

**An order by SIAC’s Emergency Arbitrator in India-seated arbitration is enforceable in India
(Supreme Court of India)**

Update by Editor

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Amazon.com NV Investment Holdings LLC v. Future Retail Limited & others

Court: Supreme Court of India | **Case Number:** Civil Appeal Nos. 4492-4493 and connected matters | **Citation:** 2021 SCC OnLine SC 557 | **Bench:** RF Nariman & BR Gavai JJ | **Date:** 06 August 2021 | Access court’s version [here](#) (references in this Update from SCC) | Read this Update on our website [here](#)

Amazon and the Future group (“Future”) are arbitrating their widely reported disputes under the SIAC Rules. The seat of the arbitration is in New Delhi, and Indian laws govern the underlying agreement. On Amazon’s application, SIAC appointed an Emergency Arbitrator, which, on 25 October 2020, passed some injunctive orders against Future until a ruling by the arbitral tribunal when constituted.

Two sets of proceedings arose from this order.

First, Future filed an anti-arbitration suit. In particular, it prayed an injunction restraining Amazon from writing to the statutory authorities. A single judge of the Delhi High Court—Mukta Gupta J--made some findings in Amazon’s favour and some in favour of Future. She ruled that order by an Emergency Arbitrator is valid under the ACA. She also found, *prima facie*, that there was tortious interference by Amazon with Future’s business. However, she did not find any necessity to grant an injunction against Amazon. See our Update [here](#) on Gupta J’s judgment that also summarizes the overall dispute. Amazon’s appeal is pending in the Delhi High Court in FAO (OS) (Comm.) 7 of 2021.

Second, Amazon filed an application in the Delhi High Court under [Section 17 ACA](#) read with [Order XXXIX Rule 2A, CPC](#) to “enforce” the Emergency Arbitrator’s order. This means that Amazon filed that petition seeking orders identical to that passed by the Emergency Arbitrator¹ and simultaneously praying to punish the respondents for violating the Emergency Arbitrator’s order.² A single judge (JR Midha J) of the Delhi High Court first made an order of *status quo*, followed by a detailed order. See our Biweekly Highlight [here](#). Future filed successive appeals, and a 2-judge bench stayed both orders. Both appeals were filed under [Order XLIII, Rule 1\(r\) CPC](#).

The second set of cases went to the Supreme Court in Special Leave Petitions.

A. Two questions arose for the Supreme Court’s consideration

Authoring for the 2-judge court, Nariman J notes in the opening paragraph the two questions that arose in the appeal. He modified the first question slightly in paragraph 30.³

¹ We reviewed the prayer clause of the petition.

² It appears that the petition may have been premised on the foundation that the order by the Emergency Arbitrator would fall under Section 17 ACA. The reliefs praying for orders in the same terms as the Emergency Arbitrator could have been by way of abundant caution because the points decided in this judgment had not been addressed earlier.

³ Nariman J noted that senior counsel Mr Salve, who appeared for Future, argued that “he would not go to the extent of arguing that an Emergency Arbitrator’s award would be outside the ken of the Arbitration Act, but that it was sufficient for his purpose to argue that an Emergency Arbitrator’s award cannot be said to fall under Section 17(1) of the Act.” However, though the first question is worded differently at para 1 and para 30, the remaining judgment makes no such distinction.

- (a) First, whether an “award”⁴ delivered by an Emergency Arbitrator under SIAC Rules is an order within the contemplation of the ACA, and further, whether it is an order under [Section 17\(1\) ACA](#) and
- (b) Second, whether an order passed under [Section 17\(2\) ACA](#) by a single judge of the High Court enforcing the award of an Emergency Arbitrator is appealable?

B. Is “award” by the Emergency Arbitrator an order under the ACA (and an order under Section 17 (1) ACA)?

The court answered yes and declared that “full party autonomy is given by the Arbitration Act to have a dispute decided in accordance with institutional rules which can include Emergency Arbitrators delivering interim orders, described as “awards.” Given the facts of the case and the arguments advanced, the court gave several reasons. Thus, we could glean thirteen reasons from the judgment.⁵ They are described in turn below.

B1. A conjoint reading of specific provisions of the ACA [paras 31-34]

The court first noticed those provisions that support the inclusion of the Emergency Arbitrator’s orders in the ACA. The court noted that:

- (a) A permanent arbitral institution could also administer the arbitration proceeding [[Section 2 \(1\) \(a\) ACA](#)].
- (b) Parties are free to authorize any person, including an institution, to determine issues that arise between the parties [[Section 2\(6\) ACA](#)].
- (c) Agreement by the parties includes any reference to arbitration rules [[Section 2 \(8\) ACA](#)].
- (d) Arbitral proceedings commence when the respondent receives a request for that dispute to be referred to arbitration [[Section 21 ACA](#)]. Arbitral proceedings under the SIAC Rules also commence similarly (like [Section 21](#)), much before the constitution of an arbitral tribunal.
- (e) Under [Section 17\(1\) ACA](#), a party may apply to the arbitral tribunal “*during the arbitral proceedings.*” The court said this expression would be elastic enough to include emergency arbitration proceedings under the SIAC Rules (which commence before the tribunal is constituted, on receipt by the Registrar of the notice arbitration).

B2. The conjoint reading noted above coupled with no express or implied bar [para 35]

The court then gave a second reason: a conjoint reading (of provisions above-noted), coupled with the fact that the ACA does not interdict, either expressly or by necessary implication, an Emergency Arbitrator. This would show, the court stated, that an Emergency Arbitrator’s orders would be covered by the ACA if provided for under institutional rules.

B3. Party autonomy [para 36-42]

“Party autonomy” is the court’s third reason: “[a]s a matter of fact, a number of judgments of this Court have referred to the importance of party autonomy as being one of the pillars of arbitration in the Arbitration Act.”

⁴ An Emergency Arbitrator has the power under the SIAC Rules to issue an interim order or an interim award. But that distinction is irrelevant for the ACA under which any ruling by the Emergency Arbitrator would not be an award.

⁵ In its reasoning, a point also made with regard to the first question is dealt while the court when it addressed the second question. Future argued that in comparative law—arbitral statutes of Singapore, New Zealand, Hong Kong, and England—the Emergency Arbitrator's awards were expressly included. The court rejected the argument saying that the interpretation of Section 17 ACA was different. See para 103.

B4. The meaning of “arbitral tribunal” depends on the context [paras 43-47]

Mr. Salve (and other senior counsel supplementing) had argued that “arbitral tribunal” is exhaustively defined to mean either a sole arbitrator or a panel of arbitrators. This would only include an arbitral tribunal constituted between the parties, which can pass interim orders and interim and final awards.

Rejecting this argument, the court said:

- (a) Yes, the “arbitral tribunal” as defined in [Section 2\(1\)\(d\) ACA](#) refers to an arbitral tribunal that is constituted between the parties and which can give interim and final relief, but the definition applies “*unless the context otherwise requires.*”
- (b) Because “arbitration” in [Section 2\(1\) \(a\) ACA](#) means any arbitration, whether or not administered by a permanent arbitral institution (when read with [Sections 2\(6\)](#) and [2\(8\)](#)), [Section 17\(1\) ACA](#) would include within its ambit even interim orders passed by Emergency Arbitrators under the rules of a permanent arbitral institution.
- (c) The words “[during] arbitral proceedings” in [Section 17 ACA](#) are not limited by any definition and, thus, encompass proceedings before an Emergency Arbitrator. The heart of Section 17 (1) is an application of interim relief. Nothing in the ACA interdicts the application of the rules of an arbitral institution.
- (d) Both [Section 9 ACA](#) and [Section 17 ACA](#) “form part of one scheme,” and the meaning of arbitral tribunal in [Section 9 \(3\) ACA](#) and [Section 17 \(1\) ACA](#) would include an Emergency Arbitrator appointed under institutional rules.⁶

B5. No inconsistency in SIAC Rules and the ACA [paras 48-49]

The Future group had argued that in the parties’ agreement, SIAC Rules were made subject to the ACA, and since the ACA did not provide for Emergency Arbitrators, that part of the SIAC Rules would not apply. Rejecting, the court relied on its finding already made that [Section 17\(1\) ACA](#) does not exclude an Emergency Arbitrator’s orders. It also said that there was nothing inconsistent in the SIAC Rules when read with the ACA.

B6. Rejecting the argument that the SIAC Rules were adopted for the arbitration alone (excluding emergency abirritation provisions) [paras 50-52]

This argument was rejected, noting the SIAC Rules in detail and concluding that “arbitration” mentioned in the parties agreement included an arbitrator appointed in accordance with the SIAC Rules, which, in turn, would include an Emergency Arbitrator.

B7. Rejecting the argument that the Parliament did not accept the 246th Law Commission Report’s recommendations [para 53]

The Future group had argued that the [246th Law Commission Report](#) advocated the amendment of [Section 2 ACA](#) to include a provision for the appointment of an Emergency Arbitrator. The Parliament did not adopt the suggestion when the ACA was amended in 2015.

The argument was rejected, noting that the mere fact that Parliament does not follow a recommendation of a Law Commission Report would not necessarily lead to the conclusion that what has been suggested by the Law Commission cannot form part of the statute as properly interpreted. [citing *Avitel Post Studios Ltd. v. HSBC PI Holdings (Mauritius) Ltd.*, (2021) 4 SCC 713. See our Update on Avitel [here](#)]

⁶ Under Section 9 (3) ACA, a Section 9 petition is not to be entertained after an arbitral tribunal is constituted unless the remedy under Section 17 ACA is not efficacious.

B8. The BN Srikrishna Committee Report [paras 55-56]

Next, the court reasoned that, significantly, the [BN Srikrishna Committee Report](#) “laid down that it is possible to interpret” [Section 17\(2\) ACA](#) to enforce emergency awards for arbitrations seated in India, and recommended that the Act be amended only so that it comes in line with international practice in favour of recognizing and enforcing an emergency award.⁷

B9. Furthering the objective of decongesting the clogged court system [para 57-62]

The court noted that several of the recommendations of the 246th Law Commission were accepted and changes made in [Section 9 ACA](#) and [Section 17 ACA](#).⁸ It emphasized that an Emergency Arbitrator’s order undoubtedly furthers the objectives to decongest the court system and give the parties urgent interim relief.

B10. Cannot resile from the agreement [para 63]

A party cannot be heard to say, the court said, after it participates in an Emergency Award proceeding, having agreed to institutional rules, that an Emergency Arbitrator’s ruling will not bind it. “It cannot lie in the mouth of a party to ignore an Emergency Arbitrator’s award by stating that it is a nullity when such party expressly agrees to the binding nature of such award from the date it is made and further undertakes to carry out the said interim order immediately and without delay.”

B11. Rejecting the argument that Emergency Arbitrator under the SIAC Rules is not an independent judicial body like an arbitral tribunal [para 64]

Rules 3, 9, and 10 of the [SIAC Rules](#) were referred to make this argument. However, the court rejected it on a seemingly simple construction of those rules.

B12. Rejecting the argument that there was no room for interpreting anything under the ACA as implied⁹ [para 65]

Future also argued that arbitration, conceptually, is an ouster of the civil court’s jurisdiction and, therefore, only what is expressly provided in the ouster provisions can be followed. There is no room for any implication here. The court responded by saying that the argument may have favoured a court if dealing with Arbitration Act, 1940. But, the ACA is a complete break from the past and is not an ouster statute but favours the remedy of arbitration to de-clog civil courts. Also, [Section 5 ACA](#) “puts paid to the submission” as it overrides all other laws for the time being in force.

⁷ Former judge of the Supreme Court Mr. BN Srikrishna was the Chairman of the “High Level Committee to Review the Institutionalization of Arbitration Mechanism in India.” Its [2017 report](#) discusses “enforcement of emergency awards” at page 76, and notes: “while one could possibly rely on section 17(2) of the ACA to enforce emergency awards for arbitrations seated in India, the Delhi High Court decision in *Raffles Design International India Pvt. Ltd. & Anr. v. Educomp Professional Education Ltd. & Ors.* held that an emergency award in an arbitration seated outside India is not enforceable in India.” Nariman J reproduces this passage at para 55, and derives support for his reasoning from the initial portion of the extracted quote.

⁸ Section 17(1) ACA was made the mirror image of Section 9 (1) ACA making it clear that an arbitral tribunal is fully clothed with the same power as a court to provide for interim relief. Also, Section 17(2) was added so as to provide for enforceability of such orders, again, as if they were orders passed by a court, thereby bringing Section 17 on par with Section 9.

⁹ Relying upon Section 28 of the Contract Act, Justice RS Bachawat's Law of Arbitration and Conciliation (Sixth Ed., Lexis Nexis), and the Chancery Division judgment of *In Re Franklin and Swathling's Arbitration*, [1929] 1 Ch. 238.

B13. No stamp of invalidity on the forehead of any order [paras 66-67]

The court also agreed with Amazon’s argument that even if an order is later set aside as having been passed without jurisdiction, for the period of its subsistence, it is an order that must be obeyed.¹⁰ It also rejected Future’s argument that it would be open to a party to ignore an award by an Emergency Arbitrator in cases of inherent lack of jurisdiction. The court noted that none of the cases cited¹¹ applied. On the contrary, after losing before the Emergency Arbitrator, no party can turn around and say that the award is a nullity or *coram non iudice*.

C. The second question: maintainability of the appeal¹²

As we noted, Future had appealed the orders made by Midha J before a 2-judge bench. The appeals were filed under [Order XLIII, Rule 1\(r\), CPC](#). Amazon contended that the appeal was not maintainable. Future’s essential point in defence was that the orders made in enforcement proceedings are outside the ACA and are instead under the CPC. Therefore, in enforcement proceedings--both under [Section 17\(2\) ACA](#) and under [Section 36\(1\) ACA](#)--appeals could be filed under the CPC. [see paras 25, 29-30, and 69 onwards, and in particular para 93]

The court’s reasons can be broadly summarized into four (with many sub-points made under those heads, apart from distinguishing the judgments cited by Future):

- (a) The first reasoning is a bit labyrinthine and is set out at paras 69 to 95. In short, it is this: if an order under [Section 9\(1\) ACA](#) is flouted, enforcement is available under [Section 9\(1\) ACA](#) itself. The powers under Section 9 (1) ACA “takes us to the Code of Civil Procedure” (that is, [Section 94 CPC](#) read with [Order XXXIX Rule 2A, CPC](#)). So, an order made under [Section 9 \(1\) ACA](#) for enforcement is the one made under [Order XXXIX Rule 2A CPC](#). Now, the power to grant an interim measure under [Section 17 ACA](#) is the same as [Section 9 ACA](#). So, it would be anomalous to hold that if the tribunal passed an interim order and is then enforced by the court with reference to [Order XXXIX Rule 2A, CPC](#), such order would not be referable to [Section 17 \(2\) ACA](#). [see para 74, 84 latter part of para 93, and 94]
- (b) Second, [Section 17\(2\) ACA](#) creates a legal fiction, but only for enforceability of interim orders made by the arbitral tribunal. Extending it to appeals being filed under CPC would be a big leap not envisaged by the legislature in enacting the said fiction.
- (c) Third, [Section 37 ACA](#) is a complete code for appeals under the ACA. [citing *Kandla Export Corporation v. OCI Corporation*, (2018) 14 SCC 715]
- (d) Fourth, no change was made in [Section 37\(2\)\(b\) ACA](#) to bring it in line with [Order XLIII, Rule 1\(r\), CPC](#) in 2015 or 2019 though [Section 17 ACA](#) was amended.

As a result, the appeals were disposed of by setting aside the High Court’s division bench orders.

Categories: [Section 9 ACA](#) | [Interim Measures by Court](#) | [Section 17](#) | [Interim Measures Ordered by Arbitral Tribunal](#) | [Section 2\(1\) \(a\) ACA](#) | [Section 2 \(6\) ACA](#) | [Section 2 \(8\) ACA](#) | [Section 21 ACA](#) | [Arbitral Tribunal](#) | [Commencement of Arbitral Proceedings](#) | [SIAC](#) | [SIAC Rules](#) | [Emergency Arbitration](#) | [Emergency Arbitrator](#) | [Emergency Award](#) | [Party Autonomy](#) | [Object](#)

¹⁰ Referring to *Krishnadevi Malchand Kamathia v. Bombay Environmental Action Group*, (2011) 3 SCC 363; *Anita International v. Tungabhadra Sugar Works Mazdoor Sangh*, (2016) 9 SCC 44; *Tayabhai M. Bagasarwalla v. Hind Rubber Industries (P) Ltd.*, (1997) 3 SCC 443.

¹¹ *Kiran Singh v. Chaman Paswan*, (1955) 1 SCR 117 (at page 122); *CIT v. Pearl Mechanical Engineering & Foundry Works (P) Ltd.*, (2004) 4 SCC 597.

¹² Two questions were left open/undecided: the rights of third-party--not a party to the arbitration agreement and to the subject matter covered by the award--affected by an order made in enforcement. And, the interpretation of Section 36 ACA. See paras 102-104.

[of ACA](#) | [Section 36 ACA](#) | [Enforcement](#) | [Enforcement of Emergency Award](#) | [Enforcement of Interim Order](#)
| [Enforcement Under Section 9 ACA](#) | [Enforcement Under Section 17 ACA](#) | [Section 37 ACA](#) | [Appealable](#)
[Orders](#) | [Section 94 CPC](#) | [Order XLIII CPC](#) | [Order XXXIX CPC](#) | [Order XXXIX Rule 2A CPC](#) | [BALCO](#) |
[Adhunik Steels](#) | [Kandla Export](#)