RELEGATION OF APPLICATION FOR INTERIM MEASURES BY COURT TO TRIBUNAL UNDER THE ARBITRATION & CONCILIATION (AMENDMENT) ACT, 2015

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1. BACKGROUND

The Arbitration & Conciliation Amendment Act, 2015 ("Amendment Act") came into force to rectify the infirmities of the Arbitration & Conciliation Act, 1996 ("1996 Act") discovered in the due course of time. The legislative intent was to makearbitration more effective, time-bound and reduce the intervention of the Courts. Introduction of time-bound proceedings, limiting the interpretation of 'public policy' in S. 34 of the 1996 Act,removal of automatic stay on operation of award after challenging the award under S. 34 are some of the major highlights in this regard. Another crucial advancement in the law of Arbitration was giving the Arbitral Tribunal equal powers to that of the Court while deciding the application of

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interim measures. The Parliament in this regard amended S. 9 & S. 17. Under the 1996 Act, the Arbitral Tribunal's order under S. 17 was not enforceable and hence, unlike the order for interim relief by a Court, the orders by the Tribunal were virtually 'toothless'. It was perhaps realized by the Legislature that parties resorted to Courts for interim relief even after the constitution of Arbitral Tribunal since the powers of the Arbitral Tribunal were limited and not enforceable.

The impuissant nature of the Arbitral Tribunal not only reduced the ambit of powers given to the Arbitral Tribunal but sparked another debate with respect to extent Court's intervention under S. 9 in interim applications. Since the Arbitral Tribunal is always seized with the dispute and can ultimately decide the matter, the Courts while deciding the S. 9 interim measures application had to act cautiously and only take a *prima facie* view. However, on some occasions the Courts have often decided the whole dispute under S. 9 and even passed orders under S. 9 during the pendency of S. 17 Application as scope of S. 9 was wider than that of S. 17 under the 1996 Act.[3]

The Legislature has now amended S. 17 and brought it at par with S. 9. Under the Amendment Act, once the Tribunal is

[3] Benara Bearing and Pistons Ltd. v. Mahle Engine Components Private Ltd., FAO 66/2016; National Highways Authority of India v. China Coal Construction Group, (2006) 1 ArbLR 265.

constituted, all the applications for interim measures are to be decided by the Arbitral Tribunal only, unless Court is of the opinion that an efficacious remedy is not available. There has been a considerable addition to S. 9 of the 1996 Act to effectuate the S. 17 amendment. S. 9(2) &S. 9(3) have been added. Whereas S. 9(2) mandates the commencement of Arbitral proceedings within 90 days from passing of order under S. 9, S. 9(3) bars the Court from entertaining the interim measures application once the Arbitral Tribunal is constituted. Only if Court is of opinion that an efficacious remedy may not be available with the Arbitral Tribunal, it can entertain the interim measures application.

The moot question which arises is whether the Court,during the pendency of the S. 9(1),can relegate the interim measures application to be decided by the Tribunal. Since the powers under S. 17 are now same as that under S. 9, the Tribunal is now vested with powers to adjudicate all such applications. Since the Amendment Act does not contain any express provision permitting the transfer or relegation of the cases, an exhaustive interpretation of S. 9(3), considering the Legislature's intent,must be looked into. At present, the Delhi and Calcutta High Courts are of divergent views. A Division Bench of the Calcutta High Court, in the case of Tufan Chatterjee v. Rangan

Dhir,[4] has held that an interim measures application under S. 9(1) can be transferred to the Arbitral Tribunal and be decided under S. 17. Even Delhi High Court, in case of Aquatech Systems (Asia) Pvt. Ltd. v. SKS Power Generation,[5]has also transferred the Application under S. 17. However, recently, a Division Bench of the Delhi High Court, in case of Benara Bearings & Pistons Ltd. v. Mahle Engine Components India Pvt. Ltd.,[6] held that a pending application under S. 9 cannot be transferred to the Arbitral Tribunal under S. 17. The Court, after interpreting the word "entertain" used in S. 9(3), held that the pending Applications cannot be transferred to the Tribunal since the Court has already been conferred jurisdiction to adjudicate a S. 9(1) Application. In order to ascertain the true intent of the Legislature, it is imperative to analyse the intent of the 1996 Act and the Amendment Act with the judicial precedents setting out the scope of S. 9.

[4] FMAT No. 47 of 2016 and CAN 308 of 2016, ¶¶ 43-45 ("Tufan Chatterjee").
[5] O.M.P. No. (I) No. 446/2015 (An appeal was filed before the Division Bench but eventually the Petitioner had withdrawn the S. 9 Petition).
[6] *Supra* note 3.

2. WHETHER A PENDING APPLICATION UNDER S. 9 CAN BE TRANSFERRED TO THE TRIBUNAL TO BE CONSIDERED AS S. 17 AS PER THE AMENDMENT ACT

S. 9(3) refrains the Court from entertaining an interim measures application under S. 9(1) once the Tribunal is constituted. It is not out of place to point out that the provision uses the word "entertain" which has been widely interpreted in law. The interpretation of the word "entertain" came up before a full bench headed by Hidayatullah, J. of the Supreme Court in the case of Lakhmiratan Engineering Works v. Assistant Commissioner (Judicial) I, Sales Tax.[7]The Supreme Court, after relying on the decisions of theAllahbad High Court,[8] held that the expression 'entertain' does not mean the same thing as the filing of the application or admission of the application by the Court. The word 'entertain', in its application, bears the meaning 'admitted to consideration'. The Supreme Court affirmed the view of the Allahabad High Court in Haji Rahim Bux& Sons v. Firm Samiullah & Sons wherein it was observed that word "entertain" meant not "receive" or "accept" but "proceed to consider on merits" or "adjudicate upon". The aforesaid

[7] (1968) 1 SCR 505, ¶¶ 7-9.

[8] Kundal Lal v. Jagannath Sharma, AIR 1962 All 547; Dhoomchand Jain v. Chamanlal Gupta, AIR 1963 All 443; Bawan Ram v. Kunj Beharilal, AIR 1961 All 42; Haji Rahim Bux & Sons v. Firm Samiullah & Sons, AIR 1963 All 326.

observation of the Supreme Court has been affirmed in State of Haryana v. Maruti Udyong & Ors.,[9] Martin & Harris Ltd v. 6th Additional District Judge and Ors.[10]and Hindustan Commercial Bank v. Punnu Sahu[11].

The Calcutta High Court in Tufan Chatterjee, while allowing a transfer of S. 9 application to the Tribunal under S. 17, relied upon the case of Martin & Harris.[12] The Court accepted the submission of the Appellant distinguishing the term "institute" and "entertain" and extended the applicability of S. 9(3) to such applications which are already pending before the Court by terming them "entertained" application eligible to be transferred to the Tribunal. The Court observed:

> *"35. However, as rightly argued by Mr. Bhattacharya, there is difference between the expressions 'institute' and the expression 'entertain'. The expression 'institute' is not synonymous with the expression 'entertain'. In Martin & Harris Ltd. v. 6th Additional District Judge and Ors. reported in (1998) 1 SCC 732 cited by Mr. Bhattacharya, the Supreme Court interpreted the expression 'entertain' in Clause 21(1)(a) of the U.P. Urban Buildings*

[9] 2007 (7) SCC 248, ¶ 8.
[10] 1998 (1) SCC 732, ¶¶ 8-10 ("Martin & Harris").
[11] 1971 (3) SCC 124, ¶ 4.
[12] *Supra* note 2.

> *(Regulation of Letting, Rent and Eviction) Act, 1972 to mean entertaining the ground for consideration for the purpose of adjudication on merits and not any stage prior thereto. Unlike the Limitation Act, which bars the institution of a suit after expiry of the period of limitation, Section 26 prohibits the Court from entertaining an application under Section 9, except in circumstances specified in Section 9(3), which necessarily means considering application on merits, even at the final stage."*

The aforesaid interpretation of the word "entertain" may suggest the interpretation of S. 9(3) that a pending application which is already admitted by the Court but not decided may fall into the category of matter as contained in S 9(3) therefore since the Court has not decided the matter on merits it is refrained from further adjudicating the matter and the only option left with the Court is to either justify that "efficacious remedy" is not available with the Tribunal so to continue adjudicating the matter or transfer it to the Arbitral Tribunal by effect of bar under S. 9(3). This interpretation was followed in Tufan Chatterjee as well.

However, none of the aforesaid cases deal with a situation wherein the word "entertain" is to be interpreted in light of the pending applications after enactment of a new legislation as is

the case in S. 9(1) after introduction of S. 9(3). A similar situation had arisen before the full Judge bench of the Supreme Court headed by Justice S.M. Sikri in case of in Dewaji v. Ganpati.[13]The Apex Court held that if the term "entertain" is used in the statute then it has no effect on the pending suit/application (similar to section 9(3) of the Amendment Act) as entertain means a bar on entertaining new applications only. The Court observed that had the legislature used the term "entertain or try any suit" then the bar could have been on the pending applications as well. Thus, the use of "entertain" shall have only prospective effect. Therefore, if the provisions of S. 9(3) are strictly interpreted then pending applications under the S. 9(1) cannot be transferred to the Arbitral Tribunal. The Division Bench of the Delhi High Court in Benara has drawn the same conclusion but didn't place reliance on the Dewaji v. Ganpati case.

Another source to interpret the meaning of term 'entertain' is the Legal Glossary published by the Government of India. Legal Glossary is used by draftsmen while preparing a Bill. As per the glossary, "entertain" means "to admit in order to deal with".[14] Therefore, the interpretation by the full bench of the Supreme

[13] (1969) 1 SCR 573, ¶ 12.
[14] GOVERNMENT OF INDIA, LEGAL GLOSSARY (Mar. 15, 2017, 10:00 PM), http://lawmin.nic.in/olwing/legal%20glossary/D%20to%20G.pdf.

Court in Dewaji case and definition as provided in Legal Glossary which is relied upon by the Delhi High Court in Benara does suggest that if the Court has already seized the interim measures application then it cannot transfer the same to the Arbitral Tribunal and S. 9(3) would only operate on a fresh application filed after the constitution of Arbitral Tribunal. However, the Delhi High Court has not recorded the legal glossary meaning in the judgment on *Benara*.

3. NEED FOR HARMONIOUS INTERPRETATION OF 9(3) AND ITS DISTINCTION FROM A USUAL OUSTING JURISDICTION CLAUSE

The aforesaid interpretation of the word "entertain" used in S. 9(3), if accepted and enforced, would turn out be a conundrum for Judiciary and Legislature. This is because in usual practice, the parties often only apply for interim measures at a primitive stage of the dispute and before the constitution of the Arbitral Tribunal and thus, merely accepting this interpretation, which may be a mere draftsmen's error, would not reduce the Court's burden or compliment the amendment to S. 17.

If the strict interpretation is given to S. 9(3), prohibiting the transfer of pending application to the Arbitral Tribunal, the whole object of bringing the Arbitral Tribunal's powers at par with the Court would become impuissant. Opinions favouring strict interpretation of S. 9(3) often assert that S. 9(3) is not an

Ouster Jurisdiction clause and has no express provision for transfer of cases. Several legislations[15] are also in support of this contention wherein a provision to ouster the jurisdiction of court/authority is followed by a provision enabling transfer of pending cases. However, it is pertinent to note that S. 9(3) is not an Ousting Jurisdiction clause but in fact gives the Court a discretion and provides a supervisory jurisdiction over the matter. The wording of S. 9(3) is:

> *"Once the arbitral tribunal is constituted, the Court shall not entertain"*

and NOT:

i. "*No civil court shall have jurisdiction to entertain any suit or proceeding"*; or

ii. *"With effect from the date of establishment of the Tribunal under this Act, no civil court shall have jurisdiction to entertain any appeal in respect of any matter, which the Tribunal is empowered to determine under its appellate jurisdiction".*

[15] The Electricity Act, 2003 (See S. 145, ousting the jurisdiction of civil courts and S. 122, which allows the transfer of pending cases); The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (See S. 34, ousting the jurisdiction of civil court and S. 5A, which allows the transfer of pending cases); The Armed Forces Tribunal Act, 2007 (See S. 33, ousting the jurisdiction of civil court and S. 34, which allows the transfer of pending cases).

It is pertinent to note that if the intention of the Legislature was to completely ouster the jurisdiction of the Court then S. 9 would have been constructed as:

> "*Once the arbitral tribunal is constituted, the Court shall not have jurisdiction to entertain"*

Therefore, rather than comprehending S. 9(3) as an ousting clause to reduce judicial interference, the provision must be interpreted to reduce the burden of the Courts. The Hon'ble Chief Justice of India, Mr. T.S Thakur, in his address at the Arbitration Conference expressed his concerns over the avalanche of cases Judiciary is handling,[16] often for interim measures. If such cases are conveniently routed to the Arbitral Tribunal, which has been conferred jurisdiction for dealing with the dispute, then it would certainly compliment the Act and vision of the CJI. Further, not only on the Amended Act but on several earlier occasions, the Indian judiciary has supported the view that its role in the arbitration process be minimal and only of a supervisory nature. Below is a brief analysis of judicial viewpoint of the 1996 Act and legislative intent inferred from the Assembly debates while enacting the 2015 Amendment Act.

[16] Closing Address of the erstwhile Chief Justice of India, Hon'ble Mr. T.S Thakur at the Arbitration Conference organized by Neeti Ayog.

4. AIMS AND OBJECTIVE OF S. 9 OF THE 1996 ACT

The 1996 Act was a step to comply the Indian Arbitration law to the UNCITRAL Model Law. Some of these objectives are clearly reflected in the Objects and Reasons of the Arbitration and Conciliation Bill, 1995, as stated herein:

a) To comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation;
b) To minimise the supervisory role of courts in the arbitral process;
c) To provide that every final arbitral award is enforced in the same manner as if it was a decree of court.

S. 9 of the 1996 Act was based on the Art. 9 of the Model Law but the Legislature decided to take it further. The Legislature empowered the Indian Courts under S. 9 to go beyond what Art. 9 does. The Model Law enabled a party to approach a court for an interim measure of protection before or during the arbitral proceedings. The Legislature, while enacting the 1996 Act, enabled a party to approach the Court before, during or even after the arbitral award is delivered (but before its enforcement by Court). As the law progressed, the judiciary, on several occasions, had to decide the scope of S. 9. The Supreme Court

of India, in Sundaram Finance Ltd. v. NEPC India Ltd.,[17] held that the Court, while passing any order under S. 9, must be satisfied that the applicant will take effective steps for commencing arbitral proceedings.[18] Essentially, interim measures are grants of temporary relief aimed at protecting the parties' rights pending the final resolution of a dispute. The efficacy of the arbitration primarily depends upon the interim measures that may prevent adverse parties from destroying or removing assets so as to render the final arbitral award meaningless.[19]This is also the view of Prof. Russel, a leading authority on Commercial Arbitration, who says:[20]

> *"The whole purpose of giving the court power to make such orders is to assist the Arbitral Tribunal in cases of urgency or before there is an arbitration on foot. Otherwise, it is all too easy for a party who is bent on a policy of non-cooperation to frustrate the arbitral process. Of course, in any case where the court is called upon to exercise the power, it must take great care not to usurp the arbitral process and to ensure, by exacting appropriate undertaking from the claimant, that the*

[17] Sundaram Finance Ltd. v. NEPC India Ltd., 1999 (2) SCC 479, ¶ 19.
[18] 1999 (2) SCC 479, ¶ 19.
[19] Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105, ¶ 31.
[20] DAVID ST. JOHN SUTTON & JUDITH GILL, RUSSEL ON ARBITRATION306-307 (22nd Edition, Sweet &Maxwell Limited, 2003).

substantive questions are reserved for the arbitrator or arbitrator."

The Court, under S. 9, can, only on the basis of a *prima facie* view, grant interim relief and not decide the merits of the matter. S. 9 does not extend to the situation wherein the Court decides the whole dispute, leaving the arbitration proceedings infructuous as nothing would be left for the Arbitrator to decide.[21]The Delhi High Court, in Softline Media Ltd. and Shalimar Advertisers v. Delhi Transport Corporation,[22] held that the Court must refrain from making observations on merits and the Arbitrator must take a fresh look into the matter on the basis of pleadings, documents and other materials placed before him without, in any way, being influenced by the observations made by the Court. The Court ordered the status quo to be maintained for 2 months and directed the parties to seek further necessary orders from the Tribunal under S. 17 if required.

An instance of the Court relegating the interim measures application to the Arbitral Tribunal even under the old Act goes way back to 2002 when the Delhi High Court, in the case of Associates India Financial Services Pvt. Ltd v. Jairaj Shetty,

[21] Trehan Promoters and Builders Pvt. Ltd. v. Welldone Technology Parks Development Pvt. Ltd., O.M.P 507/2009, ¶ 6; Deepak Mitra v. District Judge Allahabad, AIR 2000 All 9, ¶ 13; Nepa Limited v. Manoj Kumar Agrawal, AIR 1999 MP 57, ¶ 17.

[22] 2002 Supp ArbLR 632, ¶¶ 15, 22.

exercised its discretionary power and transferred the S. 9 Petition to the Arbitral Tribunal to be considered as S. 17. A similar view has been taken by Justice Manmohan Singh in Aquatech Systems (Asia) Pvt. Ltd. v. SKS Power Generation O.M.P. No. (I) No. 446/2015. However, the case of Aquatech (supra) does not hold binding value since the appeal was filed before the same Bench where case of Benara (supra) was pending and subsequently, it was also withdrawn. The intention in referring to the aforesaid cases is that the Court, in the past, has taken such steps to relegate such applications to the Arbitral Tribunal. Following are the relevant observations of Justice Dr. Mukundakam Sharma, then Ld. Single Judge:

> *"I appoint ……. as the Court Receiver who shall take possession of the two excavators and keep the same in safe custody without putting the same for any kind of use until further orders to be passed on this petition under section 9 of the Act which is pending and is now converted to a petition under section 17 of the Arbitration and Conciliation Act. All further questions and issues with regard to the custody and preservation of the two excavators shall henceforth be dealt with by the learned Arbitrator in accordance with law by exercising his powers under section 17 of the Act."*

5. SCOPE OF S. 9 (3) AND S. 17 POST THE ARBITRATION & CONCILIATION (AMENDMENT) ACT, 2015

Whereas the 1996 Act was based on the 1985 UNCITRAL Model Law wherein the Tribunal had limited powers but then, the UNICITRAL Model Law was amended in 2006. Art. 17 under the 1985 Model Law seemed a half-hearted attempt, as it neither contained an enforcement mechanism nor were any adverse effects sanctioned in the event of non-compliance. Art. 17 in 1985 Model Law was essentially premised on voluntary compliance and therefore (not unsurprisingly), was rarely resorted to.[23] The extensive revision of Art. 17 on interim measures was considered necessary, considering the facts that such measures were increasingly relied upon in the practice of international commercial arbitration. The revision also includes an enforcement regime for such measures in recognition of the fact that the effectiveness of arbitration frequently depends upon the possibility of enforcing interim measures.[24]

The 2006 amendment of the UNCITRAL Model Law marked the occasion to revisit the 1996 Act and align it as per the

[23] Sumeet Kachwaha, *"Interim Relief": Comments on the UNCITRAL Amendments and the Indian Perspective* (Feb. 28, 2017, 12:15 P.M.), http://www.kaplegal.com/upload/pdf/Transnational_Dispute_Management.pdf.

[24] Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, ¶ 4.

amended Model Law. The 20th Law Commission of India headed by Justice A.P Shah constituted a committee consisting of several eminent persons from the legal field and conducted several discussions before making its recommendations in the 246th Report of the Law Commission of India. In Chapter 1,i.e Introduction to the proposed amendments, the Law Commission of India made its stand clear that its primary intent is to reduce the judicial intervention in the pre-arbitral process. The Commission had put a strong emphasis that the Court must adopt a *prima facie* approach during the pre-arbitration institution stage. The Law Commission reasoned its recommendation to S. 17 amendments by stating that S. 17 is an important provision, which is crucial to the working of the arbitration system, since it ensures that even for the purposes of interim measures, the parties can approach the Arbitral Tribunal rather than await orders from a Court. The Law Commission also admitted that the efficacy of S. 17 is, however, seriously compromised given the lack of any suitable statutory mechanism for the enforcement of such interim orders of the arbitral tribunal.[25] The Law Commission acknowledged the efforts of the judiciary in providing suitable legal basis for enforcing the orders of

[25] LAW COMMISSION OF INDIA, 246TH LAW COMMISSION REPORT, Chapter 2, *Powers of Tribunal to Order Interim Measures*.

Tribunal under S. 17 in the case of Sri Krishan v. Anand [26]but observed that it is important to provide teeth to the interim orders of the Arbitral Tribunal as well as to provide for their enforcement.[27] The Law Commission did not provide any detailed explanation to the proposed amendments to S. 9 but observed that S. 9, being solely for the purpose of securing interim relief, although having the potential to affect the rights of parties, does not affect the "conduct" of the arbitration in the same way as the other provisions.

6. THE LAW COMMISSION'S VIEW AND THE LEGISLATIVE INTENT IN S. 9 AMENDMENT

The Law Commission proposed that *firstly*, the S. 9 interim protection order would cease to operate after 60 days or time specified by the Court to ensure that the parties timely initiate the arbitration proceedings. *Secondly*, the Law Commission proposed to add S. 9(3) which said, "*Once the Arbitral Tribunal has been constituted, the Court shall, ordinarily, not entertain an Application under this provision unless circumstances exist owing to which the remedy under section 17 is not efficacious.*" The Law Commission added an explanatory note stating:

[26] (2009) 3 ArbLR 447 (Del).
[27] *Supra* note 23.

> "*This amendment seeks to reduce the role of the Court in relation to grant of interim measures once the Arbitral Tribunal has been constituted. After all, once the Tribunal is seized of the matter it is most appropriate for the Tribunal to hear all interim applications. This also appears to be the spirit of the UNCITRAL Model Law as amended in 2006.*"

The aforesaid proposals found their place in the Amendment Act but with slight modifications. The 2015 Arbitration & Conciliation (Amendment) Bill introduced in the Parliament, which was later ratified to be enacted, departed slightly from the Law Commission's Recommendations. S. 9 in the Amendment Act has extended the duration of the Court's interim measure order to 90 days and does not expressly state if the Order would cease to exist upon the expiry of the term. With regards to S. 9(3), the Legislature has omitted the term "ordinarily" and therefore intention of the Legislature is to reduce any ambiguity which may arise where parties end up interpreting the term "ordinarily". This step is taken to reduce the scope of giving a second interpretation to S. 9(3) and provide Court's intervention only in such cases wherein efficacious remedy is not available with the Arbitral Tribunal.

6.1. Law Commission's view and Legislative intent in S. 17 Amendment

Further, with regards to the substitution of S. 17 of the 1996 with a new provision, the Law Commission's rationale at Pg. 51 of its Report was:

> *[NOTE: This is to provide the arbitral tribunal the same powers as a civil court in relation to grant of interim measures. When this provision is read in conjunction with section 9(2), parties will by default be forced to approach the Arbitral Tribunal for interim relief once the Tribunal has been constituted. The Arbitral Tribunal would continue to have powers to grant interim relief post-award. This regime would decrease the burden on Courts. Further, this would also be in tune with the spirit of the UNCITRAL Model Law as amended in 2006.]*

In fact, a perusal of the legislative debates in the Lok Sabha on 17.12.2015[28] shows that there is no dispute that the spirit of the amendment is to reduce judicial intervention in arbitral proceedings. In particular, at Page 153, the Hon'ble Member of Parliament (Joyce George) has stated:

[28] Pg. 153 and 194 of Assembly debates.

> *"Sir, in this Bill, we are trying to reduce the involvement of the court in an arbitration proceeding. For that, we have imposed certain provisions to restrict the courts from passing interim orders after constitution of an Arbitration Tribunal."*

Another Hon'ble Member of Parliament observed the intervention of Courts in the Arbitration process and stated as under*:*

> *"The delay of time in arbitral proceedings was not the only malady plaguing arbitration of India, another equally daunting challenge was courts' interference in arbitration under Section 9 and awards being set aside by courts."*

Minister of Law & Justice Shri Sadanand Gawda, while presenting the Bill in the Parliament, observed that[29]:

> *"One is inordinate delay in disposing of the cases. Second is the too much interference by the courts. The court itself used to take years together. The persons who went for arbitration could not settle the matter".*

A perusal of the aforesaid discussions with regards to the amended Act clearly evidences that the legislative intent was to

[29] *Id*. at 194.

reduce the judicial intervention but still provide the full judicial support. A bare perusal of the other important amendments such as S. 8 (reducing judicial intervention by mandating a *prima facie* approach to be taken by the Court), S. 34 (wherein limitations are added to interpret the term "Public Policy") and removal of automatic stay of the arbitral award by merely filing an Application under S. 34 clearly show that the Legislature intended to give more autonomy to the Arbitral Tribunal and reduce the burden of the Courts. These amendments must be read in spirit to aid the burdened judiciary and not curtail its power.

7. A PRAGMATIC VIEW TOWARDS S. 9(3)

Considering the aforesaid discussions, it may be suggested that relegating the interim measures applications to the Arbitral Tribunal does not seem to be an absurd thought. This gives rise to another question i.e. *Whether the interim protection order of the Court stays or gets vacated?*

In any dispute involving an arbitration, the parties often approach the Court before invoking the Arbitration clause and the whole process of getting an interim protection is so swiftly done, the other side is often not required to be served with the S. 9 Petition if no caveat is filed or arbitration is not invoked. It is a common practice to secure an *ex parte* ad interim protection of

the matter before invocation of the Arbitration clause. If the interpretation that upon the constitution of Arbitral Tribunal, the petition is to be transferred from the Court is accepted then it would limit the Court's role to a body that only provides interim protection at the first instance. The situation would be similar to admission of a PIL or an SLP wherein the Court has to act with due care. This should not be construed as taking away the power of the Court as even then, discretionary power is given to the Court to grant interim measures if it is of the opinion that an efficacious remedy may not be available with the Arbitral Tribunal.

If the protection order of the Court is not stayed till the disposal of interim measures application by the Tribunal once its relegated by the Court, it would defeat the whole purpose of the relegation. The following is a brief illustration in this regard.

7.1. **Brief Illustration**

Brief Illustration to substantiate the legislative intent and harmonious construction of S. 9(2), (3) and S. 17 of the amended Arbitration Act, 2015.

A and B have a business relationship. The Parties have a dispute. A is aggrieved by the fact that B may dispose off the assets. The arrangement provides that all issues are to be decided by Tribunal. However, since the Tribunal is not

constituted, A, due to urgency, approached the Court under S. 9. The Court issues notice and before the next date of hearing, the Tribunal is constituted. B approaches the Court, stating that the Court has no jurisdiction since Tribunal is constituted.

Three scenarios:

1. *Court finds that efficacious remedy is not available with Tribunal, and thus invokes its discretionary power and decided the matter under Section 9. (**Note**- Court must provide reasoning as to why it efficacious remedy not available with Tribunal.)*

2. *The Court finds that there is an efficacious remedy available under Section 17 and therefore it relegates the matter to the Tribunal. However, the Court does not grant any interim relief. (**Note-**In this case since A has no interim protection, and its remedy under Section 17 before the Tribunal would become infructuous and grave prejudice be caused.)*

3. *The Court finds that there is an efficacious remedy available under Section 17 and therefore, it relegates the matter to Tribunal. The Court makes no observation as to merits of the matter and only takes a prima facie view and grants interim measures which are to be looked into by the Tribunal on merits under Section 17. (No*

*prejudice is caused to either party.)(**Note-**This illustration shows the harmonious interpretation of Section 9(3), 9(2) and Section 17 of the amended Act.)*

8. CONCLUDING THOUGHTS AND PRACTICAL GUIDANCE

In my opinion, while interpreting any provision of a statute, it is imperative to first analyse the object and intent of the statute and then interpret the statute using principles rather than just a precedent. Interpretation of the word "entertain" through the prism of precedents will not fulfil the primary aim and objectives of the 1996 Act, which is to minimise judicial intervention of Courts.

It is true that arbitration in India today is plagued by misconduct and riddled with procedural disputes which are disrupting the ethos of commercial jurisprudence. The Legislature is putting in efforts to remove infirmities and improve the Arbitration law in India. Therefore, even now, the Courts are still proceeding with caution and are not too comfortable giving complete autonomy to the Arbitral Tribunal.

Although a Division Bench of the Delhi High Court has thoughtfully observed in *Benara* (Supra) at para 24 of the judgement that:

> *"We may also note that if the argument of the appellant were to be accepted that the moment an Arbitral Tribunal is constituted, the Court which is seized of a Section 9 application, becomes coram non judice, would create a serious vacuum as there is no provision for dealing with pending matters."*

However, a blanket ban on the relegation of the pending interim measures to the Tribunal may be not a fruitful solution. The aforesaid issue needs to be addressed with aim to further interpret the term "efficacious" as stated in section 9(3). It will be interesting to witness the decisions to come when the Courts will give meaning to "efficacious remedy" and set parameters and thresholds on issues which can be dealt by the Arbitral Tribunal.