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Ph: +918255090897 Website: journal.lawmantra.co.in

E-mail: info@lawmantra.co.in contact@lawmantra.co.in

Interim Measures etc. under Arbitration & Conciliation Act 1996 vis-a-vis Global Scenario*

ABSTRACT

Liberalization & globalization have resulted in rapid growth of business trade & commerce. This naturally has led a demand for more effective & quick dispute redressal mechanism to manage the dispute. The dispute can be resolved through court or through Alternative Dispute Mechanism. Arbitration is one of the Modes under (ADR) this mode is regulated under Arbitration & Conciliation Act 1996. This New Act is enacted to accommodate harmonization mandates of UNCITRAL Model. Most of the Countries have adopted the Model law with some changes. The important objective of the Model law is having uniformity in the Arbitration Law & to minimize judicial Intervention in Arbitration Dispute & reduce the delay in decisions.

The Model law prescribes dual powers in respect of **interim measures** to the court as well as Arbitrator. The Arbitration & Conciliation Act 1996 has been enacted repealing the old Arbitration Act 1940 & recently The Arbitration & Conciliation Act (Amendment) Act 2015 is passed. The Act gives the parties the power to approach Courts for seeking interim measures before or during arbitral proceedings or at any time after making of the arbitral award but before it is enforced as per the provisions of section 36 of the Act. The Act specifically says that no Judicial Authority shall intervene in the matters governed by part I except where so provided in this Part.

The amended provisions regarding Interim measures envisages that if the court passes an Interim measures of protection under the section 9 in that case arbitral proceeding shall have to commence within a period of 90 days from the date of such order or within such time as the

*Adv. Sudhir Kotwal, B.Com. LL.M.

court may determine & further court shall not entertain any application under section 9 unless it finds that circumstances exists which may not render the remedy under section 17 efficacious. It aims to ensure that parties ultimately resort to arbitration process & get their dispute settled on merits through arbitration. This Article discusses the provision of Old as well as new regarding Interim measures as well as global scenario. Principles governing the Interim measures as well as law lay down by the Courts on the subject. It further suggests amendments in the existing situation & Shortcoming in the provisions from practical point of view.

1. Introduction

The Arbitration & Conciliation Act 1996 has been enacted on the line of UNCITRAL model law of International Commercial Arbitration. The Act provides autonomy to the parties in various matters and has reduced the intervention of court to the minimum level. However, the courts can intervene to give effect to various matters as permitted by the Act. One such situation is to grant interim measures of protection as contemplated by Section 9 of the Act. At the same time under Section 17 of the Act, also uses the phrase 'Interim measures of protection' and thus gives power to the Arbitral Tribunal. when any dispute arises between the parties before court, arbitration or any forum the aggrieved party is always concerned with protecting his interest either in movable or immovable properties by taking timely action., so that his or her interest in the properties is protected. This prompt and timely action makes other party or parties unable to play any sort of mischief by way of tampering with properties. The Act, 1996, gives the parties the power to approach Courts for seeking interim measures before or during arbitral proceedings or at any time after making of the arbitral award but before it is enforced as per the provisions of section 36 of the Act. At first look it appears that it is against the basic philosophy of Arbitration for allowing Court's intervention. The reason is obvious as the main important objective of the Act is to minimize judicial Intervention & reduce the delay in decisions. The Act specifically says that no Judicial Authority shall intervene in the matters gov-

erned by part I except where so provided in this Part.¹ Section 9 is one of the statutory permission granted under the Act, where judicial intervention is permitted & such judicial interventions are inevitable, rather are necessary.

The Act provides that the arbitral tribunal may rule on his own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. The arbitration agreement shall be deemed to be independent of the contract containing the arbitration clause, and invalidity of the contract shall not render the arbitration agreement void. Hence, the arbitrators shall have jurisdiction even if the contract in which the arbitration agreement is contained is vitiated by fraud and/or any other legal infirmity. Further, any objection as to jurisdiction of the arbitrators should be raised by any party at the first instance, i.e., either prior to or along with the filing of the statement of defense. If the plea of jurisdiction is rejected, the arbitrators can proceed with the arbitration and make the arbitral award. Any party aggrieved by such an award may apply for having it set aside under Section 34 of the Act. Hence, the scheme is that, in the first instance, the objections are to be taken up before the arbitral tribunal and in the event of an adverse order; it is open to the aggrieved party to challenge the award.

2. Legal Provisions prior to Act of 1996.

Previously there was no provision either in the Arbitration Act or any other Act or the Rules made there under to give power to arbitrator to pass any interim order, but at the same time if it is provided in the arbitration agreement then in that case arbitrator can pass interim orders. Under Arbitration Act 1940 the power of granting interim injunction is to the court.

A) Arbitration Act 1940

¹ Part I. Section 5 of Arbitration & Conciliation Act 1996.

The temporary injunction and interlocutory orders have been incorporated in the Arbitration Act 1940. The power of the Court for grant of interim orders in aid of Arbitration has been provided².

- a) The provisions of the Code of Civil Procedure, 1908 (5of 1908) shall apply to all proceedings before the Court, and to all appeals, under this Act, and
- b) The Court shall have, for the purpose of, and in relation to arbitration proceedings, the same power of making orders in respect of any of the matters set out in the second Schedule as it has for the purpose, and in relation to any proceedings before the Court

Provided that nothing in Cl. (b) shall be taken to prejudice any power which may be vested in an Arbitrator or umpire for making orders with respect to any of such matters. The Second Schedules.

3. Powers of Court under old Act 1940

1. The preservation interim custody or sale of any goods which are the subject-matter of the reference.
2. Securing the amount in difference in the reference.
3. The detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein & authorizing for any of the aforesaid purpose of any party to the reference, or authoring any samples to be taken or any observation to be made, or experiment to be tried,

² Section 41 Schedule 2 of the said Act

which may be necessary or expedient for the purpose of obtaining full information or evidence.

4. Interim injunction or the appointment of a Receiver.

5. The appointment of a guardian for a minor or person of unsound mind for the purpose of arbitration proceedings.

From the above provisions it is seen that, Arbitration Act, 1940 is lacking in providing adequate remedies to the parties in case of dispute & for the purpose of interim relief. In the absence of agreement between the parties, arbitral tribunal has no power to pass any order in respect of subject matter of the dispute. Even by agreement or by law the arbitral tribunal is provided to pass interim orders still he is not competent to pass orders affecting the rights of third parties.

4. **Code of Civil Procedure, 1908**

Order 39 Rule 1 & 2 of Code of Civil Procedure 1908 deals with the temporary injunction and interim interlocutory orders for grant of interim injunction.

Where in any suit it is proved by affidavit or otherwise³

(A) That any property in dispute in a suit is in danger or being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(B) That the defendant threatens, or intends, to remove or dispose of his property with a view to (defrauding) his creditors.

³ Rule 1 of order 39 1 of code of Civil procedure Code.

(C) That the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit.

The Court may by order grant a temporary injunction to restrain such act, or make such order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit as the Court thinks fit, until the disposal of the suit or until further orders. The relief under these provisions is equitable relief & exercised by the Court based on general principles governing the law of injunction, which are as under:

Relief against parties and persons claiming under them by subsequent title⁴ - Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against,

(a) Either party thereto;

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;

(c) Any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displayed by the defendant;

(d) When a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

⁴ Section 19 of Specific Relief Act, 1963.

(e) When the promoters of a company have before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company;

Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract.

5. International Scenario-

Most of the countries have adopted the provisions as stated in the UNCITRAL model & accordingly changes were made in their laws.

A) English Arbitration Act 1996.

Court powers exercisable in support of arbitral Proceedings.⁵

1. Unless otherwise agreed by the parties, the court has for the purpose of & in relation to arbitral proceedings the same power of making order about the matters listed below as it has for the purpose of & in relation to legal proceedings.
2. Those matters are-
 - (a) The taking of the evidence of witnesses.
 - (b) The preservation of evidence.
 - (c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings-
 - (i) for the inspection, photographing, preservation, custody or detention of the property or

⁵ Section 44 of English Arbitration Act.

- (ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;

and for that purpose authorizing any person to enter any premises in the possession or control of a party to the arbitration,

(d) the sale of any goods the subject of the proceedings,

(e) the granting of an interim injunction or the appointment of a Receiver.

3. If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

4. If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties & to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.

5. In any case the court shall act only if or to the extent that the arbitral tribunal, & any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

6. if the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject matter of the order.

7. The leave of the court is required for any appeal from a decision of court under this section.

B) UNCITRAL Model Law – Article 9 & 17

i) Arbitration agreements and interim measures by courts⁶

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' as can be seen, is allows a party to request a court an interim measure of protection, without limiting such measures to 'the subject matter of the dispute'

ii) Power of Arbitral tribunal to order interim measures.⁷

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measure,

(2) An interim measure is an temporary measure, whether in the form of an award or in another form, by which at any time prior to the issuance of the award by which the disputes is finally decided, the arbitral tribunal orders a party to,

(a) Maintain or restore the status qua pending determination of the disputes,

(b) Take action that would prevent, or refrain from taking action that is likely to cause, currant or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant & material to the resolution of the disputes.⁸

⁶ Article 9 UNCITRAL Model Law

⁷ Article 17 UNCITRAL Model Law

⁸ Article 17 UNCITRAL Model Law

iii) Interim measures of Protection under UNCITRAL Arbitration Rules⁹

1. At the request of either party the arbitral tribunal may take any interim measures it deem necessary in respect of the subject matter of the dispute, including measures for conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.
2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.
3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as waiver of that agreement, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

Under the UNCITRAL Model Law, courts may order any measures including pre-award attachments, third party compliance etc. Article 9, also lays down that granting of an interim measure by a court does not negate the applicability of an arbitration agreement and is not contrary to the intention of parties agreeing to submit a dispute to arbitration. Thus no party can turn around and nullify an arbitration agreement on the ground that a court taken the dispute for the limited purpose of granting interim measures under Article 9. For the purposes of and in relation to arbitration proceedings, the Court has wide powers to pass interim orders for detention, preservation, interim custody and sale of any property, the subject matter of the reference for preservation or inspection of any property or thing, the subject matter of the refer-

⁹ Article 26 UNCITRAL Model Rules.

ence or as to which any question may arise therein for taking of samples and making observations and experiments; for securing the amount in difference in the reference; for granting an interim injunction and appointing a receiver and guardian in case of a minor or a person of unsound mind. The power referred to in section 9(b) in case of securing the amount in dispute in the arbitration. The Court to pass interim orders in aid of Arbitration and the Arbitrator has power to pass any interim orders to give interim relief during the pendency of the proceedings before him. The Court may direct the detention of money's pending the arbitration proceedings. Relief may be given under section 9 (b) of the Act when arbitration proceedings are pending before the Arbitrator though no application has been made under Section 11 of the said Act. The Court has jurisdiction to grant relief under Section 9 (b) of the Act, though the Arbitrator have not yet met for the purpose of conducting the Arbitration. There was no difference of Opinion whether the interim relief can be given under Section 9 before reference has been made to the Arbitration or which can be only given during the pendency of the arbitration proceedings before the Arbitrator. The said view as to the Court's jurisdiction to grant interim relief under section 9 where there is an Arbitration agreement but no arbitrator has been appointed,

One view is that the Court has power to grant such relief but the other view is that it has no such power. The power to grant relief under Section 9 is exercised in aid and not under the Code of Civil Procedure. Where a suit is pending before the Court, the Court has power to appoint a receiver or issue an interim injunction apart from section 9 of the Act. The fact that Arbitrator has no power to grant an injunction is a matter which the Court will take into account in exercising its discretion to stay the suit under Section 34 of the Act. The Court will usually require a claimant if it is a foreign court out of India or a person out of India who does not possess sufficient immovable property in India to furnish security for all the costs incurred or like-

ly to be incurred by the respondent. If there is no express agreement for costs as in view of the agreement such an order would be unjust.

6. Interim measures Concept

Two adjudicatory authorities possess the power to grant interim orders under the Arbitration and Conciliation Act, 1996, the court and the arbitral tribunal. The Court has been given the power under Section 9 of the Act to grant interim measures in relation to arbitral proceedings. Section 17 of the Act gives the arbitral tribunal the power to order interim measures in respect of the subject matter of the dispute. Interim Measures are granted by court or Arbitral Tribunal during the pendency of adjudication of a dispute and are usually in the form of protection, injunctions, specific performance, pre-award attachments etc. 'Interim reliefs' denotes, they are temporary or interim in nature and are granted in advance of the final adjudication of the dispute by the arbitral tribunal. The powers of the court under this provision are available only when the place of arbitration is in India. The opening words of the section 'a party may before or during arbitral proceedings or at any time after making of the arbitral award but before it is enforced in accordance with section 36 of the Act' indicate that an interim measure may be granted only from the date of the arbitration agreement up to the date of enforcement of the award under section 36.¹⁰ The concept of Interim Measures is exhaustive under the Act. Under this provision reliefs can be provided by appointing guardian for minor or person of unsound mind, appointing a receiver, making of an attachment order or any other interim order for securing the amount in dispute or for the preservation, custody or sale of the property in dispute. During the pendency of a proceeding in a court, a party may make an application for

¹⁰ OP Malhotra, Indu Malhotra, 'The Law and Practice of Arbitration & Conciliation, (2nd ed, LexisNexis,2006) 382

grant of an interim measure(s) and the court may grant such measure(s) as permitted under the procedural rules governing the powers of the court. The principle governing the grant of interim measures is the use of judicial discretion but a Court while taking into consideration questions pertaining to balance of convenience the applicant's ability to make out a prima facie case and most importantly the irreparable harm that would be caused in the event the measure is not granted. For purposes of and in relation to arbitration proceedings, the court has wide powers to pass interim orders for detention, preservation, interim custody and sale of any property, for granting an interim injunction and appointing a receiver or for appointing a guardian of a minor or a person of unsound mind¹¹.

A) Arbitration & Conciliation Act 1996.

Section 9 & 17 of the Act, which also uses the phrase 'Interim measures of protection' and thus gives co-terminus power to the arbitral Tribunal as well as court.

i) **Interim measures, etc by the Court.**¹² 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 Court:-

For the appointment of a guardian for a minor or a person of unsound mind for the purposes of Arbitral proceedings; or¹³

For an interim measures of protection in respect of any of the following matters, namely:¹⁴

¹¹ Justice R.S. Bachawat, Justice Bachawat's Arbitration & Conciliation Act, 1996 (4th ed Wadhwa 2005) 405

¹² Section 9 of Arbitration & Conciliation Act 1996.

¹³ Subsection (i) of Section 9 of Arbitration & Conciliation Act, 1996

¹⁴ Subsection (ii) of Section 9 of Arbitration & Conciliation Act, 1996

The preservation, interim custody or sale of any goods which are the subject-matter of the Arbitration agreement:¹⁵

Securing the amount in dispute in the Arbitration;¹⁶

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;¹⁷

Interim injunction or the appointment of a receiver¹⁸

Such other interim measures of protection as may appear to the court to be just and convenient,¹⁹ And the court shall have the same power of making orders as it has for the purpose of, and in relation to, any proceedings before it.

ii) Interim measures ordered by Arbitral Tribunal.²⁰

This section corresponds to Article 17 of the Model Law (Article 18 of the Draft Model Law.

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¹⁵ Subsection (ii) (a) of Section 9 of Arbitration & Conciliation Act, 1996

¹⁶ Subsection (ii) (b) of Section 9 of Arbitration & Conciliation Act, 1996

¹⁷ Subsection (ii) (c) of Section 9 of Arbitration & Conciliation Act, 1996

¹⁸ Subsection (ii) (d) of Section 9 of Arbitration & Conciliation Act, 1996

¹⁹ Subsection (ii) (e) of Section 9 of Arbitration & Conciliation Act, 1996

²⁰Section 17 of Arbitration & Conciliation Act, 1996.

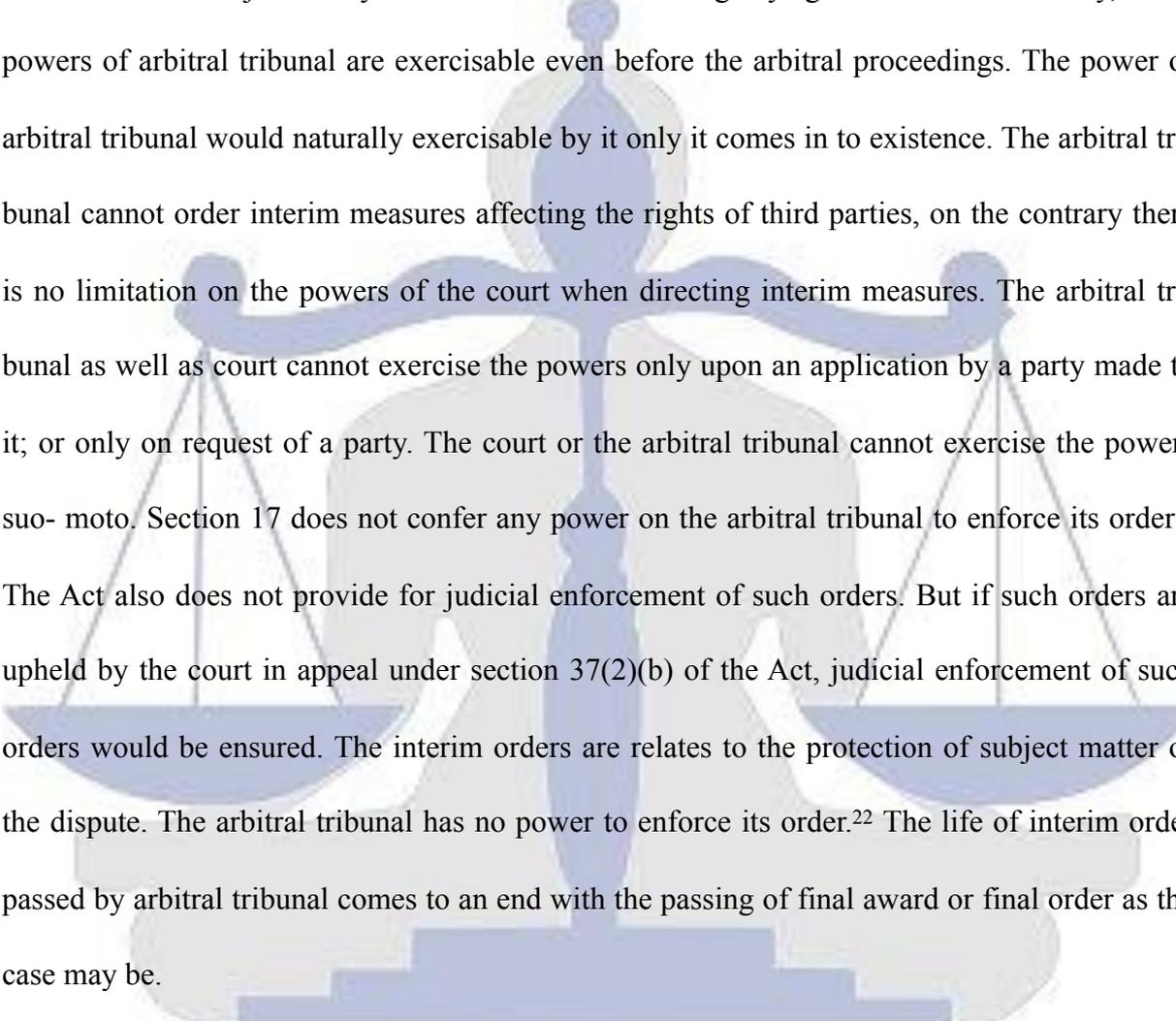
(1) Unless otherwise agreed by the parties, the Arbitral Tribunal may, at the request of a party order a party to take any interim measures of protection as the Arbitral Tribunal may consider necessary in respect to the subject matter of the dispute.

(2) The Arbitral Tribunal requires a party to provide appropriate security in connection with measures ordered under sub-section (1).

It may be relevant to point out that the Arbitration Act, 1996 of England makes interim relief more stringent in the sense that it permits such relief only when the parties have not otherwise agreed and only if and to the extent that the arbitral tribunal or any institution agreed to by the parties has no power or is unable for the time being to act effectively. Thus, the English Arbitration Act has minimised the intervention of the court and as such the provision is truly pro-arbitration. The English court in **Case of Channel Tunnel group Ltd. vs. Balfour Beatty construction Limited**²¹ observed that “It is cardinal rule that if the properly invokes preliminary alternative remedy before the Arbitral Tribunal, it is debarred from invoking the jurisdiction of the court under Section 9 of the Act. Ordinarily if the arbitrator is seized of the matter the interim relief should not be entertained and the parties should be advised to approach the arbitrator for interim relief unless and until the nature of relief intended to be sought falls outside the jurisdiction of the arbitrator or beyond terms of the agreement or reference of disputes. Otherwise, the very object of adjudication of disputes by arbitration would stand frustrated. A party should always be discouraged to knock the door of the Court particularly when the arbitrator is seized of all the relevant or even ancillary disputes.”

It can be seen from the Indian law that the, court has given extensive powers under section 9 of the Act to pass interim orders. At the same time arbitral tribunal has also given powers to order a party to take any interim measure of protection as it may consider necessary, in respect

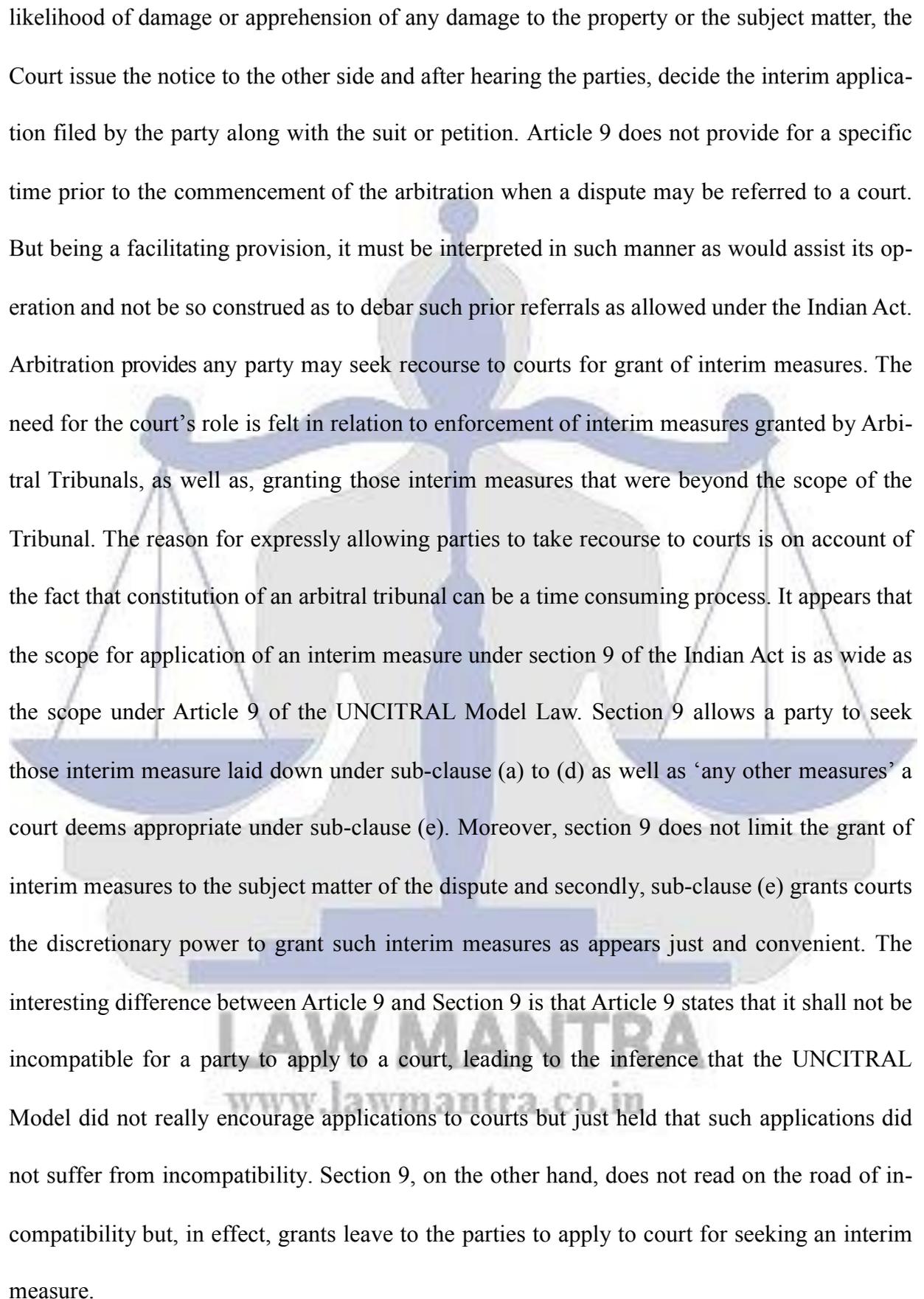
²¹ 1993 (1) ALL E R 664.



of the subject matter of dispute. But the same cannot be enforced as orders of court. It is further seen that powers of court differ from the powers of the arbitral tribunal. The powers of are not restricted to only making directions for protection of the subject matter of dispute. The powers of court are not subject to any limitation about there being any agreement to the contrary, while powers of arbitral tribunal are exercisable even before the arbitral proceedings. The power of arbitral tribunal would naturally exercisable by it only it comes in to existence. The arbitral tribunal cannot order interim measures affecting the rights of third parties, on the contrary there is no limitation on the powers of the court when directing interim measures. The arbitral tribunal as well as court cannot exercise the powers only upon an application by a party made to it; or only on request of a party. The court or the arbitral tribunal cannot exercise the powers suo- moto. Section 17 does not confer any power on the arbitral tribunal to enforce its orders. The Act also does not provide for judicial enforcement of such orders. But if such orders are upheld by the court in appeal under section 37(2)(b) of the Act, judicial enforcement of such orders would be ensured. The interim orders are relates to the protection of subject matter of the dispute. The arbitral tribunal has no power to enforce its order.²² The life of interim order passed by arbitral tribunal comes to an end with the passing of final award or final order as the case may be.

The concept of interim injunction is an old concept of law and is normally applied in the suit or petition or appeal for protecting the subject matter till the suit or petition or appeal is finally decided by the Court. In some of the cases the Court grants ex-parte injunction to the party who shows apprehension of loss or damage of subject matter or there is an eminent threat or danger to the property and the suit or petition would become infructious, if the interim injunction as prayed for is not granted. If there is no urgency in the matter and there is not

²² M.D. Army welfare Housing Organisation v. Sumangal Services Pvt. Ltd. (2004)9 SCC 619



likelihood of damage or apprehension of any damage to the property or the subject matter, the Court issue the notice to the other side and after hearing the parties, decide the interim application filed by the party along with the suit or petition. Article 9 does not provide for a specific time prior to the commencement of the arbitration when a dispute may be referred to a court. But being a facilitating provision, it must be interpreted in such manner as would assist its operation and not be so construed as to debar such prior referrals as allowed under the Indian Act. Arbitration provides any party may seek recourse to courts for grant of interim measures. The need for the court's role is felt in relation to enforcement of interim measures granted by Arbitral Tribunals, as well as, granting those interim measures that were beyond the scope of the Tribunal. The reason for expressly allowing parties to take recourse to courts is on account of the fact that constitution of an arbitral tribunal can be a time consuming process. It appears that the scope for application of an interim measure under section 9 of the Indian Act is as wide as the scope under Article 9 of the UNCITRAL Model Law. Section 9 allows a party to seek those interim measure laid down under sub-clause (a) to (d) as well as 'any other measures' a court deems appropriate under sub-clause (e). Moreover, section 9 does not limit the grant of interim measures to the subject matter of the dispute and secondly, sub-clause (e) grants courts the discretionary power to grant such interim measures as appears just and convenient. The interesting difference between Article 9 and Section 9 is that Article 9 states that it shall not be incompatible for a party to apply to a court, leading to the inference that the UNCITRAL Model did not really encourage applications to courts but just held that such applications did not suffer from incompatibility. Section 9, on the other hand, does not read on the road of incompatibility but, in effect, grants leave to the parties to apply to court for seeking an interim measure.

One of the controversies that emerged after the passing of the Indian Act was with regard to the point of time when an application could be made to a court for granting interim relief. This controversy was finally settled by the Supreme Court. The Supreme Court in case of **Sunderam Finance Ltd. v. NEPC India Ltd.**²³, held that Section 9 is available even before the commencement of the arbitration. It need not be preceded by the issuing of notice invoking the arbitration clause. This is in contrast to the power given to the arbitrators who can exercise the power u/s 17 only during pendency of arbitral proceedings before the Arbitral Tribunal. Once the mandate of the arbitral tribunal terminates, Section 17 cannot be pressed into service. The Madras High Court while interpreting Sec. 9 had ruled that in cases of prior referral under section 9 at least a notice for commencement of Arbitration was necessary. Justice B.N. Kripal ruling on behalf of the Court overruled the judgment of the High Court and held that an application under section 9 could be made even prior to sending notice for commencement of the Arbitration to the other party.²⁴ The Act has been enacted on the line of UNCITRAL model law of International Commercial Arbitration. The Act provides autonomy to the parties in various matters and has reduced the intervention of court to the minimum. However, the courts can intervene to give effect to various matters as permitted by the Act. Basically, the party seeking injunctive relief should establish a likelihood of success on the merits, irreparable harms that might be caused to him if the interim relief is denied and the balance of convenience in its favour. Under Indian Law, both the express power of granting interim measures under Order 39 Rule 1 and Rule 2 of the Civil Procedure Code as well as their inherent power under section 151 to grant an interim measure other than that specified under Order 39, Rule 1 and 2. Arbi-

²³ (1999) 2 Supreme Court Cases 479

²⁴ Kripal J. keeping in view, Article 9 of the UNCITRAL Model Law opined that Article 9 clarifies the mere request to a court by a party to an arbitration agreement for an interim measure 'before or during arbitral proceedings' and it would not be incompatible with the arbitration agreement, meaning thereby that the arbitration proceedings could commence after a party had approached the court for an order for interim protection.

tration is a forum for adjudication that is a departure away from courts and in fact, court interference has been considered a ban to its development. However, under arbitration procedural statutes and rules, courts not only have the power to grant interim measures but this power, in most cases, is wider than that of a Tribunal.

The opening words of this section '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, indicate that an interim measures as contemplated by this provision can be granted de hors these time limits. Even during these time limits, relief must be related to the Arbitral proceedings. In other words, no interim relief can be granted by the Court which is not related to any arbitration proceedings, or which is beyond the time limits. It follows that the Court can grant an interim relief under this provision only if there is a condition precedent to the relief and such a relief emanates from the terms of the agreement. Any dispute which is not a subject matter of the terms of agreement is beyond the purview of Arbitration. A party or person is entitled to interim protection if action of the other party is either in breach of the terms of the agreement or militates, against equity, fair play or the principles of natural justice, otherwise not. The powers of the Court are wide enough and are to be exercise in the spirit of the principles relating to the grant of injunction relating to the attachment before judgment and relating to the appointment of Receiver, as the occasion may arise on the principles of business of justness and convenience, its balance and in the interest of justice. Such power is essentially discretionary and the appellate Court has to be more than slow in the discharge of such power either way. The appellate Court should approach such an order with an attitude that the trial Court, in the matter of discretion, has almost a jurisdiction of finality.

Section 9 (ii) (a) relates to the preservation, interim custody or sale of any goods which are the subject-matter of the Arbitration agreement, but if the subject matter relates to a quanti-

fied claim and not the materials owned by the respondent lying at the site of which the sale is sought by the petitioner, the same cannot be granted. The Court has no power to issue interim orders in a matter where the Arbitration is held under the New York or Geneva Convention at a place outside India, If the Court does not have jurisdiction to pass an interim order as contemplated by this section, it cannot exercise inherent powers and thereby confer upon itself a jurisdiction over the proceedings before it. In case there is inherent lack of jurisdiction in the Court, it cannot exercise inherent powers so as to confer jurisdiction upon itself. Section 9 of the Act cannot be invoked by the courts to stay arbitration proceedings before Arbitral Tribunal and not the courts should be approached for such a relief

7. Principles governing grant of injunction under the scheme of the 1996 Act.

Provisions contained in Code of Civil Procedure are not applicable to the proceedings under the Act. In the absence of guidelines, how the power for grant of relief under section 9 (ii) (b) is to be exercised by the court, the principles underlying the stipulations constrained is²⁵ and procedure & power of the court are to be applied.²⁶ It is only on adequate material being supplied by the petitioner that the Court can form opinion that unless the jurisdiction is exercised under section 9 (ii) of the 1996 Act, there is real danger of the respondent defeating, delaying or obstruction the execution of the award made against it. It is indisputable that temporary injunction is granted during the pendency of the proceedings so that while granting final relief, the Court is not faced with a situation that the relief becomes anfractuous or that during the pendency other proceedings, an unfair advantage is not taken by the party in default or against whom temporary injunction is sought. But power to grant temporary injunction was conferred in aid or as auxiliary to the final relief that may be granted. Declining to give temporary in-

²⁵ Section 18 (1) states that, the parties shall be treated with equality & each party shall be given a full opportunity to present his case.

²⁶ Section 41 of the Arbitration Act, 1940

junction may result in the petition being rendered in fructuous and may make it redundant. Thus, the very purpose for which the petitioner had filed the petition would stand frustrated resulting in a serious prejudice being caused.

8. The salient points of difference between Section 9 & 17 of Act 1996;

It is to be noted that the range of interim measures covered by Section 17 was considerably narrower than that envisaged under Section 9. Section 17 of the Act provides for taking of interim measures in respect of the subject matters, of the dispute by Arbitral Tribunal:-

Section 17 not regulates the question of enforceability of such measures taken by the Arbitral Tribunal. Nonetheless, there remained an area of overlapping and possible conflict between measures by the Arbitral Tribunal and by a Court. This Section does not confer any power upon the Arbitral Tribunal to enforce its order nor does it which was in the nature of an interim award, in view of the restricted jurisdiction of the Arbitrator under 17, was held to be wholly without jurisdiction and thus nullity, being Coram non iudice. The order passed by the Arbitral Tribunal cannot be enforced and therefore the order passed under Section 17 of the Arbitration and Conciliation Act merge into the final award and the Arbitral parties who have not complied with the order passed under Section 17 of the Act, while passing the final award. The Arbitral Tribunal can order interim measures in respect of the Subject matter of the dispute only when the party in whose favour such an order is passed provides appropriate security. Such a security if it is submitted may be appropriated if the orders had been obtained by misstating facts. Although Section 9 and 17 of the Arbitration & Conciliation Act 1996 deal with the interim measures of protection but the power conferred to the court u/s 9 of the Act is wider than the powers u/s 17 of the Act. Section 9 provides (i) for taking of interim measures in cer-

tain matters as detailed in the Section, while Section 17 provides for taking of interim measures in respect of the subject matter of dispute of the Arbitral Tribunal.

9. Distinction between the two jurisdictions.

1. The power of the court can be exercised either before or during the Arbitral proceedings or even thereafter upon the making of the Arbitral award, but before it is enforced in accordance with 36 of the Act.
2. The power of the Tribunal, on the other hand, to cover interim measures of protection, is exercisable only during the pendency of Arbitral proceedings before it, because the proceedings terminate upon a final Arbitral Award or on an order passed under Rule Section (2) of Section 32 of the Act.
3. Unlike Section 17 of the Act, where the Arbitral Tribunal is empowered at the request of a party to order a party to take an interim measures of protection in respect of the subject matter of the dispute, The power of the court under Section 8 & 9 of the Act is in respect of the matters specified in cl (i) or in sub-cl (a) to (e) of cl (ii) of the Act. This provision covers a most of matters including the preservation, interim custody or sale of goods which are the subject matter of the Arbitration agreement; securing the amount in dispute in the Arbitration, the detention, preservation or inspection of any property which is the subject matter of the dispute in arbitration, interim injunction, the appointment of a receiver, and such other interim measures of protection as may appear to the court to be just and convenient.
4. Under Section 17 of the Act, the Arbitral Tribunal has to 'order a party to take any interim measures of protection' The measures on the other hand which are contemplated

by sub-cl (a) to (e) of s 9 are wider in their ambit because they go beyond a mere direction by the court to a party to take an interim measures of protection.

5. Furthermore, Section 9 of the Act provides that the court shall have the same power for making orders as it has for the purposes of and in relation to, any proceedings before it. The court, in the exercise of the powers under Section 9 of the Act, has, therefore, all the powers which are granted to it including those available under the Code of Civil Procedure 1908 for the Purposes of and in relation to any proceedings in a suit on the Original Side.
6. The Court has the coercive power to enforce its orders, but the Arbitral Tribunal is not competent to exercise any such power.
7. Recourse to Section 17 of the Act is an enabling additional recourse and is not in substitution of Section 9 of the Act. It does not operate as an ouster of the court jurisdiction under Section 9 of the Act. The court under Section 9 of the Act has power to pass appropriate orders notwithstanding pendency of the Arbitral proceedings. It is relevant to note that the power of the Arbitral tribunal under Section 17 of the Act is confined only with respect to the subject matter of the dispute while Section 9 of the Act is not subject to any such constraint. Section 9(2) (e) particularly empowers the court to order interim measures of protecting which it considers just and convenient.

10. Conclusion

The Provision in section 9 (i) is new in the Act of 1996, while sub section 9 (ii) a, b, c, d corresponds to rule Rules 1,2,3 & 4 respectively of the second schedule of the Arbitration Act 1940 Except that the word "arbitration agreement" "arbitration" "dispute in arbitration" have substituted the word "reference". The Expression "in relation to, any proceeding before it" ma-

terially corresponds section 41 (b) of the Arbitration Act 1940, & Section 12 (b) of the English Arbitration Act. 1950. The provision of section 9 (a) (c) & (d) of the Act materially corresponds to section 44 (3), 44(2) (c) & 44(2) (e) of the English Arbitration Act 1996 respectively. Section 17 of the Act corresponds to Article of the Model Law. The Act of 1996 is provides dual agency for providing interim relief. The Act gives arbitral tribunal powers in respect of interim measures but only during the pending dispute. The Act does not provide any machinery for enforcement of the order passed by the arbitral tribunal. The Act does not lay down any rules under what circumstances the arbitral tribunal can grant order of interim measures. Following rules can be laid down in these respects.

- 1) To obtain interim injunction, the plaintiff must demonstrate not only the prima facie case that there is likelihood of success on merit of the case but a substantial risk of irreparable harm in the absence of injunction.
- 2) The statutory right conferred by section 9 to approach a Court for interim relief is available either party to the arbitration.
- 3) Section 9 enables the Court to exercise jurisdiction and pass such orders as are required to maintain the sub stratum of the subject matter of the arbitration.
- 4) There is no legal impediment to grant an injunction so as to enforce a negative covenant contained in an agreement which may be determinable.
- 5) An interim order to be passed in accordance with statutory provisions like provisions of Specific Relief Act 1963.
- 6) While considering application under section 9, the principles laid down while dealing with application under Order 39 of C.P.C. can be considered.

7) Section 17 gives powers to Arbitral Tribunal but the powers under section 9 are wider.

The illustrative list of interim measures of protection which can be granted as follows:

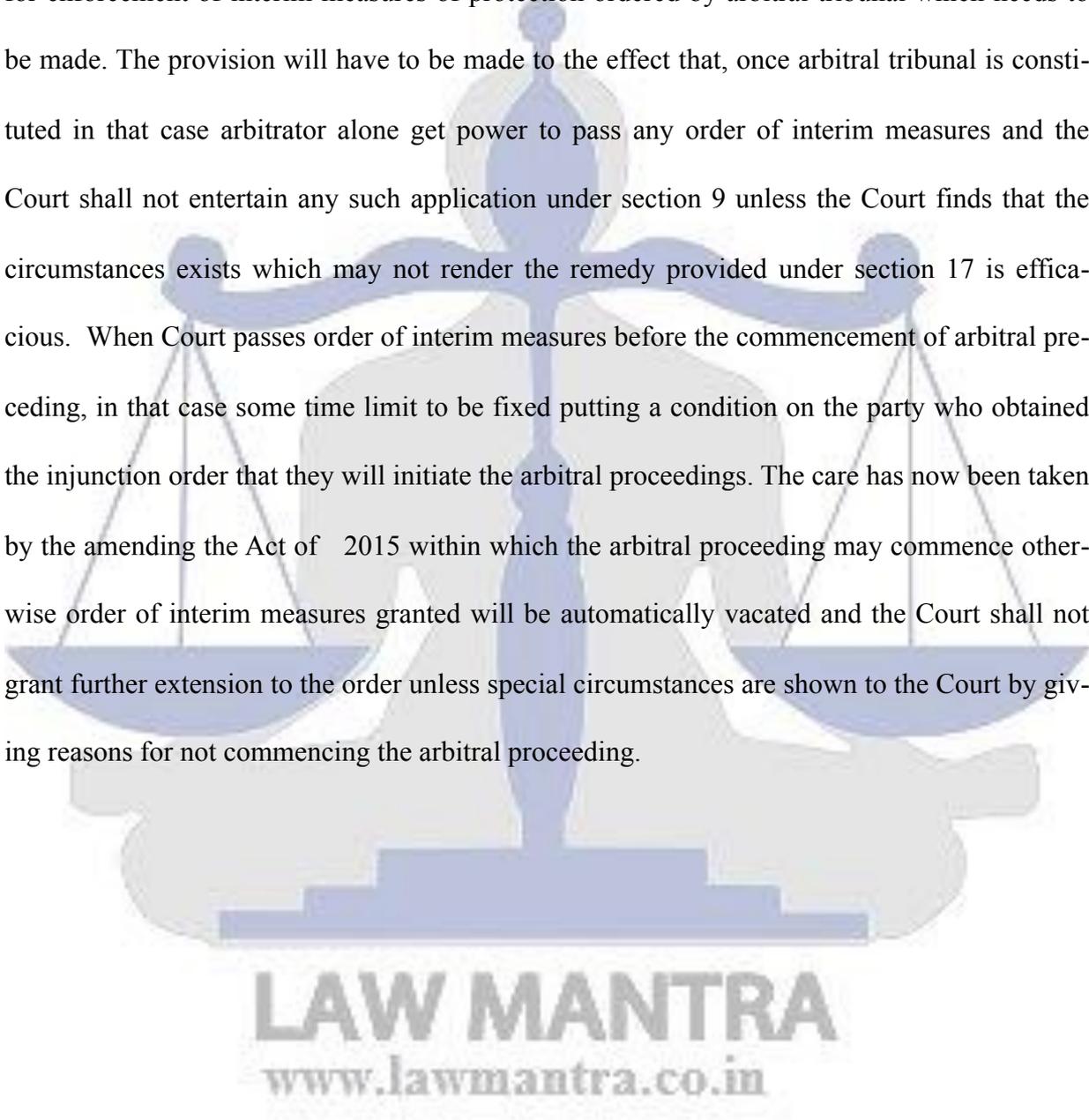
- 1) Interim injunction.
- 2) Appointment of guardian for minor or a person of unsound mind for the purpose of arbitral proceeding.
- 3) Appointment of receiver.
- 4) Payment of amount of difference in the reference.
- 5) Preservation or inspection of articles or properties which are subject matter of reference like partnership property,
- 6) Attachment before Judgment.
- 7) Production of document.
- 8) Security for the amount in dispute.
- 9) Enforcement of bank guarantee.

In addition, the provisions to issue of third party injunction need to be made so also it is necessary to abolish the dual powers vested with the court & arbitral Tribunal. The more power to be given to the arbitral tribunal instead of court & execution provision needs to be made.

11. Suggestion

The arbitration Act created two forums for the purpose of grant of interim measures. The dual system needs to be abolished. The powers of the court to grant interim measures on

matters set out under sub clause (a) to (e) of Section (ii) have to be extended to the Arbitral Tribunal under section 17 of the Act. The Act of 1996 has created system of dual agency for providing relief of interim measures. There is no enforcement mechanism provided by the Act for enforcement of interim measures of protection ordered by arbitral tribunal which needs to be made. The provision will have to be made to the effect that, once arbitral tribunal is constituted in that case arbitrator alone get power to pass any order of interim measures and the Court shall not entertain any such application under section 9 unless the Court finds that the circumstances exists which may not render the remedy provided under section 17 is efficacious. When Court passes order of interim measures before the commencement of arbitral proceeding, in that case some time limit to be fixed putting a condition on the party who obtained the injunction order that they will initiate the arbitral proceedings. The care has now been taken by the amending the Act of 2015 within which the arbitral proceeding may commence otherwise order of interim measures granted will be automatically vacated and the Court shall not grant further extension to the order unless special circumstances are shown to the Court by giving reasons for not commencing the arbitral proceeding.



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