

**Power to grant interim relief should not be exercised before the constitution of the arbitral tribunal unless the matter cannot await the constitution**

*Update by Editor*

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**Avantha Holdings Limited v. Vistra ITCL India Limited**

**Court:** Delhi High Court | **Case Number:** OMP (I) COMM 177 of 2020 | **Citation:** 2020 SCC OnLine Del 1717 | **Bench:** C Hari Shankar J | **Date:** 14 August 2020

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**A. Backdrop: Section 9 and Section 17 ACA**

Interim orders or injunctions “are made pending the hearing of the case, upon the merits, and they generally continue until a specified time or until a further order of the court.” [CM Row, *Law of Injunctions*, 9<sup>th</sup> ed., Universal 2013]

Section 9 of the ACA gives the Court broad powers to grant interim orders *before, during, or even after* arbitration proceedings (but before the award is enforced).

Section 17 ACA gives the arbitral tribunal precisely the same powers to order interim measures.

Once the arbitral tribunal has been constituted, Section 9(3) says, the Court shall not entertain an application for interim relief “unless the Court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious.”

**B. The facts—the court’s jurisdiction was invoked before initiating the arbitration. The dispute arose out of debenture trust deeds<sup>1</sup>**

Avantha Holdings borrowed INR 1265 crores from a consortium of lenders (KKR, L & T and BO<sup>2</sup>). Against the borrowing, it issued non-convertible debentures. To secure certain debentures, Avantha had pledged equity shares held by it in companies called CGP and BILT.<sup>3</sup>

Vistra, the respondent, was the Debenture Trustee.

The dispute related to invocation of the pledge and the consequent sale of the debentures by Vistra on the ground that Avantha committed numerous defaults.

The shares of CGIP were sold in the open market between July to November 2019. Some shares of BILT were sold on 15 July 2020 (after a notice was issued in the petition by the court), and some remained to be sold when the matter was heard. KKR and L&T purchased the sold shares.

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<sup>1</sup> The facts of the case and the rival arguments are noted by the court in detail. It is not proposed in this Update to refer to all of them. Rather, the legal principles Harishankar J set out applied are discussed.

<sup>2</sup> M/s KKR India Financial Services Pvt. Ltd. and KKR India Debt Opportunities Fund (“KKR”), M/s L & T Finance Ltd., L & T Fincorp Ltd and Family Credit Ltd. (“L & T”) and M/s BOI AXA Corporate Credit Spectrum Fund (“BOI”).

<sup>3</sup> M/s Crompton Greaves Power and Industrial Solutions Ltd. (“CGP”) and M/s Ballarpur Industries Ltd. (“BILT”).

Avantha filed an application under Section 9 ACA for grant of interim measures before commencement of the arbitration proceedings. It sought three main reliefs: –

- (a) transfer of the pledged CGP shares back into its Demat account;
- (b) injunction against the sale of BILT shares;
- (c) injunction against taking any steps against Avantha under the debenture deeds and pledge documents.

Among the grounds on which the reliefs were based included an averment that, under an oral agreement, Avantha had been negotiating an extension of time for repayment of the debentures. Also, there was a conspiracy amongst Vistra, KKR and others, as a result of which the share prices were artificially depressed and then purchased<sup>4</sup>.

Hari Shankar J decided that Avantha was not entitled to any of the reliefs. His reasons and conclusions are described below.

### **C. Hari Shankar J's decisions**

The court started its analysis with a discussion on the “scope of Section 9 ...” from paragraphs 24 to 31 (High Court’s website version).

#### **C1. Scope of Section 9—meaning of the expression “etc.” in the title of Section 9, and purpose of Section 9**

First, the court referred to the expression “etc ...” in the title of Section 9 (“Interim measures, etc. by Court”). It said that “etc.”, as has been held in several decisions, “is required to be interpreted *noscitur a sociis* and *ejusdem generis*. Therefore, it said that the measures put in place by the Court under Section 9 have to be “interim measures.”

Then, citing to a decision of the Bombay High Court in *Bank of Maharashtra v. M River Oghese*, AIR 1990 Bom 107<sup>5</sup>, the court said that interim reliefs “serve the temporary purpose of protecting the plaintiff’s interest so that the suit is not frustrated.”

#### **C2. Scope of Section 9—effect of Section 17 ACA. The Court should exercise Section 9 powers only where the matter cannot await the constitution of the tribunal**

Continuing its discussion in the scope, the court referred to Section 17 ACA and said that: –

While exercising its power under Section 9, the Court “has to be acutely conscious” of the power vested in the arbitral tribunal by Section 17, which is identically worded to Section 9.

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<sup>4</sup> The argument was that a law firm which represented Vistra had tabled a report containing misleading disclosures, which led the price to fall.

<sup>5</sup> A single judge of the Bombay High Court, GH Guttal J, interpreted the expression “interim” in a rule of the High Court which had required “a party to whom interim relief has been granted” to give an undertaking. It had been suggested that *ex parte* reliefs are interim and those granted after hearing are not.

- (a) It is for this reason that sub-section (3) of Section 9 proscribes grant of interim measures by the Court consequent on the constitution of the arbitral tribunal except where remedy under Section 17 is found not efficacious.
- (b) Therefore, while exercising jurisdiction under Section 9 even at a pre-arbitration stage, the Court cannot usurp the jurisdiction, which would otherwise be vested in the arbitral tribunal (yet to be constituted).
- (c) The Court is also required to ensure that Section 9 is not employed to forum-shop by litigants who feel it is easier to obtain interim relief from a court than from the arbitral tribunal.
- (d) While, in an appropriate case, the Court must not hesitate in ordering interim measures to decide whether a case is appropriate or not, the Court is required to do some tightrope walking.

### **C3. Scope of Section 9—the necessary conditions for relief**

Continuing the discussion further, the court identified the following principles governing grant of interim measures under Section 9: –

- (a) The same principles which govern the grant of a temporary injunction under Order XXXIX of the Code of Civil Procedure, 1908 in a civil suit:
  - i. Existence of a *prima facie* case
  - ii. Balance of convenience
  - iii. Possibility of irreparable loss
- (b) To this, the court said, “consideration of public interest” was “evolved by later decisions, chiefly in *Ramniklal N Bhutta State of Maharashtra, (1997) 1 SCC 134*<sup>6</sup> and *Raunaq International Ltd. v. IVR Construction Ltd., (1999) 1 SCC 492*.<sup>7</sup>
- (c) The court further added, but “mere satisfaction of these criteria does not, *ipso facto*, make out a case for ordering interim measures”. Additionally, the Court is also required to satisfy itself that the relief cannot await the constitution of the arbitral tribunal. The emergent necessity of ordering interim measures is, therefore, an additional *sine qua non* for grant of relief. In assessing this, the test is whether the denial of relief would render the recourse to arbitration futility.
- (d) Then, the Court noted these conditions in a serial wise fashion and added to the list a stipulation that the Court should be satisfied that the applicant “manifest intends to initiate arbitral proceedings.”<sup>8</sup>

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<sup>6</sup> This was a writ petition under Article 226 of the Constitution of India. The 2-judge bench of the Supreme Court (BP Jeevan Reddy and KS Paripoornan JJ) was considering a matter where the land acquisition was challenged and an injunction sought staying the acquisition. The court said that “a time has come where the courts should keep the larger public interest in mind while exercising their power of granting stay/injunction ... under Article 226”.

<sup>7</sup> This too, like *Ramniklal*, was public interest litigation under Article 226 of the Constitution by an unsuccessful bidder challenging the award of a contract by a public body. The 2-judge bench of Sujata V Manohar and BN Kirpal JJ also discussed the principles of the grant of interim injunction in such matters (see paras 24, 25).

<sup>8</sup> In its original form the ACA of 1996 did not prescribe any time limit to initiate arbitration. The Supreme Court in *Sundaram Finance Ltd. v. NEPC India Ltd., (1999) 2 SCC 479* interpreted Section 9 and said that interim relief can be granted even before the arbitration proceedings commenced. But, it added, there should be manifest intention to take

#### **C4. Scope of Section 9—a discussion on the Supreme Court’s *Adhunik Steels* case and other authorities**

After setting out the ingredients as noted above, Hari Shankar J referred to *Adhunik Steels Ltd. v. Orissa Manganese and Minerals Ltd.*, (2007) 7 SCC 125, and extracted four passages from it. In these passages, the *Adhunik* court had discussed factors to be considered in granting interim relief before an arbitral tribunal has been established, and also principles for granting a mandatory interim injunction. Hari Shankar J then said that the manner in which the court applied the principles is “also instructive.”<sup>9</sup>

He then also referred to *Arvind Constructions Ltd. v. Kalinga Mining Corporation*, (2007) 6 SCC 798, which he said: “reiterated the principle that the exercise of jurisdiction, under Section 9 of the 1996 Act, is subject to the restrictions and limitations contained in the Specific Relief Act.”

He also referred to *Firm Ashok Traders v. Gurmukh Das Saluja*, (2004) 3 SCC 155 to have said that “the Court under Section 9 is only formulating interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated.”

Then, he noted *Olex Facas Pvt Ltd. v. Skoda Export Co. Ltd.*, AIR 2000 Del 161, where Dalveer Bhandari J, then in the Delhi High Court, had said that the court’s discretionary power to grant interim relief should be exercised “where there is adequate material on record, leading to a definite conclusion that the respondent is likely to render the entire arbitration proceedings infructuous, by frittering away the properties of funds either before or during the pendency of arbitration proceedings or even during the interregnum period from the date of award and its execution.”

Hari Shankar J then set out the clauses of Section 9 and commented on “the ambit of sub-clause (ii)(e) of sub-section (1) of Section 9, which empowers the Court to grant —such other interim measure of protection as may appear to the court to be just and convenient.” He referred to Madras High Court’s *Sekar v. Akash Housing*, where Banumathi J had noted that the jurisdiction under the “just and convenient” clause “is quite while (sic wide) in amplitude, but must be exercised with restraint. Interim measures are to be granted by the Court so as to protect the rights in adjudication before the arbitral tribunal from being frustrated.”

#### **C5. The Court’s decisions on each of the prayers**

After referring to the principles and the authorities in the manner described above, Hari Shankar J considered the merits of the case under the heading “the cause of action, and the prayers, in the petition”. He started by saying that “tested on the touchstone of the above principles, it becomes apparent that none of the prayers, in this petition can be granted, under Section 9.”

He also made a finding, after a crisp summary of the facts, that *Avantha’s* case was “featherweight”.

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recourse to arbitral proceedings, if they have not commenced by the time the application under Section 9 is filed. Now, after the amendments, Section 9 (2) prescribes that where before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection, the arbitral proceedings shall be commenced within a period of ninety days from the date of the order, or time prescribed by the Court.

<sup>9</sup> *Adhunik* was granted a 10 years renewable lease by Orissa Manganese. *Adhunik* deployed resources for the mining operations and incurred considerable expenditure. Merely months later, Orissa gave the notice to terminate the lease saying the grant was against the rules. *Adhunik* applied for an interim mandatory injunction to continue the lease. The Supreme Court directed Orissa not to grant the lease to any other party but also ordered that Orissa was entitled to carry on the operations by itself. The Supreme Court reasoned that Orissa carrying on the activity will not prejudice *Adhunik* because if it succeeds in the arbitration, *Adhunik* would be entitled to get compensation for termination. It is these passages that Hari Shankar J emphasized on.

***(a) Use of Section 9 not justified to set the clock back***

As to the relief of transferring the pledged CGP shares, Hari Shankar J concluded that no interim direction could be issued because the pledge had already been involved, and a majority of the shares had already been sold in the open market. “Howsoever wide its amplitude”, he noted, Section 9 “cannot justify setting the clock back to a stage anterior to the invocation of the pledge, by [Vistra], which took place as far back as in March 2019.”

***(b) Use of Section 9 impermissible to prevent the opposite party from exercising contractual rights***

As to the sale of BILT shares, he assessed the merits of the claim and found that there was no occasion “to interdict the invocation and sale, if any, of the pledged BILT shares.” He said that “any such direction, by this Court, would amount to a proscription, on [Vistra] exercising the rights, conferred and vested in them by the covenants of the Debenture Trust Deeds. This, on the face of it, is impermissible; in any case, no such relief can be granted, in a proceeding under Section 9 of the 1996 Act.”

***(c) Relief that operates as embargo in exercising contractual rights cannot be granted. Good faith/bad faith argument not linked to contractual rights, hence irrelevant***

Lastly, Harishankar J considered Avantha’s prayer seeking a restraint on Vistra from taking any steps under the underlying contract and documents. This was rejected on the ground that apart from the fact that it amounted to an “absolute embargo” on Vistra from exercising its contractual rights, there was no denial by Avantha of the alleged default. He found that the prayer was “premised on the theory” that the underlying contracts had been rescinded, which he said had no merit. He also rejected an argument of bad faith, which was advanced, citing *Mardia Chemicals Ltd v. UOI*, (2004) 4 SCC 311 (“lenders owe a duty to act fairly and in good faith”). Hari Shankar J said that while there was “gainsaying this proposition”, it was completely irrelevant to the issue because the dispute was purely contractual, and the argument of bad faith had been raised in the context of allegedly artificially depressing the share price before purchasing them. This dispute, he noted, was “foreign to the arbitration agreement” and not the subject matter of Section 9.