

INVOCATION OF SECTION 37 OF ARBITRATION AND CONCILIATION ACT, 1996 BY A NON-SIGNATORY TO THE ARBITRATION AGREEMENT

While dealing with the issue regarding the locus of a non-signatory to the arbitration agreement under the Arbitration and Conciliation Act, 1996 ("**the Act**") with respect to section 37 of the Act which provides for Appealable orders, the Hon'ble Bombay High Court in the case of **Prabhat Steel Traders Private Limited vs. Excel Metal Processors Private Limited** (Arbitration Petition Nos. 619/2017) *vide* its landmark judgement delivered on 31st August, 2018, held that a non-signatory to the arbitration agreement can challenge the interim measures granted by an arbitral tribunal under section 17 of the Act.

BACKGROUND: By thirteen arbitration petitions filed under section 37 of the Act, the petitioners, who were non-signatories to the arbitration agreement, prayed for leave to appeal against the order passed by an arbitral tribunal and also prayed for setting aside the said impugned order, on the grounds that the interim measure was causing severe prejudice to the interests of the petitioners.

The Hon'ble Court first summarized the facts in one of the arbitration petitions which was argued as the lead matter and in view that the facts in the other petitions were identical, the judgment in the lead matter was applied to the other petitions.

FACTS:

- The Respondent No. 1 was the parent company of the Respondent No. 3 and had common directors and were sister concerns/group companies. The Respondent No. 2 was the original claimant in the arbitral proceedings before the learned sole arbitrator.
- The Petitioner had purchased 46 HR steel coils.
- The Petitioner entered into a Conducting Agreement with the Respondent No. 3, whereby the Petitioner gave the said coils to the Respondent No. 3 for storing, handling and recoiling on job work basis.

- When the Petitioner visited the warehouse of the Respondent No. 3 to take delivery of the said coils from the Respondent No. 3, the Petitioner noticed that some of the coils including the said coils of the Petitioner were marked as "SIPL" in yellow paint. At that point of time, the officers of the Respondent No. 1 and the Respondent No. 3 informed the Petitioner about certain arbitration proceedings pending between the Respondent No. 1 and the Respondent No. 2 and that the coils of the Petitioner were identified amongst 5092.860 MT HR coils which were purportedly claimed by the Respondent No. 2 and have been attached/injuncted pursuant to an order dated 27th December, 2016 ("**impugned order**") passed by the arbitral tribunal.
- The Petitioner thereafter learned that the Respondent No. 2 had invoked the arbitration proceedings against the Respondent No. 1.
- The Respondent No. 1 was given a notice by the Respondent No. 2 to appear at the hearing of the application under section 17 of the Act filed by the Respondent No. 2 against the Respondent No. 1 before the arbitral tribunal. The Respondent No. 1 however, failed to appear before the arbitral tribunal. By the impugned order, the arbitral tribunal appointed the Court Receiver, High Court, Bombay in respect of the said 5092.860 MT HR coils

and also granted injunction against the Respondent No. 1 from dealing with the entire coils at the warehouse the Respondent No. 3.

- The Petitioner vide its letter addressed to the arbitral tribunal reiterated its case of ownership of the said coils.
- Since there was no response from the arbitral tribunal to the applications made by the Petitioner, the Petitioner filed these 13 petitions under section 37 of the Act for seeking leave of the Hon'ble Court and also thereby impugning the impugned order passed by the arbitral tribunal under section 17 of the Act.

ISSUE FOR CONSIDERATION: The maintainability of the arbitration petitions was challenged on the ground that none of the petitioners were parties to any arbitration agreement between the Respondent No. 1 and the Respondent No. 2 and therefore cannot invoke section 37 of the Act.

The question that arose for consideration of the Hon'ble Court was whether a non-signatory to the arbitration agreement, who is aggrieved by any order of interim measures granted by the arbitral tribunal, can file an appeal under section 37 of the Act.

PETITIONERS' CONTENTIONS: While dealing with the preliminary objection of maintainability of the Petition filed under section 37 of the Act, it was contended that after amendment of the Act in the year 2015, extremely wide-ranging powers have been conferred on the arbitral tribunal and exercising all such powers by the arbitral tribunal would seriously prejudice the rights of the third parties who are not parties to the arbitration agreement or arbitration proceedings.

The learned counsel for the Petitioner placed

reliance on section 2(1)(h) of the Act which defines "party". While various other provisions including sections 8, 9, 17 and 34 of the Act expressly contemplated an application being made by a party, no such condition is placed under section 37 of the Act which is open ended and merely states that "*An appeal shall lie from the following orders*". The Act thus surely entitled a third party who is aggrieved by an order passed by the arbitral tribunal under section 17 of the Act, to invoke the remedy under section 37 of the Act for seeking modification/vacating the order of interim measures passed by the arbitral tribunal under section 17 of the Act. It was contended that a party cannot be left remediless.

A right to grant leave to file an appeal can be exercised by the Hon'ble Court under the provisions of the Code of Civil Procedure, 1908 and such a right is an absolute right. Such leave can be granted by the Hon'ble Court ex-parte and notice can be given to other parties only if the Hon'ble Court is of the view that other parties would be prejudiced. If a third party is prejudiced, leave has to be granted by the Hon'ble Court hearing an appeal.

RESPONDENTS' CONTENTIONS: It was contended that there is no provision permitting a stranger to intervene in the pending arbitration and the arbitral processes between two parties who had contracted for arbitration. A party who is not a party to the arbitration agreement cannot approach the Hon'ble Court for protection under section 9 of the Act. The same principles would apply to section 37 of the Act as well. An appeal is maintainable under section 37 of the Act against an order passed under sections 8, 9, 16, 17 and 34 of the Act. If a stranger cannot approach the Hon'ble Court under section 9 of the Act and cannot challenge an order as provided under section 37 of the Act, it is not

permitted for a such a stranger to challenge an order under section 17 of the Act.

Section 37(1)(a) of the Act operates qua the parties to the arbitration contract. Admittedly in this case, none of the petitioners were parties to any arbitration agreement between the Respondent Nos. 1 to 3 or the proceedings under section 17 of the Act before the arbitral tribunal and thus even if any of them are aggrieved by any order passed by the arbitral tribunal under section 17 of the Act, such a stranger cannot be permitted to file an appeal under section 37(1)(b) of the Act.

FINDINGS AND CONCLUSION: The Hon'ble Court observed that it was an admitted position that none of the petitioners in the 13 petitions were parties to the arbitration agreement entered into between the Respondent Nos. 1, 2 and 3.

The Hon'ble Court accepted the contention that section 37 of the Act does not provide that an appeal under said provision can be filed only by the parties to the arbitration agreement. Section 34 of the Act refers to the expression "party" which is absent in section 37 of the Act.

The fact that the expression "party" is absent in section 37 of the Act makes the legislative intent clear that the said expression "party" is deliberately not inserted so as to provide a remedy of an appeal to a third party who is affected by any interim measures granted by the arbitral tribunal or by the Hon'ble Court in the proceedings filed by and between the parties to the arbitration agreement. There is a possibility of collusive proceedings and collusive order of interim measures being filed and obtained by the parties to the arbitration agreement which may affect the interest of third parties.

The Hon'ble Court observed that the Division bench of the Hon'ble Bombay High Court in the case of ***Girish Mulchand Mehta and Durga Jaishankar Mehta vs. Mahesh S. Mehta and Harini Cooperative Housing Society Ltd.***¹ has dealt with an issue whether the appeal under section 37 of the Act could have been filed by the third party arising out of the order passed under section 9 of the Act. The Division bench construed Rule 803E of the Bombay High Court (Original Side) Rules and has held that section 9 of the Act is distinct from section 17 of the Act, in as much as a petition under section 17 of the Act is moved before the arbitral tribunal for an order against a party to the proceedings, whereas section 9 of the Act vests remedy in a party to arbitration proceedings to seek interim measure of protection against a person who need not be either party to the arbitration agreement or to the arbitration proceedings. In the said proceedings under section 9 of the Act, a third party was also impleaded since the grant of the proposed relief may incidentally affect those third parties. The Hon'ble Court entertained the appeal under section 37 of the Act filed by such third party who was affected by the order passed by the learned Single Judge under section 9 of the Act, though dismissed the said appeal on merit.

The Hon'ble High Court was of the view that the fact that powers of the Court under section 9 of the Act to grant interim measures and powers of the arbitral tribunal under section 17 of the Act are identical in view of the amendment to section 17 of the Act with effect from 23rd October 2015, therefore, even a third party who is directly or indirectly affected by interim measures granted by the arbitral tribunal will have a remedy of an appeal under section 37 of the Act. The principles of law laid down by the Division bench of the Hon'ble

Court in Girish Mulchand Mehta's case (supra) were extended to the present case.

By this landmark judgment the Hon'ble Court observed that, in view of an order obtained by the parties to the arbitration agreement under section 17 of the Act, directly affecting the independent rights of the Petitioner (a third party), such third parties cannot be made to suffer on the ground

that the remedy of appeal under section 37 of the Act could not be availed of by such third parties, given that the said provision does not specifically bar appeals filed by the third parties.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.