

Invocation Of Section 37 Of Arbitration And Conciliation Act, 1996 By A Non-Signatory To The Arbitration Agreement

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Introduction

The arbitration and conciliation Act, 1996 (hereinafter referred to as Act) came into force on 22nd August 1996. The purpose of enacting this Act was to provide for a speedy solution to disputes between the parties and also to limit the judicial intervention. The main intention of the Legislation was primarily to cover international and domestic commercial arbitration and conciliation. The Act was amended in 2015 and 2019 which brought some major changes to the Act.

In the case of Prabhat steel traders private limited vs Excel metal processors private limited,¹ there was an issue with regards to the locus of

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¹ Arbitration Petition No.619 Of 2017

a non-signatory to the Arbitration and conciliation Act, 1996 with regards to section 37 of the Act, which provides for appealable order.

In the case of Prabhat steel traders private limited vs Excel metal processors private limited, the High court of Bombay delivered a landmark judgment on 31st August 2018, which held that a non-signatory could challenge the interim measures granted by an arbitral tribunal under section 17 of the Act.

Section 37 of the arbitration and conciliation act, 1996:

Section 37- Appealable orders. —

(1) [Notwithstanding anything contained in any other law for the time being in force, an appeal] shall lie from the following orders (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order, namely: —

- (a) refusing to refer the parties to arbitration under section 8.*
- (b) granting or refusing to grant any measure under section 9.*
- (c) setting aside or refusing to set aside an arbitral award under section 34.*

(2) Appeal shall also lie to a court from an order of the arbitral tribunal—

- (a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or*
- (b) granting or refusing to grant an interim measure under section 17.*

(3) No second appeal shall lie from any order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

Section 37 of the Arbitration and conciliation Act deals with appealable orders.

In the 2015 amendment of the Arbitration and conciliation Act, 1996 under section 37 (1) (a) was added which makes a provision for filing an appeal against an order refusing the parties to arbitration under section 8. Before the substitution, the clause under:

- “(a) granting or refusing to grant any measure under section 9.*
- (b) setting aside or refusing to set aside an arbitral award under section 34.”*

In the 2019 amendment, “Notwithstanding anything contained in any other law for the time being in force, an appeal” was added. This is aimed at restricting the scope of appeal and preventing the court from exercising power under any other provision of law for the time being in force against any orders that may be passed concerning the arbitration proceedings.

Invocation of section 37 of a non-signatory to the arbitration agreement

Background

The case of Prabhat steel traders Private limited Vs Excel Metal Processors Private Limited looked into the invocation of section 37 of the Act by a non-signatory.

In the above case, thirteen arbitration petitions were filed under section 37 of the Act, which provides for appealable orders. In the case, the petitioners, who are non-signatories to the arbitration agreement, filed an appeal against the order passed by an arbitral tribunal and also prayed for setting aside the award, on the grounds that the interim measure was affecting the interests of the petitioners.

Case: Prabhat Steel Traders Private Limited vs. Excel Metal Processors Private Limited (Arbitration Petition Nos. 619/2017)

Facts

The following are the facts to the case - Prabhat steel traders private limited v Excel metal processors private limited.

Respondent No 1 is the parent company of Respondent No 3. They have common directors and are a sister group of companies. The original claimant in the arbitral proceedings before the learned sole arbitrator was Respondent No 2.

The petitioner had purchased 46HR steel coils. The petitioner entered into an agreement with respondent No 3 and the petitioner gave the coil to Respondent No 3 for storing, handling, and recoiling.

When the petitioner visited Respondent No 3's warehouse to take delivery of the said coils he noticed that some of the coils including the said coils of the petitioner were marked as "SIPL" in yellow paint. At the time, the officers of Respondent no 1 and Respondent No 3, informed the petitioner about an arbitral proceeding that is pending between respondent No1 and

respondent 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 under an order dated 27th December 2016 ("impugned order") passed by the arbitral tribunal.

The Petitioner thereafter learned that Respondent No. 2 had invoked the arbitration proceedings against Respondent No. 1.

Respondent No. 1 was given a Notice by Respondent No. 2 to appear at the hearing of the application under section 17 of the Act filed by Respondent No. 2 against Respondent No. 1 before the arbitral tribunal. 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 an injunction against 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.

Issues

The maintainability of the arbitration petitions was challenged on the ground that none of the petitioners were parties to any arbitration agreement between Respondent No. 1 and Respondent No. 2 and therefore cannot invoke section 37 of the Act. The question that arose for consideration of the 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 Arbitration and conciliation Act, 1996.

Petitioners' contentions

The petitioner argued in support of the maintainability of the petition filed under section 37 of the Act. The petitioner contended that after the 2015 amendment Act, there is a wide range of powers that are conferred on the arbitral tribunal and when all these powers are exercised by the arbitral tribunal, it would seriously prejudice the rights of the third parties who

are not parties to the arbitration agreement or arbitration proceedings.

The petitioner placed reliance on section 2(1)(h) of the Act which defines the term “Party”. The petitioner in support of maintainability argued under sections 8, 9, 17, and 34 which expressly contemplate an application by a party of the Act. But, under section 37 of the Act, no restriction is placed and section 37 of the Act states that “An appeal shall lie from the following orders...”.

According to the petitioner, if any third party is affected by an interim measure granted by the arbitral tribunal, they cannot challenge such order under Section 37, the arbitral proceedings could be used to abuse and prejudice third parties, where the rights and interest of such third parties are involved. The Act thus entitles a third party who is affected by an interim 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 or annul 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 without any remedies.

The third party has the right to file for an appeal with leave of the court in cases where their right is prejudiced by any order that is passed in a

proceeding to which there is not a party. This right is recognized under the Code of Civil procedure, 1908 and this right is absolute.

The court may grant such leave and a notice can be given to other parties, only if the court is of the view that the other party will be prejudiced. If the third party is affected, then the court must grant leave on hearing an appeal.

Respondents' contentions

The respondents contended that no third party can interfere in an arbitration proceeding or invoke section 37 of the Act. They stated that no provision under the Act will permit a stranger to intervene in an arbitration proceeding between two parties who have contracted for arbitration. A party who is not part of the arbitration agreement cannot approach the courts for protection under section 9 of the Act. This principle also applies to section 37 of the Act.

The respondent further contended that the only way the petitioner can avail remedy is to await the arbitral proceedings to finish. If an application is made for the execution of the award, an application opposing the execution can be filed. The respondent also stated that if an appeal by the

third party is allowed under section 37, then this would open a gate to litigation.

The respondent also argued that the application under section 17 of the Act is applicable or extends only to the parties who are part of the arbitration agreement and only they can invoke section 37 of the Act. It is admitted that in this case, none of the petitioners were parties to the arbitration agreement between the respondents No 1 to 3 or the proceedings under section 17 of the Act. If any of the petitioners is affected by the orders passed by the arbitral tribunal under section 17 of the Act, the affected third party has no right to appeal under section 37(1)(b) of the Act. The respondent also stated that section 37(2) of the Act must be read with section 17, as sections 37 and 17 can be invoked only when a person is a party to the arbitration agreement.

Findings and judgement

The single judge of the Bombay High court observed that none of the petitioners in the thirteen petitions were parties to the arbitration agreement that was entered into between respondents no 1, 2 and 3.

The court accepted the respondent's contention that section 37 of the Act

does not provide that an appeal under the said provision can be filed only by the parties to the arbitration agreement. With the 2015 amendment to the Arbitration and conciliation Act, 1996, the arbitral tribunal was vested with the same powers as that of a Court under section 9 of the Act. Although the application for an interim measure under section 17 can only be made by the party to the arbitration agreement, the relief that is granted may affect a third party who is not part of the arbitration agreement.

The court looked into section 2(1)(h) which defines the term "Party" which means as a party to the arbitration agreement. Section 34 of the Act refers to the expression "party" which is absent under section 37 of the Act. The fact that the term "party" under section 37 of the Act is absent, makes the intention of the legislature clear that the said expression "Party" is deliberately not inserted. This is to provide a remedy of an appeal to the third party who may be affected by the interim measures granted by the arbitral tribunal or by the Court in the proceedings filed by and between the parties to the arbitration agreement. The court also stated that 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 Court observed the case of Girish Mulchand Mehta and Durga Jaishankar Mehta vs Mahesh S. Mehta and Harini cooperative housing Society ltd². The case had dealt with an issue as to 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 of the Bombay High court in the above case construed Rule 803E of the Bombay High court (original side) rules and held that Section 9 of the Act is distinct from Section 17 of the Act. The petition under Section 17 of the Act is moved before the arbitral tribunal for an order against a party to the proceedings whereas, under Section 9 of the Act it vests the remedy in a party to arbitration proceedings to seek an interim measure of protection against a person who need not be either party to the arbitration agreement or 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 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

² Arbitration Petition No.493 Of 2009

arbitral tribunal under Section 17 of the Act are identical and 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 Court in Girish Mulchand Mehta's case were extended to the present case.

The Bombay High Court relied on the Division Bench's judgment in Bharat Sanchar Nigam Limited Versus Siemens Financial Pvt Ltd³, which held that depending on the facts of the case, even a third party can be added or joined as a party for appropriate relief and effective implementation under a Section 9 petition. There is no total bar on a third party being impleaded, subject to the facts of the case and the contract conditions between the parties.

The Court entertained the appeal under Section 37 of the Act filed by the 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

³ Arbitration Petition No. 1006 of 2013

merit.

The Bombay High court in the case of Prabhat Steel Traders Private Limited v. Excel Metal Processors Private Limited held that appeals filed by the petitioners under section 37 of the Arbitration and conciliation Act, 1996 are maintainable.

Comments

An essential need in the current arbitration law of India is to understand and determine if a non-signatory party an arbitration agreement falls within the scope of the arbitration agreement. In the case of Prabhat Steel Traders Private Limited vs. Excel Metal Processors Private Limited,⁴ the Bombay High court, gave a major judgment on the locus of a non-signatory to an arbitration agreement involving section 37 of the Act which provides for appealable orders.

It has always been theorized that only the parties to the arbitration agreement can appeal or question the correctness of an interim measure. And in the case of the innocent third party, they are always seen as a mute

⁴ Arbitration Petition No.619 Of 2017

spectator and are the ones who are at times affected by an order passed by the arbitral tribunal either directly or indirectly.

The Bombay high court ruling in the case of non-signatories to an arbitration proceeding in a case where their rights and interest are affected by an arbitration order is a step towards balancing the rights of an innocent third party. This Judgment is welcomed by the third party or non-signatories to the agreement especially where their interest and right are involved, and they are not part of the arbitral agreement. This ruling will ensure a balance the interest of innocent non- signatories and provide with correct measures.

Conclusion

Advocates in mediation, whether representing a party or serving as the mediator, may learn from psychology and other fields that study human emotion and behavior to better their relationships with clients, mediators, and just about everyone else. The mediators should at least understand a basic level of psychology so that they can help the parties with their interests and needs. Paying attention to the hurt psychological interests of parties is frequently the tipping point for a settlement. By understanding psychology as an innate concept of mediation it is easier to promote

positive settlements. In today's world mental health and psychological aspects are of prime focus, hence the modern jurists advocate that professionals who are concerned with resolving conflicts and disputes must have a thorough understanding of the psychological and mental factors in order to arrive at the most optimal resolution.