ELP : Arbitration Update

CAN A COURT 'ENTERTAIN' A PENDING PETITION UNDER S. 9(1) AFTER SUBSEQUENT CONSTITUTION OF AN ARBITRAL TRIBUNAL IN VIEW OF S. 9(3)?

Arcelor Mittal Nippon Steel India Ltd. v. Essar Bulk Terminal Ltd.

ABSTRACT

Arbitration and Conciliation Amendment, 2015, amended s. 9 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**), and divided the erstwhile provision into three sub-sections, which are in line with the objective of the Arbitration Act – that of providing timely and speedy resolution of disputes with minimal interference from courts. However, the inter-play between s. 9(1) and s. 9(3) became an issue before courts in cases where petitions under s. 9(1) had been filed prior to initiation of arbitration. Such cases raised a legal conundrum on whether a court can "entertain" a pending petition under s. 9(1) after subsequent constitution of an arbitral tribunal in view of s. 9(3), or whether the court will become *non coram judice* as soon as the arbitral tribunal is constituted and a pending petition under s. 9(1) would have to be transferred by the court to the arbitral tribunal. The Hon'ble Supreme Court untied this Gordon knot in the case of *Arcelor Mittal Nippon Steel India Ltd. v. Essar Bulk Terminal Ltd (Judgement available here)*.

INTRODUCTION

In the recent decision of *Arcelor Mittal Nippon Steel India Ltd. v. Essar Bulk Terminal Ltd.*[1], the Supreme Court dealt with an interesting issue pertaining to s. 9(1) and s. 9(3) of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**). Issues included:

i. Whether the Court has the power to 'entertain' an application under s. 9(1) of the Arbitration Act once the tribunal has been constituted.

ii. What is the true meaning and purport of the term 'entertain' under s. 9(3) of the Arbitration Act?

[1] Civil Appeal No. 5700 of 2021, judgement passed on 24 September 2021

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iii. Whether the Court is obliged to examine the efficacy of the remedy under s. 17 of the Arbitration Act, before passing an order under s. 9(1), once the arbitral tribunal has been constituted?

BRIEF FACTS

The disputes arose out of an agreement entered into between Arcelor Mittal Nippon Steel India Ltd. (**Arcelor**) and Essar Bulk Terminal Ltd. (**Essar**) for handling of cargo at Hazira Port in Gujarat. Arcelor invoked arbitration in terms of the arbitration clause in the agreement. Prior to constitution of the arbitral tribunal, Arcelor as well as Essar filed applications under s. 9(1) of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) before the Commercial Court, Surat, seeking certain interim reliefs. Arcelor also filed a petition under s. 11(6) of the Arbitration Act for appointment of an arbitral tribunal.

On June 7, 2021, the s. 9 applications filed by the parties were heard by the Commercial Court and reserved for orders. On July 9, 2021, the High Court disposed of the s. 11(6) petition by appointing a three-member tribunal for adjudication of the disputes. Subsequently, Arcelor moved an application before the Commercial Court for referring the s. 9 applications to the tribunal. The Commercial Court dismissed the said application. Arcelor challenged the order of the Commercial Court before the Gujarat High Court under Article 227 of the Constitution of India. The High Court dismissed the challenge and directed the trial court to pronounce the order in view of the order of the High Court, particularly with regard to the issue as to whether the remedy sought for would be rendered inefficacious under s. 17. Arcelor challenged the order of the High Court before the Supreme Court.

ARGUMENTS RAISED

Arcelor essentially argued before the Court that s. 9(3) curtails the role of courts in arbitration and once an arbitral tribunal is constituted, the court ought not to entertain an application under s. 9- unless circumstances exist which may render the remedy under s. 17 inefficacious. On the interpretation of the term 'entertain' in the context of s. 9(3), Arcelor submitted that the term would mean the entire process till final adjudication of the application.[2] It contended that the application is still being entertained by the Commercial Court. Arcelor sought support from the reasoning of the High Court in this regard. Since the order was reserved and had not yet been passed by the Commercial Court, Arcelor argued that it is still being entertained by the Commercial Court.

To counter the arguments of Arcelor, Essar submitted that s. 9(3) does not oust the jurisdiction of the courts under s. 9 but merely restricts it.[3] It further submitted that the term 'entertain' means to 'admit into consideration'. It contended that the Commercial Court has already 'entertained' the case and gone past the stage of 'entertainment' as contemplated under s. 9(3), as the Commercial has applied its mind, fully heard the matter, and reserved it for orders. Upholding the interpretation canvassed by Arcelor of the term 'entertain' would be antithetical to the objective of s. 9 as it would allow litigants to take procedural defences and avoid the remedy under s. 9, and, thus, cause unnecessary delay and expenses.

[2] *Sri Tufan Chatterjee v. Sri. Rangan Dhar,* 2016 SCC OnLine Cal 483 (Para 35,43); *Energo Engineering Projects Limited v. TRF Ltd.* 2016 SCC OnLine Del 6560 (Para 34); *Lakshmi Rattan Engineering Works Ltd. v. Asstt. Commissioner of Sales Tax, Kanpur and Anr.* (1968) 1 SCR 505 (Para 9); *Kundan Lal v. Jagan Nath Sharma* AIR 1962 All 547 (Para 7); *Hindustan Commercial Bank Ltd. v. Punnu Sahu* (1971) 3 SCC 124; *Martin & Harris Ltd. v. VIth Additional District Judge and Ors.* (1998) 1 SCC 732 (Para 8-10)

[3] *Benara Bearings & Pistons Ltd. v. Mahle Engine Components India Ltd.* (2017) 162 DRJ 431

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DECISION OF SUPREME COURT

With regard to the 1st question, the Supreme Court held in the affirmative. While answering the 1st question, the Court also considered the 3rd question. The Court held that s. 9(1) gives the right to a party to approach a court before commencement of arbitral proceedings, during arbitration and even after passing of the final award but before its enforcement under s. 36. However, the Court held that there are two parts to s. 9(3) – the first part prohibits the court from entertaining an application under s. 9(1) once arbitral tribunal is constituted – and the second part carves out an exception to such prohibition in the event the court finds that circumstances exist which may render the remedy under s. 17 inefficacious. The Court also observed that there may be numerous reasons why remedy under s. 17 may not be efficacious, such as in case of unavailability of one of the arbitrators due to illness, travelling, etc. The Court gave due consideration to urgency required in grant of interim reliefs.

With respect to the 2nd question, the Court held that the term 'entertain' means consideration of the issues raised by the parties by application of mind. In this regard, the Court relied upon the judgement of the Supreme Court in *Lakshmi Rattan Engineering Works Ltd. v. Asstt. Commissioner Sales Tax, Kanpur & Anr.*[4], which referred to the judgement of the Allahabad High Court in *Kundal Lal v. Jagan Nath Sharma and Ors.*[5] The Court referred to various other judgements of the Supreme Court and held that the process of consideration could continue till pronouncement of the judgement. Importantly, the Supreme Court clarified that the bar under s. 9(3) would not operate once the court has commenced the process of applying its mind on the application before constitution of the arbitral tribunal. The Court eventually held that the Commercial Court does not have to consider the efficacy of relief under s. 17 in view of the fact that it has entertained and considered the application under s. 9(1).

ANALYSIS

The issue of 'entertaining' an application under s. 9(1) of the Arbitration Act after constitution of an arbitral tribunal in view of s. 9(3) has been the subject matter of cases before the High Courts, and the same were also referred by the Supreme Court. One of the cases relied upon by Essar but not referred to by the Supreme Court is *Benara Bearings & Pistons Ltd. v. Mahle Engine Components India Ltd.*[6], wherein the Division Bench of the Delhi High Court held that courts had the jurisdiction to entertain a pending application under s. 9(1) even after constitution of the arbitral tribunal, and also that there was no provision under the Arbitration Act which required the court to transfer a pending s. 9(1) application to the tribunal. It is apposite that the issue has now been dealt with by the Apex Court and the meaning of the term 'entertain' has been elucidated by the Court in the context of s. 9(3). Thus, the law as it currently stands is –

i. A court is empowered to consider and decide a pending application under s. 9(1) even after constitution of an arbitral tribunal in the event it has applied its mind to the issues raised, and it is not mandatory for the court to transfer the application immediately to the arbitral tribunal upon its constitution.

ii. Once the application under s. 9(1) has been entertained, the Court also does not have to consider the test prescribed under s. 9(3) of remedy provided under s. 17 being efficacious.

iii. The purpose of s. 9 is to grant urgent relief to the applicant party in order to not render the arbitration process or the award infructuous. Thus, even in case of a pending s. 9(1) application, the court has the discretion to direct the parties to approach the arbitral tribunal while granting a limited interim protection till s. 17 application is decided by the tribunal.

iv. Court is prohibited from entertaining an application under s. 9(1) filed after constitution of an arbitral tribunal, unless the court satisfies itself that circumstances exist that may render the remedy provided under s. 17 inefficacious. Various such circumstances can exist, such as illness of one of the arbitrator(s) rendering filing of an application under s. 17 for some urgent relief, futile.

However, it begs the question as to whether by resolving one issue, the Supreme Court has opened another issue – the issue being as to when it can be considered that the court has 'applied its mind' to the issues raised. Important to

[4] *Id.*
[5] *Id.*
[6] *Supra* n. 3

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remember is that the Supreme Court has specifically stated that the term 'entertain' means the stage at which the court commences consideration, and it continues up-to pronouncement of the order. From the judgements referred to and relied upon by the Supreme Court while dealing with this issue, it appears that the consideration of the issues does not mean mere admission of the application, but consideration of the application on merits, which in most cases will be when pleadings have been completed and the application is listed for arguments. Thus, there does not seem to be enough room left to argue at which stage a court has applied its mind to the issues raised in an application under s. 9(1). However, the manner in which the judgement of the Supreme Court will be interpreted and followed by the courts will be interesting to see.

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