

**A Final Relief Cannot Be Granted Under Section 9 Of Arbitration And Conciliation Act, 1996: Delhi High Court**

**2023 LiveLaw (Del) 104**

**IN THE HIGH COURT OF DELHI AT NEW DELHI**

**CHANDRA DHARI SINGH; J.**

**O.M.P.(I) (COMM.) 396/2020; 10<sup>th</sup> January 2023**

**GMR POCHANPALLI EXPRESSWAYS LIMITED**

*versus*

**NATIONAL HIGHWAYS AUTHORITY OF INDIA**

*Petitioner Through: Mr. Atul Sharma and Ms. Harshita Agarwal, Advocates;*

*Respondent Through: Mr. Ankur Mittal and Mr. Abhay Gupta, Advocates*

**ORDER**

1. The instant petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter "Arbitration Act") read with Section 2(1) of the Commercial Courts Act, 2015 has been filed on behalf of the petitioner seeking the following reliefs:

*"i. Pass an order of mandatory injunction directing the Respondent to reimburse/release the amount of Rs. 12,56,72,430/- which has been deducted illegally and arbitrarily by the Respondent in breach of the Arbitral Award from the 22<sup>nd</sup> Annuity paid to the Petitioner under the Concession Agreement dated 31.03.2006 along with interest @5% over SBI PLR from the due date of payment till the actual date of payment;*

*ii. Pass any such other or further orders as may be deemed fit by this Hon'ble Court in the facts and circumstances of the present case."*

**FACTUAL MATRIX**

2. The parties had entered into a Concession Agreement on 31<sup>st</sup> March 2006, for the design, construction, development, finance, operations and maintenance of K.M. 367.00 (Adloor Yellareddy) to K.M. 447.000 (Kalkallu) covering 85,745 km and improvement, operation and maintenance of K.M. 447.000 (Kalkallu) – 464.000 (Gundla-Pochanpalli) covering 17,000 km on NH-7 in the State of Andhra Pradesh (hereinafter "the Project").

3. The petitioner, being a Special Purpose Vehicle incorporated and registered under the Companies Act, 1956, by the consortium of GMR Infrastructure Ltd. and GMR Energy Limited, is involved in construction, operation and maintenance of the Project arising out of the Concession Agreement between the parties. The respondent is the National Highways Authority of India responsible for maintenance, management and development of National Highways or stretch of the National Highways vested in or entrusted to it by the Central Government.

4. As per the Concession Agreement, the petitioner achieved the Provisional Commercial Operation Date within 30 months, i.e., on 26<sup>th</sup> March 2009, whereafter, the petitioner has been operating and maintaining the Project. The final Completion Certificate was also obtained by the petitioner on 25<sup>th</sup> July 2009.

5. Thereafter, disputes arose between parties regarding requirement to do renewal work every five years. After several attempts of resolution of such disputes, with the intervention of this Court in OMP (I)(COMM) No. 421/2018, an Arbitral Tribunal was constituted by the Indian Council of Arbitration and ultimately, the Award

dated 14<sup>th</sup> January 2020 was passed. The following reliefs were given in the said Award:-

*“a. The Petitioner is not entitled to the claim amount of ₹104,47,80,462/- on account of reimbursement of costs incurred for relaying the pavement at the end of the fifth year and extra costs incurred due to the decision not to allow recycling of milled material.*

*b. Petitioner is entitled to the claim amount of ₹10,78,61,8641- on account of deductions made by the Respondent towards damages. The Respondent is required to pay the aforesaid amount to the Petitioner along with interest @ 12% p.a. from the date of deduction, i.e., 27.03.2018, till the date of payment.*

*c. Petitioner is entitled to the litigation costs of ₹30 lacs, which is required to be paid by the Respondent to the Petitioner. In addition to this amount, whatever amount the Petitioner has deposited with the ICA towards the share of the fees payable by the Respondent, ₹57,65,250/-, shall also be paid by the Respondent to the Petitioner as further costs. d. Counter Claim of the Respondent stands rejected.*

*e. The awarded sum of ₹10,78, 61,8641- along with costs of ₹30 lacs and interest @ 12% p.a. shall be paid by the Respondent to the Petitioner within 30 days from the date of the Award.*

*f. The renewal work is required to commence by 01.04.2020 and the work is required to be completed by the end of the year 2020. For the 3<sup>rd</sup> cycle, it is directed that the work is required to be completed by 01.04.2025.”*

6. Accordingly, on 13<sup>th</sup> February 2020, the petitioner raised an invoice for the payment of the 22<sup>nd</sup> Annuity amounting to Rs. 54,18,00,000/- and thereafter, also submitted the work plan for undertaking renewal work as per the respondent, subject to the release of payment by the respondent in terms of the Arbitral Award.

7. It is the case of the petitioner that the respondent issued a letter recommending the payment of Rs. 54,18,00,000/-, however, a few days later the respondent recommended the damages of Rs. 27,37,86,366/- and that Rs. 1,73,75,807/- be imposed on for causing delay in completing the 2<sup>nd</sup> renewal work as well as for non-compliance of operation and maintenance obligations.

8. In pursuance thereto, the petitioner received an amount of Rs. 38,79,15,763/- after the deductions made by the respondent, by which the petitioner is aggrieved and is hence, praying the rest of the amount, i.e., Rs. 12,56,72,430/- be released in its favour by way of the instant petition seeking mandatory injunction.

### **SUBMISSIONS**

9. Learned counsel appearing on behalf of the petitioner submitted that after passing of the Arbitral Award dated 14<sup>th</sup> January 2020, the respondent was obligated to release the amount due to be released on 26<sup>th</sup> March 2020, however, the respondent deducted the amount of Rs. 12,56,72,430/- on the premise that there was a delay of 336 days in undertaking the 2<sup>nd</sup> renewal work.

10. It is submitted that the respondent has illegally and arbitrarily withheld the aforesaid amount which was payable to the petitioner as 22<sup>nd</sup> Annuity payment in terms of the Concession Agreement. Therefore, the petitioner issued Legal Notices on 23<sup>rd</sup> April 2020 and 2<sup>nd</sup> June 2020 communicating to the respondent that the deduction was completely arbitrary and in blatant breach and violation of the Arbitral Award dated 14<sup>th</sup> January 2020. However, instead of releasing the amount, the

respondent also issued a letter dated 12<sup>th</sup> June 2020 threatening the petitioner of imposing further damages.

11. Upon passing of the Arbitral Award, both the parties filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the said Award. The petitioner filed OMP (COMM) No. 433/2020 against findings pertaining to Claim No. 1 and 3 and the respondent filed OMP (COMM) No. 449/2020 against findings pertaining to Claim No. 2, 4 and 5.

12. It is submitted that the Coordinate Bench of this Court in the I.A. no. 4775/2020 in OMP (COMM) No. 433/2020 stayed the operation of the directions of the Arbitral Tribunal requiring the petitioner to carry out the 2<sup>nd</sup> renewal work as well as the operation of letter dated 12<sup>th</sup> June 2020, observing that the clauses of the Concession Agreement will have to be interpreted, insofar as the requirement of the petitioner to do renewal work every 5 years under the Concession Agreement is concerned.

13. Learned counsel for the petitioner further submitted that on 22<sup>nd</sup> November 2018, by way of a consent order, the Arbitral Tribunal passing the interim order directed the petitioner not to continue to undertake the 2<sup>nd</sup> renewal work till further orders of the Arbitral Tribunal. The petitioner was categorically directed to commence the work from 1<sup>st</sup> April 2020 to be completed by 31<sup>st</sup> December 2020. Hence, no cause of action had arisen for the respondent to deduct the amount towards damages for the alleged delay.

14. It is submitted that none of the clauses of the Concession Agreement give the right to the respondent to make the deduction from the Annuity payable to the petitioner. Moreover, Clause 6.4(b) of the Agreement states that irrespective of the pendency of the disputes, the respondent is required to release the Annuity in full to the Petitioner and such payment shall be without prejudice to a final adjustment according to the terms on which such disputes are resolved.

15. It is, therefore, submitted that the instant petition may be allowed and a mandatory injunction may be granted to release the amount of Rs. 12,56,72,430/- in favour of the petitioner.

16. *Per Contra*, learned counsel appearing on behalf of the respondent vehemently opposed the petition and the contentions raised therein. The learned counsel for the respondent raised the preliminary objection to the petitions stating that relief prayed for in the instant petition is in the nature of final relief, whereas, Section 9 of the Arbitration Act only entails the provisions for interim relief and therefore, the instant petition is not maintainable.

17. It is submitted that it is wrong to suggest that the instant petition is in furtherance of the Arbitral Award, since the Arbitral Award remains to be in operation, whereas the petitioner is assuming that the same will be set aside.

18. It is submitted that the delay in completing the renewal work is not disputed as the petitioner was obligated to complete the work on or before 25<sup>th</sup> March 2019, which the petitioner failed to do. Moreover, in terms of award dated 14<sup>th</sup> January 2020, the Arbitral Tribunal has not restrained the respondent from levying any damages for the delay that would occur in completing the 2<sup>nd</sup> periodic renewal.

19. It is also submitted that the Claim No. 1 was decided in favour of the respondent which makes it evident that irrespective of the roughness value, the petitioner must do

the periodic renewal. There is no occasion for the petitioner to escape the levy of damages on account of delay in carrying out the 2<sup>nd</sup> periodic work.

20. Learned counsel for the respondent submitted that the petitioner is trying to seek protection and advantage of the interim order passed by the Coordinate bench of this Court which was vacated in view of the finding of the Arbitral Tribunal declining the grant of final relief.

21. It is submitted that the deductions made by the respondent were neither illegal nor unauthorized and hence, the instant petition being devoid of any merit is liable to be set aside.

### **ANALYSIS AND FINDINGS**

22. Heard learned counsel for the parties and perused the record.

23. At the very outset, the preliminary objection taken on behalf of the respondent is that the relief sought by the petitioner cannot be granted under Section 9 of the Arbitration Act. The petitioner before this Court is seeking remittance and release of amount allegedly withheld by the respondent illegally on the ground of delay for carrying out the 2<sup>nd</sup> renewal work. The parties have raised several grounds on merits, in the background of the Concession Agreement and the facts of the case, however, the moot question for consideration of this Court is whether the relief sought by the petitioner may be granted by a Court exercising powers under Section 9 of the Arbitration Act.

24. It is pertinent to reproduce and reiterate the provision under Section 9 of the Arbitration Act, which reads as under:-

*“9. Interim measures, etc., by Court.—[(1)]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 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 authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising 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.*



*[(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.*

*(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under subsection (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.]”*

25. A bare reading of the provision reveals that the Court has the power to make orders granting interim measure of protection under the Act. The key word used in the provision is “interim”, the literal meaning of which is “in the intervening time” or “provisional”. The contents of Section 9 of the Arbitration Act are comprehensive enough to understand the intent of incorporating the same by the application of Literal Rule of Interpretation. An interim relief may be granted by the appropriate court at any point of time but before the Arbitral award becomes enforceable under Section 36 of the Arbitration Act. The intention is to grant relief to the party(ies) in the intervening period from the till the Award attains finality and is enforced as per the provisions of the Act.

26. The provision delineates that interim measures can be granted in the nature of and for the purposes of preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; securing the amount in dispute in the arbitration; detention, preservation or inspection of anything which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising 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; and interim injunction or the appointment of a receiver.

27. The words “*such other interim measure of protection*” have been inserted in Section 9(1)(ii)(e) of the Arbitration Act to define and narrow down the scope of the nature of interim relief that may be granted by the Court adjudicating upon petition under Section 9 of the Arbitration Act. The words used thereto are “*as may appear to the court to be just and convenient*” which is a testament to the power vested with the Court to pass an order that it deems fit, just and convenient, in accordance with the provisions of the Arbitration Act, specifically Section 9.

28. While granting an interim relief or protection, the settled principles of law need to be borne in mind to pass an order bereft of illegalities and errors apparent on the face of record. Therefore, it is pertinent to observe the principles laid down in law, under the legislation as well as by interpretation of the Hon”ble Supreme Court, to ensure that in the process of granting interim relief and protection, the final relief is not rendered infructuous. The practice and observation of these principle become even more necessary when the relief is being sought once the Award has already been made after much deliberation and consideration in the arbitral proceedings.

29. The Hon”ble Supreme Court in ***Adhunik Steels Ltd. vs. Orissa Manganese and Minerals (P) Ltd., (2007) 7 SCC 125***, while discussing the scope of interim reliefs, under Section 9 of the Arbitration Act, was the view that provisions of the Code of Civil Procedure, 1908 as well as the Specific Relief Act, 1963, although not in *sensu stricto*, have to be appreciated and applied at the time of granting interim measures. The relevant portion of the judgment is reproduced hereunder:-

*“11. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject-matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well-known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was de hors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the section itself brings in the concept of “just and convenient” while speaking of passing any interim measure of protection. The concluding words of the section, “and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it” also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act.*

*12. The power and jurisdiction of courts in arbitral matters has been the subject of much discussion. The relationship between courts and Arbitral Tribunals have been said to swing between forced cohabitation and true partnership. The process of arbitration is dependent on the underlying support of the courts who alone have the power to rescue the system when one party seeks to sabotage it. The position was stated by Lord Mustill in Coppee Lavalin N.V. v. Ken-REN Chemicals & Fertilizers Ltd. [(1995) 1 AC 38 : (1994) 2 WLR 631 : (1994) 2 All ER 449 : (1994) 2 Lloyd's Rep 109 (HL)] Lloyd's Rep at p. 116 : (All ER pp. 459j-460a)*

*“[T]here is plainly a tension here. On the one hand the concept of arbitration as a consensual process, reinforced by the ideal of transnationalism leans always against the involvement of the mechanisms of State through the medium of a municipal court. On the other side there is the plain fact, palatable or not, that it is only a court possessing coercive powers which can rescue the arbitration if it is in danger of foundering...”*

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*14. Professor Lew in his Commentary on Interim and Conservatory Measures in ICC Arbitration Cases, has indicated:*

*“The demonstration of irreparable or perhaps substantial harm is also necessary for the grant of a measure. This is because it is not appropriate to grant a measure where no irreparable or substantial harm comes to the movant in the event the measure is not granted. The final award offers the means of remedying any harm, reparable or otherwise, once determined.”*

*15. The question was considered in Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd. [1993 AC 334 : (1993) 2 WLR 262 : (1993) 1 All ER 664 (HL)] The trial Judge in that case took the view that he had the power to grant an interim mandatory injunction directing the continuance of the working of the contract pending the arbitration. The Court of Appeal thought that it was an appropriate case for an injunction but that it had no power to grant injunction because of the arbitration. In further appeal, the House of Lords held that it did have the power to grant injunction but on facts thought it inappropriate to grant one. In formulating its view, the House of Lords highlighted the problem to which an application for interim relief like the one made in that case may give rise. The House of Lords stated at AC p. 367 : (All ER p. 690g-h)*

*“It is true that mandatory interlocutory relief may be granted even where it substantially overlaps the final relief claimed in the action; and I also accept that it is possible for the court at the pre-trial stage of a dispute arising under a construction contract to order the defendant to continue with a performance of the works. But the court should approach the making of*

*such an order with the utmost caution, and should be prepared to act only when the balance of advantage plainly favours the grant of relief. In the combination of circumstances which we find in the present case I would have hesitated long before proposing that such an order should be made, even if the action had been destined to remain in the High Court.”*

30. The said position was also reiterated in **Arcelormittal Nippon Steel (India) Ltd. vs. Essar Bulk Terminal Ltd., (2022) 1 SCC 712**, wherein it was observed as under:-

*“88. Applications for interim relief are inherently applications which are required to be disposed of urgently. Interim relief is granted in aid of final relief. The object is to ensure protection of the property being the subject-matter of arbitration and/or otherwise ensure that the arbitration proceedings do not become infructuous and the arbitral award does not become an award on paper, of no real value.*

*89. The principles for grant of interim relief are (i) good prima facie case, (ii) balance of convenience in favour of grant of interim relief and (iii) irreparable injury or loss to the applicant for interim relief. Unless applications for interim measures are decided expeditiously, irreparable injury or prejudice may be caused to the party seeking interim relief.*

*90. It could, therefore, never have been the legislative intent that even after an application under Section 9 is finally heard, relief would have to be declined and the parties be remitted to their remedy under Section 17.”*

31. Therefore, the primary consideration while passing the order is to see whether irreparable harm is likely to be caused to the party seeking the relief, while bearing in mind that granting such relief shall not render the final relief or the entire proceedings infructuous. A relief beyond the final relief as an interim measure, at the preliminary stage, shall not be granted and even if granted has to be with utmost caution and vigilance. By way of exercising powers under Section 9(1) of the Arbitration Act, the Courts cannot enforce the Award in the garb of granting a relief beyond the scope of the powers but can only grant relief which is deemed necessary to ensure that the rights of either party are not being prejudiced to the extent that the resolution being sought becomes futile.

32. Further, the Hon”ble Supreme Court in **Hindustan Construction Co. Ltd. vs. Union of India, (2020) 17 SCC 324** made the following observations:-

*“36. Interpreting Section 9 of the Arbitration Act, 1996, a Division Bench of the Bombay High Court in **Dirk (India) (P) Ltd. v. Maharashtra State Power Generation Co. Ltd. [Dirk (India) (P) Ltd. v. Maharashtra State Power Generation Co. Ltd., 2013 SCC OnLine Bom 481 : (2013) 7 Bom CR 493]** held that : (SCC OnLine Bom para 13)*

*“13. ... The second facet of Section 9 is the proximate nexus between the orders that are sought and the arbitral proceedings. When an interim measure of protection is sought before or during arbitral 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. Here again the measure of protection is a step in aid of enforcement. It is intended to ensure that enforcement of the award results in a realisable claim and that the award is not rendered illusory by dealings that would put the subject of the award beyond the pale of enforcement.”*

33. The special enactment of the Arbitration Act, especially with the amendments that have been and are being introduced every decade, has been introduced with the intention to promote and encourage parties to resort to alternate forums for resolution of their disputes. The mechanisms for alternate dispute resolution enable the parties

personally involved in the dispute to have a greater role and a hands-on involvement in the proceedings, which not only makes the process of resolution speedy and timely but also efficient and effective. These mechanisms are also being strongly and exceedingly promoted to significantly reduce the burden on the Courts of the Country. Therefore, an intervention and interference of the Court in an arbitral proceeding shall be only to such extent that it does not render the entire process of arbitration proceedings infructuous by overstepping and granting a relief which the mandate of the legislation does not permit. The role of Courts, to an extent, is supervisory when it comes to the proceedings under the Arbitration Act.

34. It is, hence, evident that the relief which may be granted under Section 9 of the Act can be only to provide relief to the party claiming so to ensure that the subject matter of the arbitration is protected during and till the conclusion of proceedings and after the Award is made but is not enforced. Such a measure can certainly not be granted beyond the scope and mandate of Section 9 and in the nature of a final order/relief.

35. In the instant case, a similar situation is being observed by this Court. Although the petitioner is seeking an order on the prayers sought under Section 9(1) of the Arbitration Act, however, is attempting to obtain a permanent relief of release of amount of Rs. 12,56,72,430/- in its favour which it alleges has been wrongfully, illegally, and arbitrarily deducted. It is not the case of the petitioner that the amount to be released in its favour is merely a provisional payment necessary for sustenance or immediate operations etc., required only till the disposal of proceedings or enforcement of Award, which shall be returned or reimbursed to the respondent after the proceedings under Section 36 of the Arbitration Act are concluded. Rather, the petitioner is seeking a relief in the nature of a permanent order by praying for directions to the respondent to remit the amount deducted by it once and for all.

36. This Court, in light of the limitations delineated under Section 9 of the Arbitration Act, cannot grant a permanent relief to the petitioner, especially when an Award has already been made highlighting the extent of claims and reliefs that the parties are legally entitled for. The mandate of the provision does not permit passing of an order in the nature of a permanent measure in favour of either party under the Arbitration Act.

37. Therefore, keeping in view the discussion in the foregoing paragraphs, the facts, circumstances, contentions and submissions made in the pleadings, arguments advanced during the course of hearing, and the law laid down, this Court is of the considered view that the relief sought by the petitioner cannot not be granted under Section 9(1) of the Arbitration Act and the petition is liable to be dismissed as not being maintainable.

38. Accordingly, the instant petition is dismissed along with pending applications, if any.

39. The order be uploaded on the website forthwith.