HSA ADVOCATES
HEMANT SAHAI ASSOCIATES

INSIGHTS | May 2022

GRANT OF RELIEF UNDER SECTION 9 OF THE ARBITRATION & CONCILIATION ACT, 1996 AFTER CONSTITUTION OF THE ARBITRAL TRIBUNAL

www.hsalegal.com
mail@hsalegal.com
HSA Advocates

Amrita Narayan
Partner

Ashwin Rakesh
Senior Associate

The relationship between the provisions of the Arbitration and Conciliation Act, 1996 (**Act**) dealing with grant of interim relief by the Courts as well as the Arbitral Tribunals, encapsulated under Section 9 and Section 17 of the Act has been considerably debated upon by the Courts and as well as the jurists. There is no doubt that the 2015 Amendment to the Act (**Amendment**) grants the Arbitral Tribunals the same powers as that of the Courts in terms of granting interim reliefs to the disputing parties. The Amendment introduced a deeming fiction, where an order passed by the Arbitral Tribunal under Section 17 is deemed to be an order of the Court for all purposes and is enforceable as an order of the Court itself.

In *Arcelor Mittal Nippon Steel India Ltd v. Essar Bult Terminal Ltd*[1](**Arcelor Mittal**), an interesting issue emerged before the Supreme Court (**SC**), wherein it was held that the Courts have the power to entertain an application under Section 9 of the Act even after the constitution of the Arbitral Tribunal. The basis of such a dictum by the SC involved dealing with the extent and meaning of the term 'entertain', which finds its mention under Section 9(3) of the Act. The Section 9(3) of the Act reads as follows:

'Interim measures, etc., by Court -

> *(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.'*

The following two issues were analyzed by the SC in *Arcelor Mittal (Supra):*

- Whether Court has power to entertain application under Section 9(1) once an Arbitral Tribunal has been constituted? If yes, what does the expression 'entertain' in Section 9(3) of the Act mean?
- Is the Court obliged to examine the efficacy of the remedy under Section 17 of the Act before it passes an order under Section 9(1) once an Arbitral Tribunal is constituted?

Factual background

In order to appreciate the findings of the SC, it would be relevant to note the following brief factual background in *Arcelor Mittal:*

- Arcelor Mittal Nippon Steel India Ltd (**Appellant**) invoked the Arbitration Clause under a Cargo Handling Agreement by issuing a Notice of Arbitration dated November 22, 2020 to Essar Bulk Terminal (**Respondent**).
- Since no response was received from Respondent, the Appellant approach the High Court of Gujarat at Ahmedabad under Section 11 of the Act for appointment of an Arbitral Tribunal (**Section 11 Application**).
- The Respondent issued a response to the Notice of Arbitration on December 30, 2020.
- On January 15, 2021, the Appellant filed an Application under Section 9 of the Act before the Commercial Court and the 12th Additional District Judge, District and Sessions Court at Surat (**Appellant's Section 9 Application**).
- On March 16, 2021, the Respondent also filed an application under Section 9 of the Act before the Commercial Court (**Respondent's Section 9 Application**; the Appellant's Section 9 Application and Respondent's Section 9 Application are collectively referred to as **Section 9 Applications**).
- On June 07, 2021, after hearing both the applications, the Commercial Court reserved its orders.
- On July 09, 2021, the Section 11 Application was dismissed by appointing a 3-member Arbitral Tribunal.
- Subsequently, the Appellant also filed an Interim Application before the Commercial Court praying for reference of Section 9 Applications to the learned Arbitral Tribunal appointed by the High Court of Gujarat at Ahmedabad (**Interim Application**).
- On July 16, 2021, the Commercial Court dismissed the Interim Application.
- The Appellant filed an application under Article 227 of the Constitution of India (**Constitution**) challenging the order of the Commercial Court on the Interim Application (**Article 227 Application**).

[1] (2022) 1 SCC 712

- In the meanwhile, the High Court directed the Commercial Court to defer the pronouncement of Orders in the Section 9 Applications till the final adjudication of the Application under Article 227 of the Constitution.
- The High Court dismissed the Article 227 Application holding that the Commercial Court has the power to consider whether the remedy under Section 17 of the Act is inefficacious and pass necessary orders under Section 9 of the Act (**Impugned Order**).

Arguments by the Appellant

- Commercial Court had erred in construing the word 'entertain' narrowly, and that entertain would not mean admitting for consideration but would mean the entire process up to its final adjudication and passing of an order on merits.
- Once an Arbitral Tribunal is constituted, the Court cannot entertain an application under Section 9 of the Act unless it finds that circumstances exist, which may render the remedy under Section 17 of the Arbitration Act inefficacious.
- An order which is reserved does not mean that the District Court stopped entertaining the Section 9 petitions. A Judge may make corrections to a judgment and/or in other words continue to adjudicate and thus continue to entertain a proceeding even after a judgment is pronounced, until it is signed.

Arguments by the Respondent

- Section 9 Applications were finally heard on merits and reserved for orders on June 07, 2021, before the constitution of the Arbitral Tribunal on July 09, 2021.
- Section 9(1) of the Act provides that a party will apply to the Court before, during or after the arbitral proceedings. The Courts, therefore, do not lose jurisdiction upon constitution of the Arbitral Tribunal. Section 9(3) of the Act is neither a *non obstante clause* nor an *ouster clause*, that would render the Courts *coram non judice*, immediately upon the constitution of the Arbitral Tribunal.
- Section 9(3) of the Act restrains the Court from entertaining an application under Section 9, unless circumstances exist which may not render the remedy provided under Section 17 efficacious. In this case, only the formality of pronouncing the Order in the Section 9 Applications remained. Since the application under Section 9 had been entertained, fully heard for full 11 days and arguments concluded, Section 9(3) of the Act would not apply.

Decision of the Court

- SC observed that Section 9(3) of the Act has two limbs: the first limb prohibits an application under Section 9(1) from being entertained once an Arbitral Tribunal has been constituted; and the second limb carves out an exception to that prohibition, if the Court finds that circumstances exist, which may not render the remedy provided under Section 17 efficacious.
- An application Section 9 of the Act may be filed:
  - Before the commencement of arbitration proceedings
  - During arbitration proceedings
  - At any time after an award is made
  - Before such award is enforced in accordance with Section 36 of the Act
- On the aspect of the interpretation of the term 'entertain' Section 9 of the Act, the SC observed that the expression 'entertainment' means 'to consider by application of mind to the issues raised' – the Court entertains a case when it takes up the matter for consideration.
- Further, once an Arbitral Tribunal is constituted the Court cannot take up an application under Section 9 for consideration, unless the remedy under Section 17 is inefficacious. However, once an application is entertained in the sense it is taken up for consideration, and the Court has applied its mind to the issues raised, the Court can certainly proceed to adjudicate the application.
- The Court also observed that the question is whether the process of consideration has commenced, and/or whether the Court has applied its mind to some extent before the constitution of the Arbitral Tribunal. If so, the application can be said to have been entertained before constitution of the Arbitral Tribunal. Interestingly, it was also noted by the SC that it could never have been the legislative intent that even after an application under Section 9 is finally heard, relief would have to be declined and the parties be remitted to their remedy under Section 17.
- On the second issue, SC observed that when an application has already been taken up for consideration and is in the process of consideration or has already been considered, the question of examining whether remedy under Section 17 is efficacious or not would not arise.
- In view of the aforesaid findings, the Appeal was allowed to the extent of clarifying that it shall not be necessary for the Commercial Court to consider the efficacy of relief under Section 17, since the application under Section 9 has already been entertained and considered by the Commercial Court.

Our viewpoint

The Apex Court in *Arcelor Mittal*, without favoring either the Courts or the Arbitral Tribunals, has carefully maintained a balanced view that Section 9(3) of the Act categorically refers to application for interim reliefs before the Arbitral Tribunal in cases where the Arbitral Tribunal has been constituted and there is no dispute to that fact. However, the bar of Section 9(3) could not operate once an application has been entertained and taken up for consideration by the Court.

The SC has laid great emphasis on the true meaning and import of the term 'entertain' in the context of Section 9 interim relief. There is greater clarity as to at what stage can the parties approach the Arbitral Tribunal under Section 17 and when can the Court still be empowered to entertain the Section 9 applications.

Further, from the perspective of the parties to the dispute, this judgment brings clarity to the extent that once the matter is heard by the Court, the Court is empowered to pass an order and the same relief cannot be sought under Section 17 before the Arbitral Tribunal.

In short, if under Section 9 the process of consideration has commenced and/or the Court has applied its mind to some extent before the constitution of the Arbitral Tribunal, then the Court is empowered to entertain the Section 9 Application rather than remitting it to the Arbitral Tribunal for consideration.