

the First Petition solely related to operations under the O&M Agreement. During the pendency of the First Petition, the arbitral tribunal was constituted to adjudicate on the said disputes (**Arbitral Tribunal**), and therefore the Appellant withdrew the First Petition with liberty to approach the Arbitral Tribunal under Section 17 of the Act.

Subsequently, certain disputes pertaining to payments under the O&M Agreement arose, and the Appellant terminated the O&M Agreement. The Appellant then filed another petition (**Second Petition**) under Section 9 of the Act, seeking interim measures of directing the Respondents to allow the Appellant to use the shared services.

IRL and IWL contended that the Second Petition was not maintainable, *inter alia* as the same was barred by Section 9(3) of the Act, as the Arbitral Tribunal had already been constituted. Section 9(3) of the Act provides that,

“9(3). Once the arbitral tribunal has been constituted, the Court shall not entertain an application under subsection (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.”

The Single Judge of the HC hearing the Second Petition agreed with the contention of the Respondents, finding that the disputes had arisen under the O&M Agreement, for which the Arbitral Tribunal had already been constituted. The Single Judge further relied on the Supreme Court’s judgment in *Chloro Controls*³ to hold that the three agreements constituted a composite transaction, and the court could refer the disputes to the same tribunal. The Second Petition was thus dismissed with liberty to the Appellant to file an application for interim measures before the Arbitral Tribunal.

Aggrieved by the decision of the Single Judge, the Appellant filed the present appeal before a Division Bench of the HC under Section 37 of the Act.

ISSUES AND FINDINGS

The Division Bench summed up the issue before it as follows:

“If an Arbitral Tribunal has already been constituted to adjudicate the disputes which have arisen out of an agreement or set of agreements containing an arbitration clause, whether the remedy of approaching the Court for interim measures with respect to disputes subsequently arising from the same agreement or set of agreements is barred by Section 9(3) of the Act.”

At the very outset, the Division Bench noted that, from the pleadings of the Appellant in the First Petition, it was indisputable that the transaction between the parties was a composite transaction and the three agreements were intrinsically linked with each other. Reliance was once again placed on *Chloro Controls*⁴, as well as *Ameet Lalchand*⁵.

Having opined as above, the Division Bench, sought to impress upon the advocates of the Appellant during the course of the hearings in the appeal, that the disputes in the Second Petition ought to be referred to the Arbitral Tribunal which had previously been constituted. If the disputes were referred to a different tribunal, there could be inconsistent findings of facts. The Division Bench noted that even where there were two separate agreements, each with arbitration clause, the benefit of single arbitration could not be denied as multiplicity of proceedings and conflicting decisions would cause injustice.⁶

The Appellant, while initially arguing that the present disputes would have to be referred to a fresh arbitral tribunal having different composition than the existing Arbitral Tribunal, subsequently agreed that the composition of the fresh tribunal could be the same as the existing Arbitral Tribunal.

While the Respondents in the Appeal also argued that the disputes under the Second Petition were barred by the principle of *res judicata* under Order II, Rule 2 of the Code of Civil Procedure, 1908, the Division Bench deemed it to be an issue on merits, to be raised before the relevant arbitral tribunal.

³ *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641.

⁴ *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641.

⁵ *Ameet Lalchand Shah v. Rishabh Enterprises*, (2018) 15 SCC 678.

⁶ See *P.R. Shah, Shares & Stock Brokers Pvt. Ltd. v. B.H.H. Securities Pvt. Ltd.*, (2012) 1 SCC 594.

The Division Bench adverted to the Supreme Court's decision in *Dolphin Drilling*⁷, wherein it was held that the words "all disputes" in an arbitration clause can only mean "all disputes that may be in existence when the arbitration clause is invoked and one of the parties to the agreement gives the arbitration notice to the other". It was not possible that once arbitration was invoked in respect of certain disputes, it could not be invoked subsequently for future disputes.

The Division Bench also examined Section 21 of the Act, which, while defining the date of commencement of arbitral proceedings, uses the words "arbitral proceedings in respect of a particular dispute" (emphasis supplied). This indicated to the Division Bench that the Act envisages a separate arbitral tribunal with respect to successive disputes which may arise at multiple stages, albeit between the same parties and out of the same agreement or set of agreements.

The Division Bench then looked at the language of Section 9, which allows a party to apply to the court for interim measures "before or during arbitral proceedings...". Reading this provision in light of Section 21, it was held that the reference to 'arbitral proceedings' has to mean arbitral proceedings for adjudication of a "particular dispute".

In the present case, the Division Bench stated that the "particular dispute" for which the Arbitral Tribunal had been constituted was the operational dispute under the O&M Agreement. The dispute now in question under the Second Petition and the present appeal, was a subsequent dispute arising after termination of the O&M Agreement and failure to mutually agree on O&M charges for shared services. Noting that neither party had requested the other for arbitration of the disputes which had arisen from termination of the O&M Agreement and failure of the parties to arrive at a mutually acceptable rate payable for O&M charges for shared infrastructure for shared services, the Division Bench concluded that the arbitral proceedings with respect to this dispute had not commenced.

Therefore, the Arbitral Tribunal constituted in respect of the earlier dispute could not be the arbitral tribunal envisaged under Section 9(3) in respect of the subsequent dispute, even if the tribunal ultimately constituted for the subsequent dispute had the same composition as earlier.

Thus, the Division Bench held that the Second Petition was not barred by Section 9(3) of the Act, and the HC would have the power to grant the interim measures sought thereunder.

On the issue of whether it ought to remand the Second Petition to the Single Judge for deciding on merits, in the interest of justice and expediency, the Division Bench itself heard matter on merits, and ultimately granted the interim relief to the Appellant, under certain conditions.

It was left open to the parties to refer the disputes to arbitration, with the composition of the arbitral tribunal being the same as that of the existing Arbitral Tribunal. Further, to avoid any technical defect and noting that the interests of the Respondents were the same as IWISL, the Division Bench impleaded IWISL in the Second Petition.

ELP COMMENT

This judgment is extremely significant as it makes a clear distinction between the "particular dispute" for which an arbitral tribunal has been constituted, and any disputes which may arise subsequently, even if between the same parties and/or under the same agreements or set of agreements.

If a party was forced to approach an existing arbitral tribunal for interim measures on the subsequent disputes, it may have been possible for the opposing party to raise an issue of jurisdiction, arguing that such disputes had never been referred to the tribunal in the first place. This would defeat the underlying expediency that is required in most cases of interim measures.

Thus, the present judgment allows parties to expediently obtain interim measures in respect of subsequent disputes from the jurisdictional court, and then follow the requisite process for referring disputes to the tribunal.

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⁷ *Dolphin Drilling Ltd. v. Oil & Natural Gas Corporation Ltd.*, (2010) 3 SCC 267.