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Constitution of an arbitral tribunal is not a fetter on the Court to hear an application under Section 9(1) of the Arbitration and Conciliation Act, 1996 if the Court has already 'entertained' such application prior to the constitution

The Calcutta High Court ("**Calcutta HC**"), in *Jaya Industries v. Mother Dairy Calcutta & Anr.*[1] , has held that though Section 9(3) of the Arbitration and Conciliation Act, 1996 ("**Act**") bars a Court from entertaining an application for interim measures under Section 9(1) of the Act (on constitution of an arbitral tribunal), the Court can still proceed to adjudicate the application if it has already applied its mind to the issues raised.

Brief Facts:

- The Petitioner had filed an application under Section 9 of the Act for certain interim measures. This application was filed on February 10, 2023.
- The arbitral tribunal was constituted on May 17, 2023. Prior to the constitution of the arbitral tribunal, the Calcutta HC had passed certain orders in the matter directing the Respondents to show-cause as to why they should not be directed to deposit a sum of Rs. 5,95,40,498.60 (Rupees five crore ninety-five lakh forty thousand four hundred ninety-eight and sixty paisa only) before the Registrar, Original Side, for securing the claim of the Petitioner.
- When the matter was subsequently listed for hearing, the Respondents relied upon Section 9(3) of the Act to assert that Court should not continue to hear the petition for interim relief on account of constitution of the arbitral tribunal.

Issue:

Whether a Court should continue to entertain an application under Section 9 of the Act after constitution of the arbitral tribunal?

Findings:

[1] AP 85 of 2023.

The Court examined the scope and interplay between Sections 9(1) and 9(3) of the Act and rendered the below findings:

- The width of the Court's powers to grant interim relief to a party under Section 9(1) and the right of a party to seek for such relief is almost boundless. This is, however, reined-in by Section 9(3) which provides that, once an arbitral tribunal has been constituted, the Court will not entertain an application under Section 9(1) unless the Court finds that there exist any circumstances which may render the remedy under Section 17 inefficacious. Section 17 provides for interim measures by the arbitral tribunal and grants equal leeway to an arbitral tribunal to pass orders for interim relief.
- On a plain reading, the language of Section 9(3) is mandatory and would stop the Court from entertaining an application under Section 9(1) subject to the qualification of efficacy of the Section 17 application. However, in view of the decision of the Supreme Court in *Arcelor Mittal Nippon Steel India Limited vs. Essar Bulk Terminal Limited*[2], Section 9(3) has been given a purposive construction and its stiffness softened. While interpreting the expression 'entertain', it has been held in this decision that if a Court had already applied its mind to the issues raised, then the Court can proceed to adjudicate the application under Section 9(1), notwithstanding the bar of Section 9(3).

Re: What constitutes 'entertain'?

- The word 'entertain' requires the Court to enter into an active consideration of the issues presented by the parties and pleaded in an application and involves the Court applying its mind to the facts and the law urged before it. The process of entertaining a matter commences from the date when the Court enters into the arena of facts, law and essentially the dispute between the parties.
- Although the degree of a Court's engagement in a matter may be subjective, the broad requirement is that a Court becomes alive and interested in the matter and applies its mind to the facts before it.

Re: What is the purpose of Section 9(3)?

- The bar imposed by Section 9(3) is only to preserve the sanctity of the arbitration. It is not to wrench territory from the Court despite having put its mind to the matter. Section 9(3), in any event, contains an exception that the Court must conclude that the relief prayed for under Section 17 is equally an efficaciously available to the parties.
- The object of Section 9(3) is to allow the arbitral tribunal to consider the prayer for interim relief once the tribunal has been constituted. Section 9(3) aims to prevent multiple levels of hearing for the same relief. The section envisages a clockwise motion of considerations of the matter after an arbitral tribunal has been constituted. The hands of the clock, however, stop to tick where the Court has already gone into the matter. Permitting the parties to re-agitate the matter in such cases before the arbitral tribunal would in effect rewind the clock, which is not what section 9(3) intends.

Having rendered the above findings, in the facts of the present case, the Calcutta HC held that it had already entertained the matter; and this was a case where the Court has applied its mind to the matter and consequently 'entertained' the application filed by the Petitioner. As such, the process of consideration had commenced and the subsequent constitution of the arbitral tribunal would not act as a fetter on the Court to continue hearing the application.

JSA Comment:

The decision examines the contours of Sections 9(1) and 9(3) and eloquently articulates the situations when Courts can entertain applications for interim relief, despite the bar imposed under Section 9(3).

By explaining the ambit and scope of 'entertain', this decision also highlights and clears the air that it is not in every matter that the Court can continue hearing the application on the constitution of an arbitral tribunal. There must be an active engagement where the Court has put its mind to the matter – meat included – before it.

[2] (2022) 1 SCC 712

This decision is also a classic example, where the Court has reiterated the importance of minimum intervention by courts, and at the same time, emphasized that the same cannot be at the cost of the parties reagitating the issues (already argued by them before the Court under Section 9(1)) before an arbitral tribunal.

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