
SECTION 9 OF ARBITRATION AND CONCILIATION ACT, 1996 CANNOT BE INVOKED IN A FOREIGN SEATED ARBITRATION AFTER CONSTITUTION OF ARBITRAL TRIBUNAL

In the case of *Ashwani Minda And M/S Jay Ushin Limited v. M/S U-Shin Limited And M/S Minebea Mitsumi Inc.*, decided on 07.07.2020 by Hon'ble Delhi High Court, the Appellants had filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act") for seeking interim reliefs before Hon'ble Delhi High Court. Ld. Single Judge dismissed the said petition as not maintainable, against which judgment, the appellants preferred an appeal under Section 37 of the Arbitration Act before Division Bench of Hon'ble Delhi High Court.

The Appellants had invoked arbitration for breach of terms of a Joint Venture Agreement. The proceedings were to be held in Japan under the Rules of Japan Commercial Arbitration Association (JCAA). The Appellants had applied before the JCAA for an emergency measure of protection under Articles 75 to 79 of the JCAA Rules. The emergency arbitrator rejected the request, holding against the appellants both on the question of jurisdiction and merits. During the pendency of the emergency arbitration proceedings, the appellants submitted 'a request for arbitration' to the JCAA and an Arbitral Tribunal was constituted under the aegis of the JCAA. Prior to the constitution of the arbitral tribunal, the Appellants moved the petition under Section 9 of the Arbitration Act before the Learned Single Judge for seeking interim reliefs.

The question before the Division Bench was that whether having chosen to invoke the JCAA process and to go to the emergency arbitrator, and having failed in its endeavor to obtain interim relief, a party can then seek the same relief in Section 9 proceedings.

The Hon'ble High Court affirmed the judgment of the Learned Single Judge on the basis that while an application under Section 9 is maintainable in connection with a foreign-seated arbitration, the legislative intent was to provide an efficacious alternative means for seeking relief in the Indian courts, where the arbitral tribunal is either not constituted or otherwise unable to grant efficacious relief. Section 9(3), although expressly relatable to India-seated arbitrations, the principle thereof, is equally applicable in cases of foreign-seated arbitrations. An application under Section 9 would not lie after the constitution of the tribunal, unless the applicant demonstrates that it does not have an efficacious remedy before the tribunal. Having chosen the tribunal, the seat, the applicable rules and the forum from which to seek interim measures, a party cannot revise that choice subsequently.

ARBITRAL TRIBUNAL CONSTITUTED FOR ADJUDICATION OF CERTAIN DISPUTES IS NOT COMPETENT TO GRANT INTERIM RELIEF IN RESPECT OF DISPUTES ARISING FROM A SUBSEQUENT CAUSE OF ACTION, THOUGH ARISING OUT OF THE SAME AGREEMENT.

In the case of *Hero Wind Energy Private Ltd. v. Inox Renewables Limited & Anr*, decided on 07.07.2020 by the Hon'ble Delhi High Court, the Appellant had filed a petition under Section 9 of Arbitration Act for seeking certain interim reliefs based on termination of an Agreement by the Respondent. Since the Agreement was terminated during the pendency of arbitral proceedings in respect of certain earlier disputes which had arisen out of the same agreement, the Appellant chose to file a petition under Section 9 instead of making an application under Section 17 before the Arbitral Tribunal already constituted to adjudicate upon the earlier disputes.

The Learned Single Judge dismissed the petition as not maintainable being barred under Section 9(3) of the Arbitration Act. Against the dismissal, an Appeal under Section 37 of the Arbitration Act was filed before the Division Bench of Hon'ble Delhi High Court.

The question that came up for consideration before the Hon'ble Division Bench was that if an Arbitral Tribunal has already been constituted to adjudicate the disputes which had 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.

ARBITRATION LAW ALERT

JULY 21, 2020



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The Hon'ble Delhi High Court while reversing the judgment of the Single Judge held that the Arbitral Tribunal constituted with reference to the disputes which had earlier arisen, even though from the same agreement, cannot be the Arbitral Tribunal within the meaning of Section 9(3) of the Act even if were to be of the same composition. Section 9(3) of the Act does away with the jurisdiction of the Court with respect to interim measures also, once the Arbitral Tribunal is constituted. However, if a separate Arbitral Tribunal even if of same composition is to be constituted for disputes arising out of successive causes of action, Arbitral Tribunal constituted for adjudication of disputes arisen from an earlier cause of action cannot be the Arbitral Tribunal constituted for the disputes arising from a subsequent cause of action and qua which interim measures are sought. Parties have the right to approach the concerned Court under Section 9 of Arbitration Act to seek reliefs in such scenarios.

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