

## MAKING THE CASE FOR POST-AWARD INTERIM RELIEF FOR AWARD-DEBTOR

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### ABSTRACT

Various aspects associated with the right to interim relief under section 9 of the Arbitration and Conciliation Act, 1996 have been the subject of diverse interpretations by the courts in India. This has created uncertainty about the contours and scope of section 9 proceedings. One such aspect has been the availability of the right to interim relief to an award debtor (i.e. the losing party in the arbitration proceedings) post the award. While the Bombay High Court has held that such a right is available only to the award-creditor, the Delhi High Court has recently held that such a right is equally available to an award-debtor as well. The author through the present article tries to make a case for the availability of section 9 relief to the award-debtor by critically analysing the judgments of the Bombay and the Delhi High Courts. In the process the author would try to highlight the possible options available to a party until there is a final determination of the issue by the Supreme Court.

### I. INTRODUCTION

Indian jurisprudence reflected through judicial pronouncements relating to arbitration has undergone a paradigm shift in the recent past. After pronouncing a number of judgments which dented India's image as an arbitration friendly jurisdiction<sup>1</sup>, the Supreme Court of India (hereinafter 'the Supreme Court') has of late pronounced a few judgments favouring foreign arbitrations and international commercial arbitrations in the post-Balco era.<sup>2</sup> This pro-arbitration approach has included among others, judgments narrowing the scope of public policy as a ground for challenge of foreign awards<sup>3</sup>, as well as referring non-signatories to the arbitration agreement for arbitration<sup>4</sup>. The underlying theme of the above pro-arbitration judgments has been to make India an arbitration-friendly jurisdiction.

In order to make India an arbitration friendly jurisdiction, it is essential to have clarity with respect to one of the most crucial sections of the arbitration proceedings – the right to interim relief under section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter 'Act'). The author by way of the present article tries to highlight one aspect of proceedings under section 9 where there is a need for final word from the Supreme Court due to inconsistent judgments of the Delhi High Court and the Bombay High Court. This section pertains to the availability of interim measures to the party who loses in the arbitration proceedings, i.e. the award-debtor. This protection becomes important, as highlighted in the following parts, to ensure that the award debtor has a suitable security to protect his interests, in the event the arbitral award, after being set-aside, ultimately results in a favourable outcome for him.

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<sup>1</sup> Prominent amongst them were *Bhatia International v. Bulk Trading Co.*, (2004) 2 S.C.C. 105 (India) [hereinafter *Bhatia International*] and *Venture Global Engineering v. Satyam Computer Services Ltd. and another*, (2008) 4 S.C.C. 190 (India) [hereinafter *Venture Global*]. By reading *Bhatia International* and *Venture Global* together, it emerged that Part 1 of the 1996 Act applied to arbitrations with a seat outside India, unless the parties expressly excluded the applicability of Part 1. This meant that a foreign award could be challenged and set aside under the grounds contained in Section 34 of the Act, which was intended to apply to domestic awards only.

<sup>2</sup> Post-Balco era refers to the period after the judgment of *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services*, (2012) 9 S.C.C. 552 (India) [hereinafter *Bharat Aluminium*]. The Supreme Court through the aforesaid case has embarked on a pro-arbitration jurisprudence wherein its ideology is centered on reducing judicial intervention in foreign arbitration. See *Kartikey Mahajan & Mallika Anand, Heralding a new dawn for arbitration in India: Is there reason to be circumspect anymore?*, 79(1) ARB. 28-36 (2013).

<sup>3</sup> See *Kartikey Mahajan, Reversing the clock on "public policy" for foreign awards*, 16 (6) INTL. ARB. L. REV. N43-N46 (2013), discussing the case of *Shri Lal Mahal Ltd. v. Progettor Gana Spa*, (2013) 8 S.C.A.L.E. 489 (India).

<sup>4</sup> See *Kartikey Mahajan and Malak Bhatt, Extension of Arbitration Agreement to Non-signatories*, 16 (3) INTL. ARB. L. REV. N25-N28 (2013) referring to the consequences of the decision of *Chloro Controls (I) P. Ltd. v. Severn Trent Water*, (2013) 1 S.C.C. 641 (India).

The inconsistent judgments, which have been rendered with respect to post-award interim orders, are that of the division bench of the Bombay High Court in *Maharashtra State Electricity Generation Company Ltd. v. Dirk India Pvt. Ltd.* [hereinafter as ‘Dirk India’]<sup>5</sup> and that of the single judge bench of the *Organising Committee Commonwealth Games v. M/s Nussli (Switzerland) Ltd.* [hereinafter as ‘Organising Committee’]<sup>6</sup>.

After providing a brief background to the scheme of Section 9 of the Act in Part I of the article, the author highlights the judgment of *Dirk India* along with the relevant facts in Part II. The author critically analyses the said judgment of *Dirk India* in Part III of this article by expounding on the relevant principles which were not taken into account by the Bombay High Court. The said principles mainly relate to the rules of literal interpretation of the word ‘party’ under the Act, the legislative intent in introducing the possibility of post-award interim orders, and the relation of Section 9 with Section 34 of the Act which makes it possible for the Award-Debtor to apply for an interim relief, post the award until the filing of Section 34 applications. After analyzing the principles laid down in *Dirk India* and presenting a critique on the same, the author would then go on to elucidate in Part IV of the article, the recent single judge bench judgment of *Organising Committee*, which has not accepted the interpretation provided by the Bombay High Court. The author would finally analyze as to how the *Organising Committee* case, though a welcome step in holding that post-award interim orders are available to an award-debtor under Section 9, has not relied on the relevant legal principles that it ought to have relied upon, making it possible for it to be overturned in appeal.

## II. BACKGROUND OF SECTION 9 OF THE ACT

Section 9<sup>7</sup> of the Act was enacted to ensure that, given the pendency, initiation or conclusion of arbitration proceedings before an Arbitral Tribunal, a party should not be prevented from protecting his interests, which otherwise cannot be protected or safeguarded by the Arbitral Tribunal.<sup>8</sup> The reliefs which the Court may allow to a party under Section 9 have been held, “*to flow from the power vesting in the Court exercisable by reference to contemplated, pending or completed arbitral proceedings, the Court being conferred with the same power for making specified orders as it has for the purpose of and in relation to any proceedings before it*”.<sup>9</sup> This reasoning gets cemented by the fact that the Supreme Court in *Bharat Aluminium*<sup>10</sup> held that there was no power vested upon the Indian courts to issue interim orders to foreign seated arbitrations under New York or the Geneva Convention, as Indian courts do not have any power to interfere with such foreign proceedings.

The power contemplated under this section is not intended to frustrate arbitration proceedings; neither is it envisaged to prejudice the powers vested in the arbitrator such that he is rendered incapable of

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<sup>5</sup> Appeal No. 114 of 2013 in Arbitration Petition No. 355 of 2011 and Appeal No. 30 of 2013 in Arbitration Petition No. 355 of 2011 (India) [hereinafter *Dirk India*].

<sup>6</sup> OMP 1300/2013 (India) [hereinafter *Organizing Committee*].

<sup>7</sup> **Interim measures, etc. by Court:** A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court:-

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

<sup>8</sup> *Olex Focas Pvt. Ltd. v. Skodaexport Co. Ltd.*, (2000) A.I.R. Del. 161 (India).

<sup>9</sup> *Firm Ashok Traders v. Gurumukh Das Saluja*, (2004) 3 S.C.C. 155 (India) [hereinafter *Firm Ashok Traders*].

<sup>10</sup> *Bharat Aluminium*, *supra* note 2 at ¶159.

resolving the dispute between the parties. The focal point of Section 9 is to preserve the various pursuits and rights of the parties to the arbitration. It is in this light that every appraisal of Section 9 must be carried out. In doing so, it is submitted that the Court ought to consider two postulates - first, the Court must ponder over the intention of the legislature while codifying this provision. Second, the section must also be read in conjunction with Section 34 of the Act that deals with challenges to the arbitral award, especially because Section 9 is also concerned with protecting the subject matter of the arbitral proceedings.

Although there is a paucity of authority expounding on the principles laid down under Section 9 of the Act with respect to issuance of post-award interim orders, there also exists a conflict in the way the Bombay High Court and the Delhi High Court have sought to interpret it. This divergent interpretation has affected the rights of parties seeking interim relief to protect their rights, thus, leading to an incongruity in its construal. The following parts of this article would highlight these different approaches taken while construing Section 9 of the Act.

### **III. DIRK INDIA- POST AWARD INTERIM RELIEF ONLY FOR AWARD CREDITORS**

#### *A. FACTS*

An agreement containing an arbitration clause was entered into between Maharashtra State Electricity Board [hereinafter as "MSEB"] and Dirk India Private Limited [hereinafter as "DIPL"]. The agreement envisaged that Pulverized Fly Ash [hereinafter as "PFA"] that was generated from MSEB's Thermal Power Station at Nasik would be transported to four hoppers, which were to be constructed by DIPL at site. DIPL was to utilize PFA in its PFA handling plant for the manufacture of concrete. Subsequently, a dispute arose between the parties that was referred to arbitration and the arbitral tribunal by its award came to the conclusion that DIPL had failed to discharge its contractual obligation of erecting the requisite hoppers and of transporting the agreed quantity of PFA to its PFA plant. The Tribunal came to the conclusion that the termination of the contract by MSEB was valid and lawful.

After the award, DIPL filed an application for interim protection under Section 9 of the Act. The learned Single Judge hearing the application gave limited interim protection, leaving the question of maintainability of the Section 9 application open. The matter came before the Division Bench through cross-appeals against this order.

#### *B. JUDGMENT OF THE BOMBAY HIGH COURT*

The Bombay High Court proceeded to discuss the scheme of Section 9 before disposing off the appeal. The Court noted that there are primarily two facets that are envisioned under the scheme of Section 9. First, the Bombay High Court rightly observed that there exists an immediate and proximate nexus between the interim measure of protection under Section 9 and securing the subject matter of dispute in the arbitral proceedings. In other words, the orders envisaged are intended to preclude the claim in the arbitration from being frustrated.

Secondly, the Bombay High Court held that there is proximate nexus between the interim order sought and the arbitration proceeding itself. As per the Court, when an interim measure of protection is sought before or during the arbitration proceedings, such a measure is a step in aid to the fruition of the arbitral proceedings. When sought after an arbitral award is made but before it is enforced, the measure of protection is intended to safeguard the fruit of the proceedings until the eventual enforcement of the award. The interim order post the award as per the Bombay High Court is intended to ensure that enforcement of the award results in a realizable claim and that the award is not rendered illusory.

The Bombay High Court in order to give support to its above reasoning, gave purposive interpretation to the words, "*at any time after the making of the arbitral award but before it is enforced in accordance with section 36*" occurring in Section 9 of the Act. Under Section 36 of the Act, an arbitral award can be enforced under

the Code of Civil Procedure, 1908<sup>11</sup> [hereinafter as “CPC]” in the same manner as if it were a decree of the court. As per Section 36, the arbitral award can be enforced where the time for making an application to set aside the arbitral award under Section 34 has expired or in the event of such an application having been made, it has been refused. As per the Court, the enforcement of an award accrues to the benefit of the party who has secured an award in the arbitral proceedings and that is why the enforceability of an award under Section 36 is juxtaposed in the context of above two time frames.<sup>12</sup> The Bombay High Court, therefore held that, “*contextually the scheme of Section 9 postulates an application for the grant of an interim measure of protection after the making of an arbitral award and before it is enforced for the benefit of the party which seeks enforcement of the award*”.<sup>13</sup>

Thus, as is evident from the above italicized words, the Bombay High Court came to the conclusion that the object and purpose of an interim measure after the passing of the arbitral award but before it is enforced is to secure the property, goods or amount for the benefit of the party which seeks enforcement, i.e., the award creditor and is not available to an award-debtor.

#### **IV. CRITICAL ANALYSIS OF DIRK INDIA**

##### *A. OVERLOOKING THE STATUTORY RIGHT OF A PARTY TO CHALLENGE UNDER SECTION 34*

The reasoning given in the *Dirk India* case contemplates only two scenarios prevailing at the time of institution of a petition under Section 9, namely (a) challenge to the arbitral award has failed under Section 34 of the Act, pursuant to such challenge having been made within the stipulated time period; and (b) no application for setting aside the arbitral award has been made and the time for this purpose under Section 34(3) has expired. It is only on the occurrence of either of these scenarios that an arbitral award is ripe to be enforced under Section 36 of the Act. However, the *Dirk India* case fails to take into account alternate scenarios prevailing at the time of institution of a petition under Section 9 after the passing of the award such as:

- i) When the time for challenge available under Section 34 of the Act has not expired and the challenge to award has not been instituted; and
- ii) Situations where the award has been remanded back under Section 34(4) of the Act.<sup>14</sup>

In both the scenarios stated above, the rights and interests of the party aggrieved by the award would be irretrievably prejudiced in the construct adopted by the *Dirk India* case. The construct necessarily means that since the subject matter of the arbitration cannot be protected under Section 9 at the instance of the debtor under the award, then even if the debtor is successful in its challenge under Section 34, it may have irretrievably lost any rights in the subject matter of the arbitral dispute if that has been destroyed or alienated or otherwise rendered otiose. This becomes especially pertinent as the main purpose behind issuing a Section 9 interim order is to protect certain rights of the parties from getting irretrievably lost.

Consider the above principle in a situation of cross claims. When claims of one party are rejected in an arbitration, then in such a scenario, if the award is set aside under Section 34, the same party has a right to re-agitate its cross claim which it may not be successful in doing so due to the loss of assets because of the non-availability of Section 9 to such a party. This shows the severe prejudice, which can be caused to

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<sup>11</sup> India’s procedural code dealing with all issues starting from filing of a civil suit to execution of a decree.

<sup>12</sup> *Dirk India*, *supra* note 5 at ¶12.

<sup>13</sup> *Id.*

<sup>14</sup> Under Section 34(4) of the Act, the Court while deciding a challenge to an arbitral award, can either "adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award". This necessarily envisages the Court having to remit the matter to the Arbitral Tribunal. This is subject to the Court finding it appropriate to do so and a party requesting it to do so. This has been held in the case of *Cybernetics Network Pvt. Ltd. v. Bisquare Technologies Pvt. Ltd.*, (2012) 188 D.L.T. 172 (India). Thus there are provisions, which allow the court to remit the matter back to arbitration although on limited grounds as envisaged under section 34(4) of the Act.

a party (due to the non-availability of Section 9 relief) if he loses in the arbitration proceedings, although his claims can be revived by way of a favourable setting aside order under Section 34 of the Act.

*B. THE DIRK CASE OVERLOOKS THE SETTLED PRINCIPLE OF LAW THAT WHEN AN AWARD IS UNDER CHALLENGE UNDER SECTION 34, IT CANNOT BE ENFORCED UNDER SECTION 36.*

The author through this point of critique would elaborate on the situation (i) mentioned above and highlight the fact that availability of Section 9 before the filing of Section 34 application is in line with the scheme of the Act and as well as that of CPC.

It is an established principle that filing of the application under Section 34 of the Act for setting aside an arbitral award within the limitation period operates as an automatic stay on the arbitral award.<sup>15</sup> Hence, enforcement would be postponed at least until the application to set aside the award is refused. This is in stark contrast to a decree in a civil suit where the Appellate Court will stay the execution of the decree upon sufficient cause only. This sufficient cause essentially enables the Court to stay the decree only on passing orders for deposit of the decretal amount in cases of first appeals. This principle has been provided in Rules 5(1)<sup>16</sup> and 5(3)<sup>17</sup> of Order 41 of the CPC.

Similarly, a party can only move an application for seeking stay on the execution proceedings under Order XXI, Rule 26 of the CPC. However, prior to granting any such stay, it is compulsory for the Court to require security or impose such conditions as it thinks fit, unless sufficient cause is shown to the contrary.

On the other hand, a combined reading of Sections 34 and 36 of the Act clearly and unambiguously mandates that an arbitral award cannot be enforced till such time that a challenge under Section 34 is not made within the period of 90 days or; when such a challenge is made and pending before the Court, till such time that the challenge is not adjudicated upon by the Court. Thus, when an Award-Debtor has not preferred a Section 34 application for setting aside the arbitral award and is within his limitation period to do so, Section 9 would definitely be available to such party as the arbitral award cannot be enforced and Section 9 will be the only remedy available to such a party for protection of his interests.

For example, a bank guarantee is due to expire on a date after the arbitral award but before the limitation period for filing Section 34 is due to expire. If the award debtor intends to file his Section 34 application, after the due expiration date of the bank guarantee, then in such a scenario, the only available remedy to the Award debtor is to file an application under Section 9 to keep the said bank guarantee alive.

The above interpretation is in line with the words, “*at any time after the making of the arbitral award but before it is enforced in accordance with section 36*” occurring in Section 9, as well as with the scheme of the Act which makes a clear departure from the scheme of the CPC.

*C. NON-ADOPTION OF THE RULE OF LITERAL INTERPRETATION IN DIRK INDIA*

**1. Literal Construction is the foremost rule of interpretation**

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<sup>15</sup> National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd., (2004) 1 S.C.C. 540 (India); Fiza Developers & Inter-Trade Pvt. Ltd. v. AMCI (I) Pvt. Ltd., (2009) 17 S.C.C. 796 (India).

<sup>16</sup> **Stay of proceedings and of execution 5. Stay by Appellate Court.-**

(1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

<sup>17</sup> 5(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied-

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

The first and foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation. The other rules of interpretation e.g. the mischief rule, purposive interpretation etc. can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally, would nullify the very object of the statute.<sup>18</sup> Where the words of a statute are absolutely clear and unambiguous, recourse cannot be made to the principles of interpretation excepting the literal rule.<sup>19</sup>

Another aspect of the literal rule, which has been firmly established by judicial precedents is that the language employed in a statute is the determinative factor of the legislative intent.<sup>20</sup> The legislature is presumed to have made no mistake.<sup>21</sup> The presumption is that it intended to say what it has said.<sup>22</sup> Thus, the word 'party' occurring in Section 9 of the Act should be literally interpreted to mean any party to the arbitration agreement without there being any need to qualify the same with respect to the outcome of the arbitration proceedings (i.e. an Award-Debtor or an Award-Creditor).

## 2. Non-observance of past precedents with respect to meaning of term 'party'

Before arriving at its conclusion that Section 9 is not available to the Award-Debtor, the Bombay High Court noted the definition of 'party' in the Act but failed to appreciate the relevance of the same in Section 9 of the Act as per the Hon'ble Supreme Court's observation in the case of *Firm Ashok Traders*<sup>23</sup> which held as follows: "Party" is defined in Clause (h) of Sub-section (1) of Section 2 of A & C Act to mean a party to an arbitration agreement. So, the right conferred by Section 9 is on a party to an arbitration agreement. The time or the stage for invoking the jurisdiction of Court under Section 9 can be (i) before, or (ii) during arbitral proceedings, or (iii) at any time after the making of the arbitral award but before it is enforced in accordance with Section 36. ....For the moment suffice it to say that the right conferred by Section 9 cannot be said to be one arising out of a contract. The qualification which the person invoking jurisdiction of the Court under Section 9 must possess is of being a "party" to an arbitration agreement. A person not party to an arbitration agreement cannot enter the Court for protection under Section 9. This has relevance only to his locus standi as an applicant. ...."<sup>24</sup>

Thus, as can be seen from the observation of the Supreme Court in *Firm Ashok Traders* case, there appears to be no reason as to why Section 9 of the Act should not be literally construed.<sup>25</sup> It is in this context that the application of any contextual interpretation by the Bombay High Court in *Dirk India* seems incomprehensible. Section 2(1)(h) of the Act defines the term 'party' to mean, "a party to an arbitration agreement". Thus, the only precondition for seeking relief under Section 9 of the Act is for **a party to be a party to an arbitration agreement**.<sup>26</sup>

## 3. Specific Instances where only one party has a right under the Act

The meaning ascribed to the term 'Party' cannot be contextually modulated on the basis of whether a party has succeeded or failed, as done in the *Dirk India* Case. This postulate is further buttressed by the fact that the legislators have specifically highlighted as to which party can apply to the court for specific recourse. For example, in the case of disputes being referred to arbitration under section 8: for requesting the Chief Justice to appoint an arbitrator under Section 11(4), (5) and (6); for challenging appointment

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<sup>18</sup> Swedish Match AB v. Securities and Exchange Board of India, A.I.R. 2004 S.C. 4219 (India).

<sup>19</sup> *Id.*

<sup>20</sup> Prakash Nath Khanna v. C.I.T., 2004 (9) S.C.C. 686 (India).

<sup>21</sup> Delhi Financial Corporation v. Rajiv Anand, 2004 (11) S.C.C. 625 (India).

<sup>22</sup> *Id.*

<sup>23</sup> Firm Ashok Traders, *supra* note 9.

<sup>24</sup> The ratio of Firm Ashok Traders, *supra* note 9, was also relied upon by the Delhi High Court in the case of NHAI v. China Coal Construction Group Corpn, A.I.R. 2006 Delhi 134 (India).

<sup>25</sup> Sundaram Finance Ltd. v. NEPC India Ltd., 1999 (2) S.C.C. 479 (India).

<sup>26</sup> Also see Steel Authority of India Ltd. v. AMCI Pty Ltd. and Anr., 2011 (3) ARB. L.R. 502 (Delhi) (India) and I. Sudershan Rao v. Evershine Builders Pvt. Ltd. Mumbai, 2013(2) ARB. L.R. 52 (AP) (DB) (India). In the both these case, the respective High Courts observed that the any party to the arbitration agreement can file a petition under Section 9 after the arbitral award is passed.

procedure under Section 12(4) and 13(5); for challenging the award of the tribunal under Section 16(6) on the grounds mentioned under Section 16; for setting aside of an award under Section 34 etc.

As can be seen from the above examples, the legislature has clearly specified the circumstances in which the power has been bestowed upon a specific party to take recourse to setting aside of the award or challenging the appointment of the arbitrator. It can be easily concluded that the legislature intended the party who has lost in the arbitration to be given the same right of interim protection from the court under Section 9 as the party which has got the award in its favour. This is the reason for the legislature to use the word ‘a party’ under Section 9. The interpretation provided in the *Dirk India* case to the term ‘party’ as being the ‘successful party’ is beyond the scope of the Act and legislature’s intention, and therefore is bad in law.

#### ***D. Non-availability of section 9 to a third party***

On a plain reading of the judgment in *Dirk India*, it is evident that the Bombay High Court did not consider a situation where an arbitral award affects the rights of the third party. Consider a situation where an arbitration agreement is between three parties and dispute arises between two parties, which ultimately results in an arbitral award affecting the rights and interests of the third party. As per Section 9 of the Act, the third party has the right to file an application under Section 9 to safeguard his right and interest after the award has been passed. Whereas, applying the interpretation given by the Bombay High Court, only a party in whose favour the award has been passed can approach the court for interim relief, which basically means that such third party would not be entitled to any protection under Section 9 of the Act. This will make it plainly inequitable for the third party to be not provided with a right to protect its interests under Section 9 of the Act even when it was not a party to the arbitration proceedings.

Thus, it is respectfully submitted that the interpretation by the Bombay High Court is not only against the spirit of Section 9 and the legislative intention behind it, but is also highly inequitable and impractical with respect to third parties.

### **V. ORGANISING COMMITTEE- RELIEF FOR AWARD-DEBTORS**

#### **A. FACTS**

The Delhi High Court has elucidated the rationale behind allowing Section 9 for Award-Debtors in the *Organising Committee* case<sup>27</sup>. In 2010, the Respondent was awarded a turnkey contract by the Petitioner for providing overlays on rental basis for the Commonwealth Games, 2010 (“Games”). In order to secure the contract’s performance, the Respondent was required to furnish a ‘performance bank guarantee’ (“PBG”) equivalent to the 10% of the contract value (which Respondent furnished).<sup>28</sup> Following the conclusion of the Games, disputes arose between the parties and the matter was referred to arbitration. From time to time, the Respondent was restrained to encash PBG; first, as a result of a Section 9 petition filed by the Petitioner and then because of a direction issued by the Arbitral Tribunal.<sup>29</sup> The Petitioner’s claims in the arbitration were rejected by the tribunal and thus, the Petitioner was the losing party in the arbitration proceedings. The Petitioner in the *Organising Committee* had not yet filed its objections to the award under Section 34 of the Act and had petitioned the court under Section 9 to stay the discharge issued by a bank at the behest of the respondent, and to seek a direction to the respondent to keep the bank guarantee alive till the conclusion of proceedings under Section 34 of the Act.<sup>30</sup>

Interestingly, the respondent placed reliance on the judgment of the Bombay High Court in *Dirk India* to negate the stance of the petitioner. Thus, the respondent contended that since Section 9(ii) of the Act is intended to protect the fruits of successful arbitration proceedings, a party whose claim has been rejected

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<sup>27</sup> *Organising Committee*, *supra* note 6.

<sup>28</sup> Abhinav Shrivastava, *Delhi High Court provides ‘Interim Measure’ (Arbitration) in Post-Award Stage*, February 28, 2014, available at <http://legaljunction.blogspot.in/2014/02/delhi-high-court-provides-interim.html>.

<sup>29</sup> *Id.*

<sup>30</sup> *Organising Committee*, *supra* note 6 at ¶1.

during the course of the arbitration cannot have the arbitral award enforced in accordance with Section 36 and can, therefore, not seek any interim relief under Section 9 of the Act.

## B. JUDGMENT

Justice Sanghi in *Organising Committee* held that the case of *Dirk India* cannot be relied upon by the Respondent as it was rendered in an entirely different factual context. In *Dirk India* case, DIPL was seeking an interim measure for continuing to perform the contract even after the termination of the agreement had been held to be valid by the arbitral Tribunal. The Division Bench of the Bombay High Court, in that context, held that DIPL could not maintain a petition under Section 9 of the Act as the Award was not in its favour, and could not seek enforcement of the Award.<sup>31</sup> The Delhi High Court rightly pointed out that the Bombay High Court was not concerned with a situation like the one present before it, wherein the Respondent was a foreign corporation having no assets or presence in India.<sup>32</sup> The Respondent being a foreign corporation, was a significant factor in this case, as, if the PGB of the foreign corporation would not have been kept alive, then the Petitioner would not have had any possible remedy to secure his future claims in case of successful pursuit of setting-aside proceedings under Section 34 of the Act.

The Delhi High Court also took liberal assistance from the provision of Order XXV, Rule 1 of the CPC although clarifying that the said provision is not squarely applicable to the facts present before it.<sup>33</sup> Order XXV, Rule 1 of CPC provides that where the plaintiff is a foreign party, i.e. residing outside India, and does not possess sufficient immovable property within India, he would be required to furnish security for costs.<sup>34</sup>

Another important principle which found reason with the Delhi High Court was that the counter claim of the petitioner had been partially allowed, leaving the scope for the Petitioner to assail the arbitral award within the statutory period of limitation. In case the Petitioner succeeded in its objections that may be preferred by it, it would be entitled to re-pursue its counter claim in appropriate proceedings.<sup>35</sup> As per Justice Sanghi, the said right of the petitioner would be defeated by permitting the respondent to allow the PBG to lapse in the meantime<sup>36</sup> Thus, it appears that the Delhi High Court took equitable considerations<sup>37</sup> into account while delivering its judgment in the case of *Organising Committee*.

## VI. CONCLUSION

The Delhi High Court seems to have come to the right conclusion that Section 9 is not only available to an Award-Creditor but also to an Award-Debtor. The Delhi High rightly relied on the principle that the factual situation before it was different from that before the Bombay High Court and that *Dirk India's* ratio is pertinent with respect to its own peculiar facts. This is because it is an established principle in Indian jurisprudence that a decision is a precedent with respect to its own facts and the words used by the judges in their judgments are not to be interpreted like the words of an act of the Parliament.<sup>38</sup>

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<sup>31</sup> *Organising Committee*, *supra* note 6 at ¶22.

<sup>32</sup> *Id.*

<sup>33</sup> *Organising Committee*, *supra* note 6 at ¶26.

<sup>34</sup> This position has been crystallized by a number of judgments. For more insight on the applicability of Order XXV Rule 1 of CPC, *see* *Revlon Inc. & Ors. v. Kemco Chemicals & Ors.*, A.I.R. 1987 Cal. 285 (India).

<sup>35</sup> The counter-claim in *Organising Committee* was founded upon the petitioner's case that a fraud had been committed in the process of the contract being entered into between the parties. The said issue was a serious one, which according to the Delhi High Court needed examination under Section 34 of the Act.

<sup>36</sup> *Organizing Committee*, *supra* note 6 at ¶27.

<sup>37</sup> The said equitable considerations while providing interim relief to Award-Debtors was:

1) The Award-Creditor was a foreign party which made it difficult to secure the interests of Award-Debtor, and

2) Incase of possibility of re-agitating counter-claims, the lapse of PBG would be considered inequitable.

<sup>38</sup> *See* *State of Orissa v. Sudhansu Sekhar Misra*, A.I.R. 1968 S.C. 647 (India); *Union of India & Ors. v. Dhanwanti Devi & Ors.*, 1996 (6) S.C.C. 44 (India).

Although, the Delhi High Court also relied on the fact that the counter-claim of the petitioner was partially allowed in the facts before it, it fell short of distinguishing the *Dirk India* case on the tenable legal principles like that of literal construction, intention of the legislature, instances of remitting back the award under section 34(4) of the Act or of non-filing of challenge under section 34 by the Award debtor.<sup>39</sup>

Thus, even though the *Organising Committee* case is still subject to the possibility of two rounds of appeal before the Delhi High Court and Supreme Court respectively, and the *Dirk India* case is *sub-judice* in Supreme Court, it seems plausible that the Section 9 interim relief is available even to Award-Debtors in certain situations which are considered equitable. The author believes that such relief being available to the Award-Debtors is in line with the intention of the legislature and also with the scheme of the Act which specifically deviated from the Model Law<sup>40</sup> while providing for post-award reliefs. So the circumstances by which such a relief should not be provided to an Award-Debtor before filing the challenge to award under Section 34 should be only limited to those circumstances which a court may consider inequitable. An authoritative pronouncement by the Supreme Court is certainly required as the final word on this issue to elaborate on the circumstances wherein a post-award interim order is available or is not available to an Award-Debtor.

However, it must be emphasized that the Award-Debtor should try and immediately file its objections to the award under Section 34 of the Act at the first instance as such filing of objections would operate as immediate stay on the award and would obviate the need for filing an additional application by way of Section 9.

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<sup>39</sup> All of these have been discussed at length in Part III of the article.

<sup>40</sup> Although Part I of the Act is based on the UNCITRAL Model law on International Commercial Arbitration (UNCITRAL Model Law), Section 9 in the Act varies from Article 9 of the UNCITRAL Model Law. Article 9 of the UNCITRAL Model Law, unlike Section 9 of the Act, does not contemplate interim measure after the arbitral award is passed. Article 9 of the UNCITRAL Model Law reads as follows:

Article 9. Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.