

The Unusual Case of Dirk India

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☞ Arbitration awards; India; Interim relief; Parties; Purposive interpretation

Abstract

Section 9 of the Arbitration and Conciliation Act 1996 (hereinafter Arbitration Act), is a necessary provision, permitting a party to an arbitration agreement to approach a court for seeking interim measures before initiating an arbitration, during an arbitration and even after making of the award but before its enforcement under s.36 of the Arbitration Act. It is modelled on art.9 of the UNCITRAL Model Law on International Commercial Arbitration, albeit it has a peculiar language. In the case of Dirk India Pvt Ltd v Maharashtra State Electricity Generation Co Ltd,¹ however, the Bombay High Court gave a restrictive interpretation to s.9. It held that an award-debtor cannot approach a court for seeking interim relief after passing of an award. The judgment of the Bombay High Court has been discussed, followed as well as dissented in subsequent judgments of various High Courts. The present article demonstrates that the language of s.9 does not discriminate between a successful and a losing party. Further, the article attempts to prove that the view taken by the Bombay High Court is antithetical to the language of s.9 and deprives a party to a right conferred by the statute.

Introduction

Arbitration over the years has become a hugely popular method of dispute resolution, so much so that in today's time arbitration clauses are found in almost all commercial contracts. An arbitration clause is an essential part of a contract and, at the same time, has an existence of its own separate from the contract and even survives termination of the contract.² The main reasons which make arbitration attractive to commercial entities are its salient features of party autonomy, exclusion of rigmarole procedures of courts and confidentiality. Importantly, non-interference from courts in arbitral process is one of the fundamental principles of arbitration. The said principle has been incorporated in art.5³ of the UNCITRAL Model Law on International Commercial Arbitration (Model Law). However, the Model Law mentions certain exceptions to the said principle wherein courts are not per se interfering or meddling in the arbitral process, but acting in support of arbitration by assisting the parties involved in an arbitration to enforce certain rights and seek

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¹ 2013 (7) B.C.R. 493.

² Doctrine of Separability, enshrined in art.16 of the UNCITRAL Model Law.

³ Article 5. Extent of court intervention: In matters governed by this Law, no court shall intervene except where so provided in this Law.

certain remedies.⁴ Courts act as a panacea to parties to alleviate their grievances encountered in an arbitration. One such exception is when a party approaches a court seeking interim measures. Under the Model Law, art.9 states that the power of the national courts to order interim measures is not incompatible with arbitration.⁵

The power to grant interim measures is an indispensable one as, if the subject-matter of the dispute(s) that has to be referred or has been referred to arbitration is not preserved, the whole arbitral process may be rendered futile. Although, under the Model Law, arbitral tribunal has the power to grant interim measures,⁶ however, in certain situations assistance of national courts becomes necessary to obtain interim measures,⁷ for example, where an interim measure has to be obtained against a third party.⁸ Article 9 does not enumerate the interim measures that can be granted by the national courts⁹ and it does not also mention the grounds on which such measures can be granted. However, national legislation of certain states that have adopted the Model Law have specified the interim measures which can be granted and have given wide powers to the courts to grant such measures in support of arbitration. In India, interim measures that can be granted by the courts are specified under s.9 of the Arbitration and Conciliation Act 1996 (Arbitration Act). The importance of s.9 of the Arbitration Act is corroborated by the fact that it is applicable even if the arbitration is seated in a foreign jurisdiction. Therefore, any judgment pertaining to applicability and scope of s.9 will be significant for the international arbitration community also and its ramifications are global.

The relevance of s.9 was explicated in the landmark judgment of the Supreme Court in *Sundaram Finance Ltd v NEPC India Ltd*,¹⁰ wherein the Supreme Court was dealing with the issue as to whether an interim measure under s.9 can be granted even prior to commencement of the arbitral proceedings and appointment of an arbitrator. The Supreme Court answered in the affirmative and held that effect has to be given to the language of s.9. The Supreme Court held that courts are empowered to grant interim measures even prior to commencement of arbitral proceedings under s.21, otherwise the term “before” occurring in s.9 would be rendered redundant. The Supreme Court, while delivering the seminal judgment, referred to art.9 of the Model Law and s.44 of the English Arbitration and Conciliation Act 1996.¹¹ The Supreme Court interpreted the words “proposed party

⁴ *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] SGCA 5; *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] A.C. 334.

⁵ Model Law, art.9: “It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.”

⁶ See arts 17 to 17I of the Model Law

⁷ Gary B. Born, *International Arbitration: Law and Practice* (2d edn, Kluwer Law International 2016), p.219, para.11.03

⁸ See *Cref Finance Ltd v Puri Construction Ltd* 2000 (3) ARBLR 331 Delhi, *Goyal MG Gases Pvt Ltd v Air Liqueide Deutschland GmbH*, MANU/DE/0098/2005; *Value Advisory Services v ZTE Corporation* (2009) 3 Arb. L.R. 315 (Delhi); *Girish Mulchand Mehta v Mahesh S. Mehta* (2010) 2 MhJ 657; *Dorling Kindersley (India) Pvt Ltd v Sanguine Technical Publishers* (2013) 56 PTC 40 (Delhi); *Mohammad Ishaq Bhat v Tariq Ahmad Sofi* (2010) 3 Arb. L.R. 107

⁹ *Official Records of the General Assembly, Fortieth Session, Supplement No.17 (A/40/17)*, Annex I, para.96 (“It was understood that article 9 itself did not regulate which interim measures of protection were available to a party. It merely expressed the principle that a request for any court measure available under a given legal system and the granting of such measure by a court of ‘this State’ was compatible with the fact that the parties had agreed to settle their dispute by arbitration”).

¹⁰ AIR 1999 SC 565

¹¹ Section 44 of the English and Arbitration Act 1996 states:

to the arbitral proceedings” in s.44 to mean a party to an arbitration agreement and where disputes have arisen but arbitral proceedings have not commenced. However, the Supreme Court held that the party obtaining the interim measure has to commence arbitral proceedings within a reasonable time and courts have the power to fix the time period within which such arbitral proceedings have to commence. This has now been made a statutory provision in the form of subs.(2) of the amended s.9. The seminal judgment in *Sundaram Finance*¹² has been followed by the Supreme Court and the High Courts in numerous judgments.¹³

Interim measures under the 1940 Act and the 1996 Act

Prior to introduction of the 1996 Act,¹⁴ arbitration proceedings were governed by the Arbitration Act 1940 (1940 Act). The 1940 Act was brought into force on 1 July 1940 and replaced the Arbitration Act of 1899. Under the 1940 Act, the arbitrator(s), after delivering the award and signing it, had to file the award in the court having jurisdiction as per s.2(c) of the 1940 Act,¹⁵ and the court then used to pronounce judgment according to the award, making it a decree of the court.¹⁶ Section 18 of the 1940 Act empowered courts to pass an interim order after filing of the award in order to prevent the award-debtor from defeating, delaying or obstructing the execution of the decree that may be passed by the courts under s.17. Apart from the power to pass an interim order in terms of s.18, s.41(b) read

“44. Court powers exercisable in support of arbitral proceedings

- (1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.
- (2) Those matters are—
 - (a) the taking of the evidence of witnesses;
 - (b) the preservation of evidence;
 - (c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings—
 - (i) for the inspection, photographing, preservation, custody or detention of the property, or
 - (ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;
 and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;
 - (d) the sale of any goods the subject of the proceedings;
 - (e) the granting of an interim injunction or the appointment of a receiver.
- (3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.
- (4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.
- (5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.
- (6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order.
- (7) The leave of the court is required for any appeal from a decision of the court under this section.”

¹² See fn.10 above.

¹³ See *Firm Ashok Traders v Gurumukh Das Saluja* (2004) 3 SCC 155; *M/s East India Udyog Limited v Maytas Infra Ltd* (2015) 4 CTC 593; *Cholamandalam DBS Finance Ltd v Sudheesh Kumar* (2010) 1 CTC 481; *M. Ashraf v Kasim VK*, 2018 SCCOnline Ker 4913; *NKG Infrastructure v Granco Industries*, 2018 SCC OnLine J&K 335.

¹⁴ For the purpose of this chapter and the subsequent chapter titled “Distinct language of Section 9 of Arbitration Act”, the author is defining the Arbitration and Conciliation Act 1996, as “the 1996 Act” so as to make it easier for the reader to discern between the Arbitration Act 1940, and the Arbitration and Conciliation Act 1996.

¹⁵ Arbitration Act 1940 s.14.

¹⁶ Arbitration Act 1940 s.17.

with Second Schedule granted powers to courts to order interim measures in aid of arbitration. Section 41(b) stated that courts had the same power to make orders in relation to arbitration proceedings in respect of the matters enumerated in the Second Schedule as they had in respect of a court proceeding. The Second Schedule mentioned the following interim measures which could be granted by courts:

- (i) The preservation, interim custody or sale of any goods which are the subject-matter of the reference.
- (ii) Securing the amount in difference in the reference.
- (iii) The detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.
- (iv) Interim injunctions or the appointment of a receiver.
- (v) The appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceedings.

The powers of courts in India were restricted to grant of interim measures on the abovementioned matters. However, this all changed with the introduction of the 1996 Act.

Two major changes that are noticeable in the 1940 Act and the 1996 Act are:

- (i) The replacement of the term “reference” by “arbitration agreement” in point (i) above and by “arbitration” in point (ii) above. This deliberate change was brought about in order to widen the powers of the courts and not restrict them to just the subject matter of the disputes referred to arbitration but the subject matter covered by the arbitration agreement.
- (ii) Introduction of cl.(e) in subs.(1) of s.9, which empowered the courts to order any interim measure which they deemed to be just and convenient in the circumstances. This was a marked departure from the limited matters on which courts could grant interim orders in terms of the Second Schedule of the 1940 Act. It gave the discretion to courts to grant any kind of interim measure which appeared just and convenient depending on the situation before them. However, the grounds for granting interim measures to a party seeking it were the same as the grounds for seeking interim order in a matter before a court, namely prima facie case, balance of convenience and irreparable harm.¹⁷

¹⁷ Section 9 does not mention the grounds for granting an interim relief. However, the courts have held that the grounds for grant of interim injunction under Order 39 Rules 1 and 2 of the Code of Civil Procedure 1908 would be the guiding principles for grant of interim relief under s.9. See *Adhunik Steels Ltd v Orissa Manganese and Minerals Pvt Ltd* AIR 2007 SC 2563; *Nimbus Communications Ltd v Board of Control for Cricket in India* (2012) 5 BomCR 114; *Prajita Developers Pvt Ltd v Yusuf Khan alias Dilip Kumar* (14 January 2016, Bombay High Court); *Jetpur Somnath Tollways Ltd v National Highways Authority of India* (2017) 4 Arb. L.R. 391(Delhi).

The 1996 Act overhauled arbitration law in India as it consolidated the law pertaining to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards into one statute and brought in various other changes to bring it in line with the contemporary arbitration practices. The 1996 Act considerably varied from the 1940 Act, which was made clear by the Supreme Court in *Sundaram Finance*.¹⁸ While dealing with the issue as to whether courts can be approached under s.9 for grant of interim measures prior to invocation of arbitration, the Supreme Court held that the provisions of the 1996 Act are very much at variance with the provisions of the 1940 Act and, therefore, taking aid of the provisions of the 1940 Act to interpret the provisions of the 1996 Act would lead to misconstruction. The Supreme Court instead placed reliance on the Model Law to interpret s.9 as the 1996 Act was primarily based on the Model Law. The Supreme Court held that s.9 could be resorted to by the parties even before invocation of arbitration, provided the party obtaining the benefit of the interim measure had an intention to invoke arbitration within a reasonable time. The decision to interpret the 1996 Act independently of the 1940 Act was a notable one which helped towards positive development of arbitration law in India.

Distinct language of section 9 of the arbitration act

The language of s.9 (pre-amendment¹⁹ as well as post-amendment) differs from the language of art.9 of the Model Law. Section 9 begins with the words, “A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court ...”. The difference being that s.9 also allows a party to apply to a court for seeking interim measures even after making of the arbitral award but before it is enforced.²⁰ It seems the peculiar language of s.9 enclosing the post-award stage has its basis in s.18 of the 1940 Act. Section 18 of the 1940 Act gave power to a court to pass interim orders after filing of the award in the court if the award-debtor had taken or was about to take steps to defeat, delay or obstruct the execution of

¹⁸ See fn.10 above.

¹⁹ Section 9 has been subsequently amended by the Arbitration and Conciliation Amendments Act 2015. The pre-amended s.9 stated:

“Interim measures, etc., by Court

A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court:—

- (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or
- (ii) For an interim measure of protection in respect of any of the following matters, namely:—
 - (a) The preservation, interim custody or sale of any goods, which are the subject matter of the arbitration agreement;
 - (b) Securing the amount in dispute in the arbitration;
 - (c) The detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
 - (d) Interim injunction or the appointment of a receiver;
 - (e) Such other interim measure of protection as may appear to the court to be just and convenient,

And the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.”

²⁰ See *Firm Ashok Traders v Gurumukh Das Saluja* (2004) 3 SCC 155; *Trammo DMCC v Nagarjuna Fertilizers and Chemicals Ltd*, 2017 SCC Online Bom 8676; *Fornax Real Estate Limited, Delhi v M/s Chandigarh Spun Pipe Company, Chandigarh* (Punjab & Haryana High Court, FAO No.7020 of 2015).

any decree that might have been passed upon the award. This power of the court was to specifically preserve the subject matter of the arbitration so that execution of the award is not rendered vain. Although the post award timeline of s.9 might be based on s.18 of the 1940 Act, however, as stated earlier, the 1996 Act significantly differs from the 1940 Act in its objectives and intents. Therefore, the 1940 Act cannot be relied upon to interpret the provisions of the 1996 Act.

The specific inclusion of post-award stage in s.9 is at variance with interim relief provisions of some of the popular arbitration jurisdictions. Hong Kong Arbitration Ordinance incorporates the Model Law verbatim with modifications to certain provisions to make them congruous with the requirements that the arbitration scenario in that region demands. Section 21²¹ of the Hong Kong Arbitration Ordinance provides for interim measures and is a reproduction of art.9 of the Model Law. Similarly, s.11 of the Malaysian Arbitration Act 2005 incorporates art.9 of the Model Law. The Hong Kong Arbitration Ordinance and Malaysian Arbitration Act 2005, therefore, specify that the courts can grant interim measures only before and during the arbitral proceedings. Similarly, in Australia, the International Arbitration Act 1974 grants force to the Model Law by virtue of s.16.

In contrast, in Singapore and England, the language of the sections pertaining to interim measures by courts is substantially different from art.9 of the Model Law and s.9 of the 1996 Act. Under the Singapore Arbitration Act 2002, and Singapore International Arbitration Act 1994, s.31 and s.12A, respectively, pertain to interim measures by courts. Both the enactments do not specify the stage(s) at which a party can approach the court for grant of an interim measure. Similarly, s.44 of the English Arbitration Act 1996, provides for grant of interim measures by a court without specifying the stage at which the parties can approach for grant of such interim measures. The language of the aforesaid provisions evinces that grant of interim measures by courts in Singapore and England may not be restricted to a particular stage and any of the parties to an arbitration agreement may approach the courts at any stage, irrespective of the status of the arbitration.

Therefore, it is evident that the language of the abovementioned legislations is at a variance with the language of s.9 of the 1996 Act.

Considering the above, it can be reasonably stated that s.9 has a distinct wording and is a peculiar provision which has to be interpreted as per the clear, unambiguous and precise language used by the legislature in drafting it.

Dirk India judgment

In *Dirk India*,²² the Bombay High Court was dealing with appeals under s.37 of the Arbitration Act arising from a petition filed under s.9²³ by Dirk India Pvt Ltd (DIPL) against Maharashtra State Electricity Generation Co Ltd (MSEGCL) for grant of interim measure to let DIPL continue to lift pulverised fly ash (PFA) from

²¹ Article 9 of UNCITRAL Model Law (Arbitration agreement and interim measures by court). Article 9 of the UNCITRAL Model Law, the text of which is set out below, has effect—

“Article 9. Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.”

²² See fn.1 above.

²³ Arbitration Petition No.355 of 2011, Bombay High Court, 30 April 2012.

the hoppers in the manner it was being done prior to termination of the contract by MSEGCL.

The factual background of the case is that MSEGCL and DIPL had entered into a contract dated 4 October 2000, for disposing of PFA which was being generated as a by-product from burning of coal in Nashik Thermal Power Station. DIPL was required to construct hoppers and collect a certain quantity of PFA every day for disposing of. MSEGCL alleged that DIPL had failed in its obligations and, thus, terminated the contract on 23 November 2006. DIPL subsequently filed a petition under s.9²⁴ of the Arbitration Act before the Bombay High Court for allowing DIPL to collect PFA in the same manner before termination notice was issued by MSEGCL. By Order dated 22 December 2006, the Court granted the request of DIPL. The matter was referred to arbitration and an arbitral tribunal was appointed for adjudicating the disputes between the parties.

The arbitral tribunal rendered its award on 31 March 2011, in favour of MSEGCL by dismissing the claims of DIPL. However, it also dismissed the counter-claims of MSEGCL. DIPL and MSEGCL filed petitions under s.34²⁵ of the Arbitration Act before the Bombay High Court challenging the arbitral award. During pendency of the s.34 petitions, DIPL also filed a petition under s.9²⁶ for continuation of the interim order dated 22 December 2006 passed in the earlier s.9 petition.²⁷ The Ld Single Judge, by an Order dated 30 April 2012, modified the earlier interim order and permitted DIPL to collect one-third of PFA being generated from 30 per cent of the hoppers in operation. MSEGCL raised an objection before the Ld Single Judge regarding maintainability of the petition on the ground that since there was no award in favour of DIPL, it had no basis for filing the petition seeking interim measures. The Ld Single Judge deciding the petition held that there is substance in the objection raised by MSEGCL, however, chose to pass the aforesaid interim order until pendency of the s.34 petitions. Both parties challenged the Order dated 30 April 2012, passed by the Ld Single Judge before the Division Bench by filing appeals²⁸ under s.37 of the Arbitration Act.

The main issue before the Division Bench of the Bombay High Court was regarding maintainability of the petition since DIPL did not have an award in its favour. MSEGCL gave four reasons pertaining to non-availability of the right to the losing party to seek interim measures, which are:

- (i) The scheme of s.9 is for the courts to pass a protective order for protecting the subject-matter of the dispute or the amount involved in the dispute.
- (ii) The purpose of s.9 after making of the award but prior to its enforcement under s.36 is to protect the interests of award-creditor in order for it to fruitfully enforce the arbitral award.

²⁴ 2007 Supp. Arb. L.R. 213.

²⁵ 2014 SCC OnLine Bom 1279.

²⁶ See fn.23 above.

²⁷ See fn.23 above.

²⁸ Appeal No.114 of 2013, *Dirk India Pvt Ltd v Maharashtra State Electricity Generation Co Ltd* (Bombay High Court); and Appeal No.30 of 2013, *Maharashtra State Electricity Generation Co Ltd v Dirk India Pvt Ltd* (Bombay High Court).

- (iii) The award-debtor cannot have a claim decided in its favour in a petition under s.34. A petition under s.34 is not in the nature of an appeal and, therefore, the award can only be set aside.
- (iv) A proceeding under s.9 is at the instance of a party who wants the award to be enforced. An order under s.9 is in aid of enforcement of the award.

DIPL countered these arguments on the following grounds:

- (i) Finality of an award is an issue of executability and has no connection with an order under s.9.
- (ii) There is no restriction under s.9 for a losing party to seek interim measures.
- (iii) In certain situations, arbitration proceedings can re-commence such as in the case of violation of principles of natural justice or if the arbitral tribunal is not properly constituted. Therefore, it may be necessary for a party to obtain an order under s.9 even though it is a losing party.

The Bombay High Court passed an Order dated 18 March 2013 in favour of MSEGCL, holding that a losing party cannot file a petition under s.9 of the Arbitration Act after making of an award since the purpose of s.9 is to give a protective order in aid of enforcement of the award. For arriving at the aforesaid conclusion, the court analysed the nature of interim orders that a court could grant under clauses (i) and (ii) of s.9.²⁹ The court held as follows in [13] of its judgment:

“The underlying theme of each one of the sub-clauses of clause (ii) is the immediate and proximate nexus between the interim measure of protection and the preservation, protection and securing of the subject-matter of the dispute in the arbitral proceedings.”

Secondly, the court held that before commencement of and during the arbitral proceedings, the purpose of an interim order under s.9 is to protect the subject-matter of dispute. After making of the arbitral award, the purpose is to protect the fruits of the arbitral proceedings, i.e. the arbitral award, until its enforcement under s.36.

Thirdly, the Bombay High Court attempted to establish a connection between s.9 and s.34 and s.36 of the Arbitration Act. The court stated that enforceability of an award is dependent on either the losing party failing to file an application under s.34 for challenging the award within the stipulated time or the dismissal of an application under s.34 since under this section the courts can only set aside an award and not reverse the findings in the award and grant a claim to the losing party, therefore, it is not possible for the losing party to get the award enforced. Section 9 is for protection of the subject-matter of the arbitral award, hence it is for the benefit of the award-creditor. Importantly, the court held in [14] of the judgment:

²⁹The judgment in *Dirk India* was delivered prior to the amendments in the Arbitration and Conciliation Act 1996, vide Arbitration and Conciliation Amendment Act 2015. By way of amendments, subsections (1), (2) and (3) have been introduced in s.9.

“What such a litigating party cannot possibly obtain even upon completion of the proceedings under section 34, it cannot possibly secure in a petition under section 9 after the award.”

It is pertinent to mention that the court rejected the petition of DIPL also on the ground that DIPL was seeking specific performance of the contract which was not permissible under s.9.

The decision of the Bombay High Court has far-reaching consequences inasmuch as it denies a party, other than the winning party, the right to approach the court for seeking interim measures. The Order dated 18 March 2013, of the Bombay High Court in *Dirk India*³⁰ was challenged in the Supreme Court³¹ but was dismissed as withdrawn for being infructuous by Order dated 29 November 2016, since the parties had arrived at a settlement.³² However, the Delhi High Court in *Nussli Switzerland Ltd v Organizing Committee Commonwealth Games 2010*³³ and the Bombay High Court in *Home Care Retails Pvt Ltd v Haresh N. Sanghavi*³⁴ relied on the judgment in *Dirk India*³⁵ and passed similar orders which were then challenged before the Supreme Court and are currently pending decision.³⁶

Analysis of Dirk India judgment

The primary question before the Bombay High Court was whether the s.9 petition filed by DIPL was maintainable. The court relied on the judgment of the Supreme Court in *Sundaram Finance Ltd v NEPC India Ltd*³⁷ to state that courts can be approached under s.9 even prior to commencement of arbitral proceedings. The court then referred to the judgment of the Supreme Court in *Firm Ashok Traders v Gurumukh Das Saluja*³⁸ and observed that the Supreme Court held that the purpose of interim measures is to protect the right under adjudication before the arbitral tribunal from being frustrated. The court, thereafter, referred to s.9 and observed that there are two facets to s.9. First, the underlying theme of s.9 is the proximate connection between interim measure of protection and preservation, protection and securing of the subject matter of the dispute in arbitration. Secondly, the proximate connection between the orders sought for and the arbitral proceedings. The court held that when interim measures are sought prior to or during the arbitral proceedings, they are in aid to fruition of arbitral proceedings. In continuation of this corollary, the court held that interim measures sought after an arbitral award has been made but prior to its enforcement are for protecting the fruit of the proceedings until its enforcement. Hence, the court held that interim measures at post-award stage are a step in aid of enforcement of the award. It further held that it is imperative to impart a purposive interpretation to the words “at any time after

³⁰ See fn.1 above.

³¹ SLP(C) No.13688 of 2013 (Supreme Court of India).

³² See Order dated 29 November 2016, *Dirk India Pvt Ltd v Maharashtra State Elec. Gen. Co Ltd*, SLP(C) No.13688 of 2013; *Wind World (India) Ltd v Enercon GmbH* 2017 SCC OnLine Bom 1147 at [12].

³³ 2014 145 DRJ 399.

³⁴ 2016 SCC OnLine Bom 5027.

³⁵ See fn.1 above.

³⁶ *Nussli Switzerland Ltd v Organizing Committee Commonwealth Games, 2010*, SLP (C) No.26876/2014; *Home Care Retails Pvt Ltd v Haresh N. Sanghavi*, SLP No. (C) 29972/2015.

³⁷ See fn.10 above.

³⁸ (2004) 3 SCC 155.

making of the arbitral award but before it is enforced in accordance with section 36”.

For imparting a purposive interpretation, the court interpreted s.36 of the Arbitration Act and stated that enforcement of the award enures to the benefit of the party in whose favour the award has been passed. The court then related it to the two ways in which an award can become executable. The court held that the award becomes executable with the failure of a party to challenge it within the time period stipulated in s.34 or refusal of the court to set aside the award under s.34.

Further elucidating on the above-mentioned reasoning, the court held that the losing party cannot get the award enforced under s.36 since the court dealing with s.34 application is not a court of first appeal. The only recourse available to the losing party is to get the award set aside, however, it cannot get the findings of the arbitrator reversed and obtain a claim in its favour. Hence, the court held that granting interim measure to DIPL would be a perversion of the object and purpose of s.9.

The Bombay High Court also held that in order to further the intent and purpose of s.9, a purposive interpretation will have to be given to the words “at any time after making of the arbitral award but before it is enforced in accordance with section 36”. As stated above, the language of s.9 starts with the words “A party”, which signifies that any party to the arbitration agreement has the right to approach the court for obtaining an interim measure. This is supported by the definition of the term “party” in s.2(1)(h)³⁹ of the Arbitration Act, which states that “party” means a party to the agreement. The language used in s.9 does not discriminate between the winning party and the losing party. The purpose of defining a term in a statute is to state its particular meaning in the context of the statute for a proper appreciation of the understanding of the scheme and objective of the statute.⁴⁰ It is only when a term is not defined in the statute, it becomes the duty of the courts to expound its meaning.⁴¹ However, if a term has been defined in the statute, its meaning does not vary even if it is used at several places within the statute.⁴² This aspect was not discussed by the court in its judgment.

Further, the language of s.9 does not imply, in any manner whatsoever, that the term “party” should be accorded a restrictive meaning. The Supreme Court in the case of *Nathi Devi v Radha Devi Gupta*⁴³ elucidated the doctrine of Literal interpretation of statute⁴⁴ which states that if the words in a statute are plain and unambiguous, they should be expounded in their natural and ordinary sense.⁴⁵ The Supreme Court held:

“The interpretative function of the Court is to discover the true legislative intent. It is trite that in interpreting a statute the Court must, if the words are clear, plain, unambiguous and reasonably susceptible to only one meaning,

³⁹ Clause (h) of subs.(1) of s.2: “party” means a party to an arbitration agreement.

⁴⁰ Justice G.P. Singh, *Principles of Statutory Interpretation* (Revised by Justice A.K. Patnaik, 14th edn, LexisNexis, 2016), p.97.

⁴¹ Singh (fn.40 above), p.97.

⁴² Singh (fn.40 above), p.196; also see *Bhagwati Developers Pvt Ltd v Peerless General Finance Investment Co Ltd* (2013) 9 SCC 584.

⁴³ AIR 2005 SC 648.

⁴⁴ See *Becke v Smith* (1836) 2 M&W 191.

⁴⁵ See *Jugal Kishore Saraf v Raw Cotton Co Ltd*, AIR 1955 SC 376.

give to the words that meaning, irrespective of the consequences. Those words must be expounded in their natural and ordinary sense. When a language is plain and unambiguous and admits of only one meaning no question of construction of statute arises, for the Act speaks for itself. Courts are not concerned with the policy involved or that the results are injurious or otherwise, which may follow from giving effect to the language used. If the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In considering whether there is ambiguity, the Court must look at the statute as a whole and consider the appropriateness of the meaning in a particular context avoiding absurdity and inconsistencies or unreasonableness which may render the statute unconstitutional.”

The Supreme Court went ahead to state that if the words are capable of only one construction then, even though any other construction which is more aligned with the object of the statute might be possible, it would not be open to the courts to expound such other construction of the words, unless literal construction leads to an absurdity. In present case, the construction of the words “a party” cannot be construed as “a successful party” since the term “a party” has been clearly defined in the Arbitration Act. Further, giving a selective interpretation to the term “a party” only in respect of interim measures sought after the arbitral award is made but before it is enforced would lead to an absurd and anomalous result. Also, it denies a party to the arbitration agreement a right conferred on it by the Arbitration Act. A right conferred by a statute can only be taken away by a legislative enactment.⁴⁶ The courts do not have the power to amend a statute.⁴⁷

In the case of *Nussli Switzerland*,⁴⁸ the Delhi High Court discussed the issue of interpretation of the words “a party”⁴⁹ and also the exception to the rule of Literal interpretation of statutes.⁵⁰ The exception being that if an ordinary construction of the words used by the legislature leads to absurdity, repugnancy or injustice, then the courts can take assistance of internal aids of construction such as the Preamble of an Act or the Statement of Objects and Reasons to determine the true purport of those words.⁵¹ The Court observed that a literal interpretation of the term “party” as defined under s.2(1)(h) of the Arbitration Act meant any party to the arbitration agreement can approach the court post-award for an interim relief. The issue before the Delhi High Court was that the Organizing Committee, Commonwealth Games 2010 (OC), filed a s.9 petition before a Ld Single Judge of the Delhi High Court

⁴⁶ *Rajendra Singh v State of UP* (Allahabad High Court, Service Bench No.1110 of 2014) (“17. In view of the above, we are of the considered opinion that every statutory provision requires strict adherence, for the reason that the statute creates rights in favour of the citizens, and if any order is passed de hors the same, it cannot be held to be a valid order and cannot be enforced. As the statutory provision creates legal rights and obligations for individuals, the statutory authorities are under a legal obligation to give strict adherence to the same and cannot pass an order in contravention thereof, treating the same to be merely decoration pieces in his office”). Also see *Hosein Kasam Dada (India) Ltd v State of MP* 1953 SCR 987; *Garikapati Veeraya v N. Subbiah Choudhry* 1957 SCR 488; *Sehajdhari Sikh Federation v Union of India* 2012 1 RCR(Civ) 384; *Nahar Industrial Enterprises Limited v Hong Kong and Shanghai Banking Corporation* (2009) 8 SCC 64.

⁴⁷ *Behram Khurshid Pesikaka v State of Bombay*, AIR 1955 SC 123.

⁴⁸ See fn.36 above.

⁴⁹ See fn.36 above at [19]–[22].

⁵⁰ See fn.36 above at [23]–[31].

⁵¹ See *Delhi Transport Corporation v DTC Mazdoor Congress*, 1990 SCR Suppl. (1) 142; *Warburton v Loveland* (1929) 1 H&B IR 623, 648.

for extension of a bank guarantee given by Nussli Switzerland Ltd (Nussli) until disposal of the petition filed by it under s.34 challenging the award. The Ld Single Judge, *vide* Order dated 26 February 2014, ordered in favour of OC. Hence, Nussli filed an appeal against the said Order under s.37 of the Arbitration Act. In the appeal, not agreeing with the literal interpretation, the Delhi High Court proceeded to refer numerous judgments⁵² to hold that provisions of enactments should be construed in such a manner that fulfils and furthers the object of the Act. Further, from the judgments referred by it, it seems that the court was trying to emphatically show that there is ambiguity in the language of s.9 which needed to be cured in order to make the provision workable. The test is to see whether plain meaning of the words leads to absurdity, repugnancy or injustice. It is imperative to remember that the test laid down is of a very high standard whereby the court is compelled to give a different meaning to the words in order for them to make sense in view of the objects and intent of an Act. The Delhi High Court also referred to art.9 of the Model Law but rejected the argument that s.9 gives all pervasive powers to the courts to grant interim measures to each and every party to the arbitration agreement, including the losing party. In the end, the Delhi High Court agreed with the view of the Bombay High Court in *Dirk India*⁵³ and held that the term “a party” means the winning party when considered against the objectives of the Arbitration Act.

The reasoning of the Bombay High Court in *Dirk India*⁵⁴ and the conclusion arrived at by it that a losing party cannot approach a court under s.9 after passing of the arbitral award was negated by the Gujarat High Court in *Gail (India) Ltd v Latin Rasayani Private Ltd.*⁵⁵ In the said case, the Gujarat High Court held that s.9 does not make a distinction between a winning party and a losing party. Both the parties are entitled to approach the court for grant of interim measure. In the *Latin Rasayani* case,⁵⁶ the respondent was before the Gujarat High Court in appeal under s.37 of the Arbitration Act against the order of Additional District Judge, Vadodara, in a petition under s.9 for interim relief. The Gujarat High Court affirmed the interim order passed by the Additional District Judge, Vadodara. The High Court relied on its judgment in *Madhavpura Mercantile Cooperative Bank Ltd v Shah Bimani Chemicals Pvt Ltd.*⁵⁷ wherein it held that an award can be enforced only after the time to file a challenge under s.34 has expired or the challenge, though filed, has been set aside.

Award-debtor as winning party

In the *Nussli* case,⁵⁸ the important thing to be noticed is that, first, the Delhi High Court frequently referred to Nussli as the winning party when, in fact, OC also had an award in its favour in respect of the counter-claims raised by it. Therefore,

⁵² See *Camden (Marquis) v IRC* (1914) 1 K.B. 641; *State of WB v Union of India*, AIR 1963 SC 1241; *Abel v Lee* (1871) L.R. 6 C.P. 365; *Jivabhai v Chhagan*, AIR 1961 SC 1491; *Union of India v Prabhakaran Vijaya Kumar* (2008) 9 SCC 527; *Chinnamarkathian alias Muthu Gounder v Ayyavoo alias Periana Counder* (1982) 1 SCC 159; *Girdhari Lal & Sons v Balbir Nath Mathur* (1986) 2 SCC 237.

⁵³ See fn.1 above.

⁵⁴ See fn.1 above.

⁵⁵ 2014 SCC OnLine Guj 14836.

⁵⁶ 2014 SCC OnLine Guj 14836.

⁵⁷ (2009) 2 Arb. L.R. 287 (Gujarat).

⁵⁸ See fn.36 above.

both Nussli and OC were winning parties in their own right. Consequently, there was a possibility that in the proceedings under s.34 of the Arbitration Act, the award in favour of Nussli could have been set aside and award in favour of OC could have been upheld. Hence, in such a situation, an interim order under s.9 could have been a necessity for OC. However, the Delhi High Court held that the amount awarded to OC has been subsumed in the larger amount awarded in favour of Nussli. The court held that a court under s.34 does not have the power to modify the award and at best the award could be set aside leaving the parties to commence fresh arbitration proceedings in respect of the claims.⁵⁹ In this regard, it is important to mention the recent case of *Oil and Natural Gas Corporation Ltd v Consortium of Sime Darby Engineering*⁶⁰ filed before the Bombay High Court wherein this exact issue was raised by Oil and Natural Gas Corporation Ltd (ONGC). ONGC filed a s.9 petition against Consortium of Sime Darby Engineering (SDE) for extending the performance bank guarantees submitted by SDE in favour of ONGC. The arbitral tribunal had passed an award allowing counter-claims of ONGC to the amount of US\$15,665,064.80 and allowing claims of SDE to the amount of US\$20,792,980.20. The arbitral tribunal had held that a net amount of US\$5,127,915.40 is payable by ONGC to SDE. ONGC argued before the court that it was not a losing party since its counter-claims to the extent of US\$15,665,064.80 had been allowed by the arbitral tribunal. The Bombay High Court held that severability principle cannot be applied to convert an award in favour of one party to an award in favour of another party in s.34 proceedings. The court relied on the judgment of the Hon'ble Supreme Court in *National Buildings Construction Corporation Ltd v Lloyds Insulation India Ltd*⁶¹ which held that under s.36 of the Arbitration Act, the court cannot go beyond the award to determine the manner in which the arbitral tribunal had arrived at an amount. In the said case, the arbitral tribunal had adjusted the amount awarded under claims and counter-claims and arrived at a net figure payable by the defendant to the claimant. The claimant had challenged the award in favour of the defendant and had proceeded to enforce the part of the award in its favour which had not been challenged by the defendant under s.36 of the Arbitration Act. The petition under s.36 had been admitted by the Delhi High Court and it was subsequently challenged by the defendant before the Supreme Court. The Supreme Court had allowed the appeal on the ground that when a petition under s.34 is pending adjudication, the award becomes inexecutable. The Delhi High Court as well as the Bombay High Court held that once the counter-claim awarded to the defendant was subsumed in the larger amount awarded to the claimant and a net amount was arrived at by the arbitral tribunal, the courts under s.34 could not go beyond the amount awarded and could not modify the award. The only options available with the courts are to either affirm the award or to set it aside. This leads us to the important question of severability of an arbitral award.

⁵⁹ See fn.36 above at [34].

⁶⁰ Commercial Arbitration Petition (L) No.471 of 2018, Bombay High Court, 27 April 2018.

⁶¹ (2005) 2 SCC 367.

Severability and modification of arbitral award under section 34

As stated above, in the case of *Oil and Natural Gas Corporation Ltd v Consortium of Sime Darby Engineering*,⁶² ONGC argued that its claims to the tune of US\$15,665,064.80 have been allowed and, therefore, it is not a losing party. ONGC relied on the case of *RS Jiwani v Ircon International Ltd*⁶³ to plead that doctrine of severability can be applied to an award and part of the award in favour of ONGC can be separated from the part in favour of the SDE. In *Ircon International*,⁶⁴ the Full Bench of the Bombay High Court was dealing with a situation where a Ld Single Judge had upheld 11 out of 15 claims of the petitioner therein but relying on the judgment of *Pushpa P. Mulchandani v Admiral Radhakrishin Tahiliani*⁶⁵ he had set aside the whole award. The Full Bench applied the doctrine of severability and held that impugned award can be separated into parts and there was no need to set aside the whole award as the claims upheld under s.34 can be enforced. The court further held that setting aside of the whole award even though a part of the award is vitiated would not be in consonance with the objectives of the Arbitration Act. Importantly, the court held, “judicial discretion vested in the court under the provisions of section 34 of the Act takes within its ambit power to set aside an award partly or wholly depending on the facts and circumstances of a given case”. The court in the *ONGC* case⁶⁶ held that the facts in the present case are different from *Ircon International*⁶⁷ inasmuch as the present case involves claims as well as counter-claims.

Applying the ratio of the *National Buildings* case,⁶⁸ the Bombay High Court held that the severability principle cannot be applied to convert an award in favour of one party to an award in favour of another party in s.34 proceedings. The point to be noted here is that judgment in the *National Buildings* case⁶⁹ was not in respect of s.34 petition but a petition under s.36 of the Arbitration Act. The Supreme Court had held that that the executing court cannot look into the manner in which the awarded amount is arrived at the stage of enforcement. It had further held that no action can be taken to execute the award in view of the automatic stay granted by pre-amended s.34 of the Arbitration Act on the arbitral award. However, the Supreme Court did observe, and which goes in favour of the Bombay High Court, that the arbitral tribunal had not passed two awards awarding claims and counter-claims separately to the parties but only one award mentioning the net amount payable by the appellant therein to the respondent, and, therefore, the part of the award favouring the respondent could not be enforced while the petition under s.34 was pending.

In *Saptarishi Hotels Pvt Ltd v National Institute of Tourism & Hospitality Management*,⁷⁰ the appellants therein sought an interim order restraining the respondent from removing the appellants from the subject land. In the said case,

⁶² See fn.60 above.

⁶³ (2010) 1 Mh. L.J. 547.

⁶⁴ (2010) 1 Mh. L.J. 547.

⁶⁵ (2008) 7 LJ Soft 161.

⁶⁶ See fn.60 above.

⁶⁷ See fn.63 above.

⁶⁸ See fn.61 above.

⁶⁹ See fn.61 above.

⁷⁰ 2019 SCC OnLine TS 1765.

the reason for the Telangana High Court to differ from the judgment in *Dirk India*⁷¹ was different from that in the *Latin Rasayani* case⁷² inasmuch as the Telangana High Court held that the reasoning of the Bombay High Court that under s.34 an arbitral award can only be set aside and the claims of the aggrieved party cannot be allowed since it is not an appeal is incorrect. The High Court held that the courts have the power to modify an award under s.34 in the event the claims decided by the arbitral tribunal are distinct and separate from each other. The High Court in this regard relied on several Supreme Court and High Court judgments. The Supreme Court most perspicuously stated in *JG Engineers Pvt Ltd v Union of India*⁷³ that the courts have the power to separate distinct claims and set aside claims which suffer from any of the infirmities enumerated under s.34(2) of the Arbitration Act. It held in [18]:

“It is now well settled that if an award deals with and decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent. As the awards on items 2, 4, 6, 7, 8 and 9 were upheld by the civil court and as the High Court in appeal did not find any infirmity in regard to the award on those claims, the judgment of the High Court setting aside the award in regard to claims 2, 4, 6, 7, 8 and 9 of the appellant, cannot be sustained. The judgment to that extent is liable to be set aside and the award has to be upheld in regard to claims 2, 4, 6, 7, 8 and 9.”

Further, in the case of *ONGC Ltd v Western Geco International Ltd*,⁷⁴ the Supreme Court held that courts may set aside or modify an award in a petition under s.34 depending on the fact the infirmed part is severable from the rest of the award.⁷⁵

The power of courts to modify an award under s.34 is a contentious issue. It was extensively discussed by the Delhi High Court in the case of *Puri Construction Pvt Ltd v Larsen and Toubro Ltd*.⁷⁶ After referring to numerous cases, it held that the courts do not have the power to modify, vary or remit an award but only to set it aside. Importantly, it relied on the judgment of the Supreme Court in *McDermott International Inc v Burn Standard Co Ltd*⁷⁷ wherein the Supreme Court held:

“The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. 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. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the

⁷¹ See fn.1 above.

⁷² See fn.55 above.

⁷³ (2011) 5 SCC 758.

⁷⁴ (2014) 9 SCC 263.

⁷⁵ (2014) 9 SCC 263 at [30].

⁷⁶ 2015 SCC Online Del 9126 at [116]–[118].

⁷⁷ (2006) 11 SCC 181.

court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.”

Therefore, as per the view adopted by the Delhi High Court, a court does not have the power to modify, vary or remit an award. Interestingly, both the Delhi High Court and the Telangana High Court have relied on the same case laws and come to different conclusions.⁷⁸

The Telangana High Court came to the conclusion that an award can be modified and, therefore, held that the foundational premise of the judgment in *Dirk India*⁷⁹ was wrong and the aggrieved party whose claim was rejected cannot be left remediless.⁸⁰ The Telangana High Court, by stating that an arbitral award is subject to modification by courts under s.34, expressed that there may arise a situation wherein under s.34 petition an arbitral award may transform in favour of one of the one or the other party. A situation may also arise whereby the claims or the counter-claims may have to be re-adjudicated before an arbitral tribunal. Therefore, an aggrieved party cannot be deprived of its right to approach a court under s.9 for interim measures after passing of an arbitral award until its enforcement.

The following points can be deduced from the above:

- (i) In a case where the arbitral tribunal awards claim as well as counter-claim and arrives at a net amount after adjusting the amounts of the claim and counter-claim and passes a single award, then the court under s.34 or under s.36 cannot go behind the award to see how the net amount was arrived at. In such a case, the whole arbitral award will have to be set aside if it is found to be hit by any of the grounds contemplated under subs(2) of s.34, except s.34(2)(a)(iv).
- (ii) A party challenging a part of the award passed against it cannot enforce the other part of the award which is in its favour.
- (iii) The power of the courts to modify an award under s.34 is a contentious issue with the Supreme Court as well as the High Courts having differing views. However, differing from the Delhi High Court and the Bombay High Court, the other High Courts have held that a party, even being a losing party, cannot.

Denial of right to other parties

In continuation of the discussion pertaining to *Dirk India*⁸¹ and *Nussli*,⁸² another issue pertaining to these cases is that the Bombay High Court as well as the Delhi High Court held the words “a party” occurring in s.9, when read along with s.34 and s.36, to be absurd enough to go against the objectives of the Arbitration Act. However, depriving a party the right to approach the court for seeking a relief, no matter how absurd the relief, is an absurdity in itself. The courts in India have consistently held that a party to the arbitration agreement can approach the court

⁷⁸ Both the courts have relied upon *McDermott International Inc v Burn Standard Co Ltd* (2006) 11 SCC 181 and *RS Jiwani v Ircan International Ltd* (2010) 1 Mh. L.J. 547.

⁷⁹ See fn.1 above.

⁸⁰ The Telangana High Court, however, did not comment on the court's power to remit an award.

⁸¹ See fn.1 above.

⁸² See fn.36 above.

for seeking interim measures.⁸³ In the case of *Firm Ashok Traders v Gurumukh Das Saluja*,⁸⁴ the Supreme Court held:

“ ‘Party’ is defined in Clause (h) of sub-Section (1) of Section 2 of A & C Act to mean ‘a party to an arbitration agreement’. So, the right conferred by Section 9 is on a party to an arbitration agreement. The time or the stage for invoking the jurisdiction of Court under Section 9 can be (i) before, or (ii) during arbitral proceeding, or (iii) at any time after the making of the arbitral award but before it is enforced in accordance with Section 36 ... For the moment suffice it to say that the right conferred by Section 9 cannot be said to be one arising out of a contract. The qualification which the person invoking jurisdiction of the Court under Section 9 must possess is of being a party to an arbitration agreement. A person not party to an arbitration agreement cannot enter the Court for protection under Section 9. This has relevance only to his locus standi as an applicant. This has nothing to do with the relief which is sought for from the Court or the right which is sought to be canvassed in support of the relief. The reliefs which the Court may allow to a party under clauses (i) and (ii) of Section 9 flow from the power vesting in the Court exercisable by reference to ‘contemplated’, ‘pending’ or ‘completed’ arbitral proceedings. The Court is conferred with the same power for making the specified orders as it has for the purpose of and in relation to any proceedings before it though the venue of the proceedings in relation to which the power under Section 9 is sought to be exercised is the arbitral tribunal.” (emphasis supplied)

The court has the power to dismiss a petition under s.9 by considering the merits of the case and applying its mind to them. In the event, if the court considers in its wisdom to dismiss the petition, it may very well do so.

Further, the decision goes against the fundamental principles of arbitration that a party should be treated fairly and equally and should be given a reasonable opportunity to present its case.⁸⁵ Apart from the arbitral proceedings, these principles also extend to the proceedings before the courts.⁸⁶ Also, the court again held a narrow view without contemplating the situation wherein a party (any party other than the winning party) may require an interim measure of protection which may not be in relation to preservation of the amount involved in the arbitration but may pertain to preservation of documents or other evidence or any other kind of protection.

This takes us to the point that there might be certain situations where the award-debtor or any other party who is neither a winning or a losing party may need to obtain an interim measure from the court. One such situation arose in the case of *Wind World (India) Ltd v Enercon GmbH*.⁸⁷

⁸³ Also see *Sundaram Finance Ltd v NEPC India Ltd*, (1999) 3 SCC 479.

⁸⁴ (2004) 3 SCC 155.

⁸⁵ Article 18 of the Model Law; s.18 of the Indian Arbitration and Conciliation Act 1996; art.15(1) of the UNCITRAL Arbitration Rules 1976.

⁸⁶ See *Shanti Bhushan v Supreme Court of India* (Supreme Court of India, Writ Petition (Civil) No.789 of 2018); *Naresh Shridhar Mirajkar v State of Maharashtra* (1966) 3 SCR 744.

⁸⁷ Arbitration Petition No.105 of 2016 (Bombay High Court).

Wind World case: importance of interim measure for losing party

In the case of *Wind World*,⁸⁸ Wind World (India) Ltd (Wind World) had filed a petition under s.9 before the Bombay High Court against Enercon GmbH (Enercon) for, inter alia, a grant of an interim order to continue a procedural order passed by the arbitral tribunal which allowed Wind World to redact names of suppliers and component manufacturers from the documents supplied to Enercon and Wobben Properties GmbH (Wobben). Respondent No. 3 in the s.9 petition was the London Court of International Arbitration which held the unredacted copies of the documents supplied. The arbitral award was passed in favour of Enercon and Wobben. Wind World feared passing of its confidential information into the hands of Enercon and Wobben and, inter alia prayed for, first, continuation of the procedural order; and secondly, a restrain order against Enercon and Wobben from addressing any correspondence to third parties in relation to the dispute. Although the relief sought by Wind World did not relate to the merits of the case, however, it was important for protection of its confidential information. The argument advanced by Wind World was that in the event the s.34 petition filed by it succeeds and the award is set aside, Enercon and Wobben would still be benefited as they would be privy to the confidential information belonging to Wind World. Therefore, Wind World required continued protection of its confidential information which was given to it during the entire arbitral proceedings. Wind World also submitted that the facts of the present case were entirely different from that of *Dirk India*⁸⁹ and, therefore, its s.9 should be considered in the light of the facts present before the court. Therefore, Wind World had a strong case in its favour since the impact of disclosure of confidential information would be quite substantial and beyond the confines of arbitration between Wind World and Enercon. However, the court passed an Order dated 7 February 2017 holding that it was bound by the decision in *Dirk India*⁹⁰ and, consequently, dismissed the petition of Wind World as being not maintainable as Wind World was the losing party.⁹¹ Wind World filed an appeal⁹² against the said Order before the Division Bench of the Bombay High Court. The court confirmed the impugned Order of the Ld Single Judge and dismissed the appeal.⁹³

The *Wind World*⁹⁴ case shows that there may arise circumstances wherein a party may require protection of documents or intellectual property aside from the amount involved in the dispute. In these circumstances, it becomes imperative for the court to consider the petition of such a party under s.9 rather than dismissing it on the grounds that it has no right to approach the court after passing of the arbitral award since it is the losing party. The *travaux préparatoires* evince that a wide range of measures can be granted under art.9 of the Model Law, including measures relating to protection of trade secrets and proprietary information.⁹⁵

⁸⁸ Arbitration Petition No.105 of 2016 (Bombay High Court).

⁸⁹ See fn.1 above.

⁹⁰ See fn.1 above.

⁹¹ See fn.70 above at [12].

⁹² 2017 SCC OnLine Bom 1147.

⁹³ 2017 SCC OnLine Bom 1147 at [18]–[19].

⁹⁴ See fn.70 above.

⁹⁵ *Official Records of the General Assembly, Fortieth Session, Supplement No.17 (A/40/17), Annex I, para.96.*

Recommencement of arbitration

Another point to be noted is the argument put forth by DIPL that there is a possibility that the arbitration may recommence in case (a) there is violation of principles of natural justice or (b) the tribunal has not been properly constituted. It may also recommence in case the arbitral award is set aside.⁹⁶ It also argued that as per s.43(4) of the Arbitration Act, the time period between the date of commencement of arbitration and date of order of the court setting aside the arbitral award is excluded with respect to the disputes submitted for arbitration. Therefore, an interim measure of protection may be required even for a losing party as recommencement of arbitral proceedings would put the parties in the position they were prior to commencement. However, the court did not discuss such an important scenario in its judgment. Importantly, this argument was also made by *Wind World*, however, the court did not delve into this aspect since it held that the petition under s.9 is not maintainable. The winning party may try to dispose of an asset of the losing party in order to obtain the awarded amount in terms of the arbitral award prior to filing of a petition under s.34 or even when the proceedings are pending before a court. In these circumstances also, it might be necessary for the losing party to obtain an interim measure until disposal of the s.34 petition.

Conclusion

The language of s.9 is plain, unequivocal and unambiguous. It states that any party⁹⁷ to the arbitration agreement can approach the court for an interim measure of protection at any stage mentioned in the said section. This, coupled with the fact that the courts have very wide powers under s.9 to grant interim measures to a party, elucidates the intention of the legislature in not specifically carving out an exception under s.9 by using the words “successful party” instead of “a party”. As stated above, the Supreme Court has said that words which are explicit and clear should be interpreted in the ordinary and natural sense. Applying purposive interpretation to the language of s.9 seems to be act of judicial overreach. First, the term “party” has been defined under the Arbitration Act and, therefore, there was no need to expound a new meaning of the term. Secondly, purposive construction is to be applied when literal construction of the words leads to an absurdity. Thirdly, constructing the term “party” as a “successful party” only in respect of the post-award stage amounts to an amendment of s.9, which is the prerogative of the legislature and not the courts. The Supreme Court has also categorically held that a party to the arbitration agreement has the right to approach a court for seeking interim measures at all the three stages.⁹⁸ Further, even the analytical compilation of comments by governments and international organisations on the draft text of a model law on international commercial arbitration dated 21 July 1985,⁹⁹ states that if a situation arises in an arbitration which causes a party to seek judicial assistance, the court should determine whether it has the jurisdiction

⁹⁶ See *McDermott International Inc v Burn Standard Co Ltd* (2006) 11 SCC 181; also see Ch.X.

⁹⁷ Since s.2(1)(h) of the Act defines the term “party” as “a party to the arbitration agreement”, also see *Sundaram Finance Ltd v NEPC India Ltd* AIR 1999 SC 565; *Gail (India) Ltd v Latin Rasayani Private Ltd* 2014 SCC OnLine Guj 14836.

⁹⁸ See fn.38 above.

⁹⁹ <https://undocs.org/en/A/CN.9/263/Add.2> [Accessed 11 February 2021].

to intervene and the first step would be to see if the situation is covered by the express words of the model law (which in the case of a country would be its national arbitration legislation). As demonstrated above, there may arise a situation where a party other than a winning party may approach the court for an interim measure of protection. The reasoning given by the Bombay High Court that under s.34 the court can only set aside an award and not grant a claim of the petitioner since it is not a court of appeal may be true. However, it is also true that parties may have to agitate their claims again before an arbitral tribunal or an award may transform in favour of one of the parties in a petition under s.34.¹⁰⁰

The reasoning that s.9 is only for the purpose of aiding the winning party to assist it in enforcing the award is also dubious. As rightly argued by DIPL, the words “or at any time after the making of the arbitral award but before it is enforced in accordance with section 36” refers to the time period in which a party can apply to the court for interim measures. The period categorically denotes that a party cannot approach a court after an award is enforced as a decree under s.36, however, it has the right to do so prior to enforcement. The right under s.9 is a right conferred by a statute which can only be taken away by the statute. In fact, the Bombay High Court itself in *Home Care Retails Pvt Ltd v Hareesh N Sanghavi*¹⁰¹ observed that the judgment in *Dirk India*¹⁰² raises debatable issues. There might arise an anomalous situation where the losing party obtains an interim measure from the court but it does not challenge the award within the stipulated time. The result would be that the winning party will have a hurdle in enforcing the award and will have to approach the court which has granted the interim measure in order to get it vacated. However, there is a very low possibility for such an event to occur.

The implications of the judgment in *Dirk India*¹⁰³ are very substantial and far-reaching and play a crucial role in the development of arbitration law in India. As evinced above, the judgment has already been followed in numerous cases by the High Courts in India. The legal issue arising in this judgment is currently pending decision before the Supreme Court. The manner in which the Supreme Court interprets the language of s.9 will be significant in determining the scope and applicability of the said section. It is also to be kept in mind that s.9 is applicable to foreign arbitrations and, therefore, its ramifications will be felt in the international arbitration community. However, until the Supreme Court finally lays the matter to rest, the chances of a losing party to obtain an interim measure under s.9 remain dubious.

¹⁰⁰ See Chs IX and X.

¹⁰¹ See Order dated 23 September 2015 in Appeal (L) No.701 of 2011 (Bombay High Court).

¹⁰² See fn.1 above.

¹⁰³ See fn.1 above.