However, an attempt was made to limit the powers of the court by the Arbitration and Conciliation

(Amendment) Act, 2015.<sup>11</sup> The amendment curtailed the courts from entertaining any such applications once the arbitral tribunal has been constituted. On such an occasion, the courts are to take a backseat as the arbitral tribunal has similar powers to grant the required interim relief.<sup>12</sup> A proviso, however, tipped the scales back to the side of judiciary as it states that such powers can be exercised if the courts are of the opinion that the relief under section 17 will not effectively cater to the needs of the parties. Ensuing the above, the Arbitration and Conciliation (Amendment) Act, 2019<sup>13</sup> was enacted to further articulately augment the powers of the arbitral tribunal by widening the scope of section 17. Earlier the interim relief could only be granted by the arbitral tribunal any time after it has laid down the arbitral award, but before its enforcement. The 2019 amendment amputated this pre-condition and attempted to give equal footing to both the provisions. In conjunction, both the amendments can be viewed as legislative endeavours to procure balance of power.

This being the position of the law, the judicial interpretations and pronouncements present a different picture. From a judicial standpoint, powers of the arbitral tribunal must be kept under check and the judiciary, has hence, taken on the mantle to 'supervise'. The Supreme Court in the case of *I.T.I. Ltd. v. Siemens Public Communications Networks*

<sup>7</sup> Aditya Sondhi, 'Arbitration in India: Some Myths Dispelled', [2007], 19, Student Bar Review, 48, 52.

<sup>8</sup> Arbitration and Conciliation Act 1996, s 9.

<sup>9</sup> Arbitration and Conciliation Act 1996, s 17.

<sup>10</sup> A.K Ganguli, 'THE PROPOSED AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT, 1996 – A CRITICAL ANALYSIS', [2003], 45, Journal of Indian Law Institute, 3, 16.

<sup>11</sup> Arbitration and Conciliation (Amendment) Act 2015.

<sup>12</sup> A.K Ganguli, 'THE PROPOSED AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT, 1996 – A CRITICAL ANALYSIS', [2003], 45, Journal of Indian Law Institute, 3, 15.

<sup>13</sup> Arbitration and Conciliation (Amendment) Act 2019.



*Ltd*<sup>14</sup> has laid down that appeals can be filed against the orders of the arbitral tribunal, passed under section 17 of the Act, and are also revisable<sup>15</sup> under the relevant provisions of the Civil Procedure Code, 1908.<sup>16</sup> The court, in the same judgment, also laid down that such orders can be brought before the Supreme Court, for its perusal, under Special Leave Petition (SLP)<sup>17</sup> as well. A division bench of the Calcutta High Court ruled that an order under section 9 of the Act would be valid, even if the seat of arbitration is outside India.<sup>18</sup> On another recent occasion, in the case of *Bhubaneshwar Expressways Pvt. Ltd. v. NHAI*, despite the formation of the arbitral tribunal, the Delhi High Court went ahead with the grant of interim relief.<sup>19</sup> The Delhi High Court has opined that the scope of powers under section of the Act is not restricted and that it is a comprehensive provision which does not limit the authority of courts.<sup>20</sup>

Indubitably and irrefutably, the courts, constituting an integral part of justice delivery system in our country, must supervise any institution or authority which adjudicates over disputes. This supervision is necessary, for the simple reason that the judiciary is the bedrock of justice administration. Thus, any authority undertaking this function must operate under the patronage of the judiciary. However essential, these supervisory powers must be circumscribed and cannot be absolute. This 'limited supervision', will enable the

authority to carry out its duties without any hinderance, at the same time, make it accountable and answerable for its actions. Excessive regulation can hamper the effective functioning of the authority. The relationship between the arbitral tribunals and the courts must be established on the same rationale. Various provisions in the Act call for judicial checks and intrusion in the arbitral proceedings albeit the judiciary must not overstep its bounds and deter the potency of arbitral proceedings via its decisions.

### CONUNDRUM CAUSED

Two broad interpretations can be deduced from the pattern of judicial decisions, the paternalistic legislative ventures and the overall state of affairs of arbitral proceedings. Either, that the judiciary does not have faith in the efficacy of arbitral proceedings and hence feels obligated to interfere or that the parties (citizens at large) are sceptical of the proceedings and thus fall back on the wisdom of the judiciary to adjudicate. The disbelief in the utility of ADR mechanism is not new. The mechanism has been battling balking reservations since its inception. Annihilation of this disbelief and instillation of confidence in the ADR system is crucial as its future hinges on it. Undoubtedly, various legislative and judicial attempts have been made to formulate a system which fosters and promotes ADR mechanism. To illustrate the same, closer examination of the Supreme Court judgment in the case of *Mahanagar Telephone Nigam Ltd. vs. Canara Bank*<sup>21</sup>

<sup>14</sup> (2002) 5 SCC 510.

<sup>15</sup> Aditya Sondhi, 'Arbitration in India: Some Myths Dispelled', [2007], 19, Student Bar Review, 48, 52.

<sup>16</sup> Civil Procedure Code 1908, s 115.

<sup>17</sup> The Constitution of India 1950, art. 136.

<sup>18</sup> *Kaventer Agro Ltd. v. Seagram Co. 1.* (APO 498 of 1997 and APO 449 of 1997).

<sup>19</sup> OMP(I) (COMM.) 218/2019 decided on 03rd June 2020.

<sup>20</sup> OMP. (I) COMM 109/2020, decided on 13th May 2020.

<sup>21</sup> AIR 2019 SC 4449.



must be done. While deciding this matter, Supreme Court applied the “Group of Companies” doctrine and laid down that the other parties, who have not entered into the arbitration agreement, can also be made a part of the arbitration proceedings, if while signing the agreement, circumstances exhibited the intention of signatory as well as non-signatory parties. This evinces the court’s open mindedness towards the process. On another occasion, the Supreme Court *rashid raza vs. sadaf akhtar*<sup>22</sup> held that vitiation of arbitral proceedings cannot happen on mere allegations of fraud; in the case of *Hindustan Construction Company Limited versus Union of India*<sup>23</sup> it was ruled that an challenge to the arbitral award in the courts does not automatically stay the execution of the same. These decisions, along with many others, depict the pro ADR approach of the judiciary. However, the question emanates as to whether these efforts are ‘adequate’ in the backdrop of the abovementioned mistrust in the ADR process.

### WAY FORWARD

It would be erroneous to state that the ADR system reduces the burden on the judicial machinery. Cavernous judicial interference exists from the stage of formulation of arbitral tribunal or appointment of arbitrators (under Section 11 of the Act<sup>24</sup>) up to the stage of enforcement of an award passed by such a tribunal by the courts (under section 36 of the Act<sup>25</sup>). There are multiple layers which authorise judicial scrutiny and various spots which call for judicial intervention in the Act. The myth of reduction of judicial load not only contradicts the foundational principles of ADR mechanism, but also defeats the very

purpose of enactment of the Act. In order to transpire this legislative hope into reality, a reorientation of the system is required.

Firstly, the legislature must continue to pass amendments which ameliorates the Act. The 2015 and the 2019 amendments are testaments to legislature’s pro ADR approach. However, the provisions furthering excessive judicial interference in the Act are the result of legislature’s decision to systematize them in such a manner. The subservience of the ADR machinery to judiciary is thus, the result of legislative actions. While necessary, the extend of such subservience must be reduced. Confidence can be inilled in the ADR process, only when people see its independent and effective functioning. While judicial supervision is essential, it must be kept to a minimal. This can easily be achieved by the legislature by imbibing this rationale in its law making.

Furthermore, the obscure judicial stance on the issue must be clarified. The judiciary has given decisions which, in certain cases, hamper or obstruct the ADR process. Notwithstanding the same, it has also laid down precedents which shed light on the profitability and practicality of it and has assisted in easing the process. It is imperative for the judiciary to reiterate on its decisions which aggrandize the ADR mechanism. There is a need, to time and again, highlight the quick, cost effective and efficacious aspects of the ADR process. This emphasis will dispel all the questions about judicial mistrust on the mechanism. It will also encourage other stakeholders to look at it with the lens of optimism and approach it with more certainty. The judiciary must

<sup>22</sup> (2019) 8 SCC 710.

<sup>23</sup> 2019 (6) ARBLR 171 (SC).

<sup>24</sup> Arbitration and Conciliation Act 1996, s 11.

<sup>25</sup> Arbitration and Conciliation Act 1996, s 36.



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maintain its supervisory position, nonetheless, it must also take a backseat and sanction the ADR machinery to take its natural course.

Lastly, the society at large, must relinquish its qualms and imprint some faith in the ADR mechanism. Since its outset, the public at large have been habituated to knock on the doorstep of judiciary for settlement of disputes. Thus, the hesitance to move to another institution can be understood. However, one must take into account the perverse effect it has on the judicial machinery. Not only does it exhaust judiciary with excessive workload, it also distracts the judiciary with matters which can be resolved easily with amicable settlement. Understanding the juxtaposition of a legal battle in the courts and amicable settlement in ADR process can further clarify the dire need for a pro ADR system.

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