



High Court of Delhi on foreign seated arbitrations and interim relief under Section 9 of the Arbitration and Conciliation Act, 1996

Introduction

In a recent judgment dated July 19, 2022, titled as in *Shanghai Electric Group Co. Ltd. Vs Reliance Infrastructure Ltd¹*, the Delhi High Court (“**Delhi HC**”) has considered important issues relating to the scope of Section 9 of the Arbitration & Conciliation Act, 1996 (“**Act**”) in relation to arbitration seated outside India.

Facts of the case

An 'Equipment Supply and Service Contract' dated June 26, 2008, was entered into between Shanghai Electric Group Co. Ltd. (“**SEGCL**”) and Reliance Infra Projects (UK) Limited (“**Reliance UK**”), a subsidiary of Reliance Infra Projects Limited (“**RIL**”).

SEGCL agreed to supply the equipment and provide services to Reliance UK in relation to erection and commissioning of 6 (six) units of boilers, turbines and generators, for construction of the coal-fired super critical thermal ultra-mega power project at Sasan, Madhya Pradesh, India. RIL issued a guarantee letter dated June 26, 2008 (“**Guarantee Letter**”) to SEGCL to secure the performance of obligations of its subsidiary, Reliance UK.

Reliance UK had failed to pay the amounts due under the agreement. Thereafter, SEGCL called upon RIL to make good the payment as per the Guarantee Letter. Since RIL did not comply with SEGCL’s demand for money, SEGCL invoked arbitration against RIL vide notice dated December 13, 2019. The Guarantee Letter was governed by the English law and the arbitration clause provided for the seat of arbitration in Singapore and the arbitration was to be administered by the Singapore International Arbitration Centre (“**SIAC**”) as per the United Nations Commission on International Trade Law (“**UNCITRAL**”) Rules².

SEGCL filed a petition under Section 9 of the Act before the Delhi HC seeking interim measures for securing the amount in dispute as well as for injunctive reliefs restraining RIL from disposing off/ dealing with its assets during the pendency of the arbitration.

¹ OMP (I) (COMM) 433 of 2020

² The arbitration clause is not quoted in the judgment

Issues

The questions of law to be decided in this case were as follows:

1. Whether the parties had agreed to exclude Section 9 of the Act.
2. Whether petition was not maintainable under Section 9(3) of the Act since the arbitral was already constituted.
3. Whether the Delhi HC's jurisdiction could be invoked on the basis that RIL's assets which were located within its jurisdiction.

Decision and Observations of the Delhi HC

1. Exclusion of Section 9 of the Act

Section 2(2) of the Act provides that Section 9, empowering an Indian court to grant interim relief, would apply even in respect of foreign seated arbitrations, subject to an "agreement to the contrary". In the present case, the Delhi HC held that:

- a) To render Section 9 inapplicable, it has to be demonstrated that there was an agreement to the contrary, thereby "explicitly" excluding application of Section 9 of the Act.
- b) Even though Section 9 does not require such an agreement to be express yet, an agreement to the contrary cannot be assumed or interpreted on the mere assertion of a party.
- c) In other words, unless an agreement to the contrary is "convincingly founded", Indian courts can grant interim relief even in respect of foreign seated arbitrations.
- d) The applicability of Section 9 of the Act could not be excluded on the basis that the parties chose a foreign seated institutional arbitration under UNCITRAL Rules.

2. Maintainability of the petition when the arbitral tribunal already stood constituted

Section 9(3) stipulates that once an arbitral is constituted, a court will not entertain a petition for interim relief unless it finds that the remedy provided under section 17 of the Act would not be efficacious. Section 17 of the Act confers powers upon an arbitral tribunal, having seat of arbitration within India, to grant the same interim relief which can be granted by a court under Section 9 of the Act.

In the present case:

- a) The Delhi HC first referred to the decision of the Division Bench of the Delhi High Court in **Ashwani Minda v. U-Shin Ltd.**³ ("**Ashwini Minda Case**"), where the Division Bench had held that if a foreign seated arbitral tribunal had already been constituted then Indian courts would generally not pass any orders for interim relief, given the mandate of Section 9(3).
- b) In the Ashwini Minda Case, the Division Bench had further observed that though Section 9(3), on its own, expressly related to Indian-seated arbitrations as evidenced by the reference to Section 17, yet it was held that the principle enshrined under Section 9(3) would be equally applicable when interim measures are sought from Indian Courts in connection with foreign-seated arbitrations. As such, while deciding a petition under Section 9, the Delhi HC would have to consider whether the remedy of interim relief available to the petitioner before it was "efficacious" or not.
- c) The Delhi HC held that an interim order passed by a tribunal having a seat outside India is not enforceable in India. Also, an interim order passed by a foreign court are not enforceable in India.
- d) Thus, SEGCL did not have an efficacious remedy and as such, it could invoke the remedy under Section 9 of the Act notwithstanding the constitution of the tribunal.

³ *Ashwani Minda v. U-Shin Ltd.*, 2020 SCC Online Del 721.

3. Jurisdiction of the Delhi HC on the basis of location of assets

The Delhi HC held that in light of the original jurisdiction exercisable by it, the location of assets to satisfy the resultant foreign award, can indeed come into play when taking recourse to proceedings under Section 9.

4. On merits

Having decided the jurisdictional objections in favour of SEGCL, the Delhi HC declined to grant interim relief basis the facts, that SEGCL had not satisfied the principles which generally apply for grant of interim injunction. Particularly, the nature of relief claimed by SEGCL (viz. an order for securing the amount claimed prior to the passing of an arbitral award), was analogous with the nature of relief provided under Order XXXVII Rule 5 of the Code of Civil Procedure (i.e., the attachment before judgment). The Delhi HC found that there was no material on record to conclude that RIL was attempting to remove or dispose of the assets “with the intention of defeating the decree/ award that may be passed”. RIL’s financial condition alone could not be the reason to justify the attachment before judgment. Comment

In an arbitration agreement stipulating seat of arbitration outside India, it would be worthwhile for the parties to expressly agree on whether or not remedy under Section 9 of the Act would be available to the parties. Such an express provision would obviate the need for the Indian courts to interpret from the agreement the parties’ intent.

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