

India—Scope of interim reliefs under the Arbitration Act are wider than the threshold under civil procedure laws governing litigation (Essar House v Arcellor Mittal)

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Arbitration analysis: Recently, the Supreme Court of India ('Supreme Court') held that the court is not bound by the rigours of the Code of Civil Procedure 1908 (CPC 1908) when deciding an application for grant of interim reliefs under Section 9 of the Arbitration & Conciliation Act, 1996 ('Arbitration Act'). Section 9 of the Arbitration Act deals with interim measures that can be granted by the Court before or during the arbitral process, or any time after the arbitral award is made but before its enforcement. Consequently, the Supreme Court held that the scope of an interim relief under the Arbitration Act is wider than the CPC 1908. In addition, the Supreme Court also clarified that a strong possibility of diminution of assets is sufficient for the court to grant interim reliefs under the Arbitration Act. Written by Alipak Banerjee, Shweta Sahu and Ansh Desai, International Dispute Resolution Team at Nishith Desai Associates.

G v X, GMCI, GMCC [2022] HKCFI 829 (not reported by LexisNexis®UK)

Essar House Private Ltd v Arcellor Mittal Nippon Steel India Ltd [2022] SC 625 (subscription to [Lexis+US](#) required)

What are the practical implications of this case?

The case seemingly clears the dust on the principles for grant of interim protection under the Arbitration Act, and in particular, whether the threshold applicable under the CPC 1908 will have to be satisfied prior to grant of the interim protection under the Arbitration Act.

This decision comes in the wake of differing approaches of various High Courts—the inclusive and exclusive approach. The inclusive approach considered the principles governing grant of interim reliefs under the CPC 1908 to be at par with those under Section 9 of the Arbitration Act. This meant that the court will follow the same rigours of the CPC 1908 when deciding an application under Section 9 of the Arbitration Act. Whereas, the exclusive approach kept the principles governing the CPC 1908 and Section 9 of the Arbitration Act distinct. It considered Order 38 Rule 5 of the CPC 1908 to only be a guiding light to Section 9 of the Arbitration Act and nothing more. Order 38 Rule 5 of the CPC 1908 deals with a situation where the defendant seeks to dispose his property or any part thereof with the intent of obstructing or delaying the execution of a decree. In such situations, the court can demand the defendant to furnish security.

The judgment reinforces the pro-arbitration approach of the Indian judiciary by dissociating the principles governing the CPC 1908 from those governing the Arbitration Act, in terms of granting interim reliefs in aid of the arbitration. If interim reliefs are obtained, it can lead to early settlement of the case, allow the successful claimant to enforce the arbitration award in a timebound manner, and adds to the efficiency of the arbitral process.

What was the background?

Essar Steel India Ltd ('Essar Steel') had entered into several agreements with other group companies, like Essar Services India Private Ltd ('Essar Services') and Essar House Pvt ('Essar House') for exchange of services and real estate. Certain agreements required Essar Steel to provide a security deposit to Essar House (to the tune of INR 35 crores or US\$4.2m) and Essar Services (to the tune of INR 47.41 crores or US\$5.7m). Essar Steel had unpaid dues towards several third-party creditors like HDFC Bank Ltd, Standard Chartered Bank and State Bank of India.

Standard Chartered Bank and State Bank of India initiated corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 to recover dues from Essar Steel. The resolution

plan submitted by Arcellor Mittal Nippon Steel India Ltd ('Arcellor') was approved by the Supreme Court (See *Creditors of Essar Steel India through Authorised Signatory v Satish Kumar Gupta* (2020) 8 SCC 531). Pursuant to the approval of the resolution plan, Arcellor took over the management of Essar Steel, and requested Essar House to refund the security deposit worth INR 35 crores of Essar Steel, to which Essar House replied that it had been used to repay dues of other group companies through internal agreements, and hence, there was no security deposit left.

Arcellor subsequently filed an application against Essar House under Section 9 of the Arbitration Act to secure INR 35 crores ie the security deposit amount, before the Single Judge of the Bombay High Court, which was ultimately allowed. Aggrieved by the decision of the Single Judge, an appeal was filed before the Division Bench of the Bombay High Court, which was dismissed. Similarly, an interim reliefs application was filed before the Single Judge of the Bombay High Court against Essar Services to secure an amount of INR 47.41 crores (originally payable to Essar Steel, and now to Arcellor). The Single Judge allowed the application. In appeal, the Division Bench of the Bombay High Court upheld the finding of the Single Judge.

Aggrieved by the judgment passed by the Division Bench of the Bombay High Court, Essar House and Essar Services filed appeals before the Supreme Court.

What did the court decide?

First, the Supreme Court observed that while the basic principles of CPC 1908 cannot be ignored when deciding an application under Section 9 of the Arbitration Act, the same is not curtailed by the rigours of every procedural provision in the CPC 1908. The Supreme Court held that it is not strictly bound by the provisions of the CPC 1908 when an application under Section 9 is filed, and as such, the technicalities of CPC 1908 cannot prevent the court from securing the ends of justice. The Supreme Court held:

'While it is true that the power under Section 9 of the Arbitration Act should not ordinarily be exercised ignoring the basic principles of procedural law as laid down in the CPC, the technicalities of CPC cannot prevent the Court from securing the ends of justice. It is well settled that procedural safeguards, meant to advance the cause of justice cannot be interpreted in such manner, as would defeat justice.'

Second, the Supreme Court noted that besides the specific power of securing the amount in dispute, the courts have been empowered to pass any interim measure of protection, keeping in view the purpose of the proceedings before it, and therefore, Section 9 of the Arbitration Act confers a residuary power on the Court to pass such other interim measures of protection as may appear to be just and convenient.

Third, after analyzing the prior case laws (See *Jagdish Ahuja v Cupino Ltd* 2020 SCC OnLine Bom 849 (not reported by LexisNexis®); *Valentine Maritime Ltd v Kreuz Subsea Pvt Ltd* and another 2021 SCC OnLine Bom 75 (not reported by LexisNexis®); *Ajay Singh and others v Kal Airways Pvt Ltd* (2017) SCC OnLine Del 8934 (not reported by LexisNexis®); *Srei Infrastructure Finance Ltd v Ravi Udyog Pvt Ltd* and another AP No 522 of 2008 (not reported by LexisNexis®)), the Supreme Court held that the following requirements must be considered for the court to grant interim relief under Section 9 of the Arbitration Act:

- the existence of a prima facie case
- the balance of convenience being in favour of granting interim relief
- the applicant approaching the court with reasonable expedition

Fourth, the Supreme Court observed that if a strong prima facie case is made out and the balance of convenience is in favour of interim relief being granted, the court exercising power under Section 9 of the Arbitration Act should not withhold relief on the mere technicality of absence of averments, incorporating the grounds for attachment before judgment under Order 38 Rule 5 of the CPC 1908. The grounds for attachment under Order 38 Rule 5 of the CPC 1908 are:

- where the Court is satisfied that the defendant with the intent to obstruct or delay the execution of any decree that may be passed against him is:
 - about to dispose of the whole or any part of his property, or
 - about to remove the whole or any part of his property from the local limits of the jurisdiction of the court

Fifth, the Supreme Court observed that proof of actual attempts to deal with, remove or dispose of the property with a view to defeat or delay the realization of an impending Arbitral Award is not imperative for grant of relief under Section 9 of the Arbitration Act, and instead, a 'strong possibility' of diminution of assets would be sufficient.

Following this line of reasoning, the Supreme Court held that security deposit was not being released to Arcellor by Essar House or Essar Services since it adopted a convoluted series of internal arrangements between group companies to divert the security deposits and deny the dues of Essar Steel to third-party creditors.

Analysis

While this judgment is explicit in language with regard to the non-applicability of principles governing interim reliefs under Order 38 Rule 5 of CPC 1908 in an application under Section 9 of the Arbitration Act, a subsequent judgment by the Supreme Court obfuscated the picture once again. Subsequent to the Essar judgment, another bench of the Supreme Court in Sanghi Industries Ltd v Ravin Cables Ltd and another SCC OnLine SC 1329 ('Sanghi Industries') (not reported by LexisNexis®) did not consider Essar House v Arcellor and held that reliefs under Section 9 of the Arbitration Act cannot be granted without satisfying the conditions stipulated under Order 38 Rule 5 of the CPC 1908. Further, the Supreme Court observed that there should be 'cogent material' for the court to grant reliefs under Section 9 of the Arbitration Act with respect to specific allegations that the award is likely to be defeated by the actions of the respondent by disposing of the properties. The Supreme Court held:

'The order(s) which may be passed by the Commercial Court in an application under Section 9 of the Arbitration Act, 1996 is basically and mainly by way of interim measure. It may be true that in a given case if all the conditions of Order XXXVIII Rule 5 of the CPC are satisfied and the Commercial Court is satisfied on the conduct of opposite/opponent party that the opponent party is trying to sell its properties to defeat the award that may be passed and/or any other conduct on the part of the opposite/opponent party which may tantamount to any attempt on the part of the opponent/opposite party to defeat the award that may be passed in the arbitral proceedings, the Commercial Court may pass an appropriate order including the restrain order and/or any other appropriate order to secure the interest of the parties. However, unless and until the conditions mentioned in Order XXXVIII Rule 5 of the CPC are satisfied such an order could not have been passed by the Commercial Court which has been passed by the Commercial Court in the present case, which has been affirmed by the High Court.'

The Essar judgment has considered all the prior cases and is well reasoned, when compared with Sanghi Industries. Since the Supreme Court with benches of equal strength seem to be at loggerheads on this respect, it remains open for a bench of a higher strength to reconcile the differing views and settle the dust once and for all.

Case details:

- Court: Supreme Court of India
- Judges: Indira Banerjee and AS Bopanna, JJ
- Date of judgment: 14 September 2022

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