

Parties To A Foreign Seated Arbitration Can Seek Interim Reliefs In India - Bombay High Court

Recently, the Division Bench of the Bombay High Court, in Heligo Charters Vs Aircon Belbars FZE discussed the applicability of the Section 9 (Interim Reliefs) of the Arbitration & Conciliation Act, 1996 (Act) to a foreign seated arbitration; in view of the amendments introduced in the year 2015. The Bombay High Court with characteristic clarity has held that the amended Section 2(2) of the Act, confers right upon the parties to an arbitration seated overseas to approach Indian courts for interim reliefs. Notably, the Bombay High Court also held that in order to exclude the applicability of Part-I of the Act, the terms of exclusion in the agreement should be specific and that a general agreement providing for a foreign venue and law will not be an automatic exclusion of Part-I of the Act.

Facts: Based on the arbitration agreement contained in a contract, Aircon Belbars FZE (Aircon) initiated arbitration against Heligo Charters Pvt Ltd (Heligo). As per the arbitration clause, the arbitration proceedings were conducted in Singapore in accordance with Singapore Law. The arbitration concluded in favour of Aircon with an award of approximately US\$ 7 million (Rs. 46 Crore) for sale of a helicopter. The award was not challenged by Heligo and thus it became final.

Post award, Aircon approached the Bombay High Court (the Court), under Section 9 of the Act seeking injunctive /restraining orders against Heligo, in respect of Heligo's asset: an Augusta Helicopter, the only significant asset that Heligo had in India. Aircon's apprehension being that Heligo may remove from the jurisdiction of the Court, encumber, or sell the Augusta Helicopter.

Upon considering Aircon's application, the Single Judge of the Court allowed the same, granting reliefs in favour of Aircon. Against this order, Heligo preferred an appeal before the Division Bench of the Court. Dismissing the appeal, the Division Bench of the Court confirmed the order of the Single Judge.

Contentions: It was contended on behalf of Heligo, that Section 9 of the Act has no application to a foreign award, which are governed by Part-II of the Act. This contention of Heligo was in two parts:

First, there is an "agreement to the contrary" i.e. there is an agreement that excludes the application of Part-I of the Act: in view of arbitration being seated in Singapore and subject to Singapore Law i.e. it translates into implied exclusion of the Part-I of the Act.

Second, even if there no such implied exclusion of Part-I of the Act, Section 9 of the Act cannot be invoked, unless the award made or to be made is enforceable and recognized under Part-II of the Act.

Judgment: Rejecting the first contention of Heligo, the Division bench confirmed the findings of the Single Judge. Notably, the amended proviso added to Section 2(2) reads as follows:

"2(2) Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act."(Emphasis Supplied)

Taking note of the above, the Court observed that the proviso clearly stipulates that the provision of Section 9 shall apply to International Commercial Arbitration even if the place of arbitration is outside India. Adverting to the recommendation of the Law Commission, in this regard, the Court observed that

the operation of Section 9 cannot be excluded in absence of a specific agreement to the contrary.

On this aspect, the observations of the single judge clarify the position beyond doubt. The Single Judge observed that if the suggestion of Heligo is accepted: that a general arbitration agreement which provides venue and law of arbitration in effect impliedly excludes the application of Part I of the Act, it would render the section 2(2) and its proviso utterly otiose. Hence it is necessary that in order for the terms of exclusion of Part-I to be effective, they must in specific words state that Part I (or some section of Part I) will not apply to the arbitration between parties.

In support of the second contention, it was submitted by Heligo that Aircon cannot invoke the provision of Section 9 until the foreign award becomes enforceable and recognized under Part-II of the Act. That is to say that Section 9 cannot be invoked unless the foreign award passes the tests laid down in Section 48 of the Act. To suggest this, Heligo relied on the language used by the Legislature in amended proviso added to Section 2(2) of the Act, particularly the words, "enforceable and recognised under the provisions of Part II of this Act". This contention of Heligo was also rejected by the Division Bench.

On this aspect also, the division bench confirmed the findings of the Single Judge. It was observed by the Single Judge that actually what the proviso to amended section 2(2) seeks to do, is to make available a remedy or recourse under Section 9 to the parties holding a foreign award, pending the process contemplated under Section 48 of the Act is completed.

Section 48 of the Act basically enumerates various conditions (akin to Section 34 of the Act: Application

for setting aside arbitral award) on which the foreign award is required to be tested, by a court in India, in order to be enforceable in India.

It was observed by the Single Judge that Section 2(2) enables the courts in India, to protect the assets (party against whom the foreign award is passed) from being diverted or dissipated, on application of the holder of foreign award under section 9. By virtue of Section 2(2) the court can ensure that the holder of a foreign award has an asset in India to proceed against, in case the enforceability of the foreign award succeeds the test laid down under section 48. Further, in a scenario where the foreign award fails the tests of Section 48 the protective order under section 9 will come to an end. In other words, by exercising power under Section 9 of the Act, the court can avoid deliberate frustration of the foreign award.

Conclusion: In view of the observations of Bombay High Court in Aircon's case and as per the provisions of section 9 it can be concluded that the parties to an arbitration seated outside India can apply for interim reliefs to a court in India (where such assets are situated), before the invocation of the arbitration, during the continuance of the arbitration proceeding and after the award is passed till the award is executed, subject of course to the facts of the matter and subject to the provisions of Part I not being expressly excluded by the parties in the arbitration agreement.

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.